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▶ **To cite this version:**

Thierry Kirat, Frédéric Marty. The regulatory practice of the French financial regulator, 2006-2011. From substantive to procedural financial regulation?. Journal of governance and regulation, 2015, 2015 (4(continued4)), pp.441-450. hal-01276504

HAL Id: hal-01276504
https://hal.science/hal-01276504

Submitted on 22 Feb 2016

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The Regulatory Practice of the French Financial Regulator, 2006-2011. From Substantive to Procedural Financial Regulation?

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This version: 27 September 2015

Abstract

Fraud and misconduct in financial markets have recently become a key regulatory issue against the backdrop of the financial crisis. This paper investigates the sanctions policy and practices of the French financial regulator, Autorité des Marchés Financiers (AMF). It argues that, over time, the AMF has shifted from substantive to procedural regulation of finance. This shift consists in departing from sanctions based on observed outcomes in the market and, instead, assessing how the internal organizational schemes of financial firms actually perform. The AMF's new policy and practice involves a process of legalization of organizations; it also evidences a tendency to delegate regulation to financial firms themselves

Key-words: Financial market, substantive regulation, procedural deterrence, legalization of organization

JEL codes: G18, G28, K22

Fraud and misconduct in financial markets have recently become a key regulatory issue against the backdrop of the financial crisis, as evidenced by recent issues of major journals (e.g. *Accounting, Organizations and Society*, 38, 2013). The purpose and scope of financial market regulation are often discussed in terms of the gap between, on the one hand, national legislation and regulation and, on the other hand, interconnected and globalized markets. The development of high-frequency trading raises another major regulatory issue: several authors consider the internal "discreete regulation" of the financial industry as the real regulatory process for finance, which narrows the scope of public regulation (Huault & Richard, 2012). All countries with highly developed financial industries implement a policy of punishing market participants that do not comply with prevailing laws and regulation (Demerens & al., 2014). The penalty policies enforced by financial supervisors form the core of this paper.

Sanctions usually have several objectives: to deter fraud, compensate for harm, and punish white-collar crime. A large part of the economic and financial literature on sanctions focuses more on their purpose than on what they consist of and who is sanctioned. This is one of the issues we raise in this paper.

Our argument is that financial regulation can be split into two types, which we call "substantive" and "procedural". What we mean by substantive regulation is that the scope is limited to outcomes, which are punished in and of themselves. With procedural regulation, however, the outcome is considered as the result of an internal decision-making process, which must be addressed as such. We therefore give a specific meaning to the concepts of procedure and proceduralization, as regards the legal-political post-modernist analysis of law (see Frydman, 1998, for a survey). We depart from Teubner's or Ladeur's analyses of procedural regulation and proceduralization in terms of relations between legal and non-legal systems and reflexive-responsive regulation (Teubner, 1993; Ladeur, 2001), including participation of civil society in public decision-making (Black, 2000).

We take 'procedure' to mean organizational features beyond the outcome of market behaviors. This concept is inspired by Montagne's analysis. In this respect, we expand on her analysis of legal control of fund managers in the U.S. (Montagne, 2006,

2013). According to the author, managers' legal duties towards employees benefiting from a pension plan, as well as towards the firms contributing to it, are assessed according to the standard of investors' prudence. The managers have a best-endeavors obligation, i.e. to set up a technological and organizational scheme that meets the standards of a modern financial industry. In other words, the responsibility of fund managers if their funds collapse is assessed on their organizational and technological skills rather than on the observed outcome of their behavior. This is what Montagne analyzes as the procedural assessment of a prudent investor, for instance in terms of duty of care[1] (Montagne, 2013). Following Montagne's perspective, we stress the procedural issue: aside from the observed outcomes on the market, we argue that internal and/or organizational features tend to become a key issue in financial supervisors' enforcement policies.

The article is based on empirical research into pecuniary and non-pecuniary sanctions imposed by the *Autorité des Marchés Financiers* (AMF), the regulator that has enforced financial regulation in France since 2003. The analysis covers the period 2006-2011, which includes the 2007-2008 financial crisis. Examining the database containing all the AMF's sanction decisions yields one major finding: over time, the AMF Enforcement Committee has focused increasingly on the internal organizational structures of financial firms rather than on their compliance with substantive financial regulation.

This evolutionary process can be summed up by saying that the AMF had moved from substantial to procedural control of the finance industry. As a newly created authority, the AMF started out with a mainly legalistic framework for compliance, focusing on observed outcomes of financial behaviors and on market practices. The outcomes were then assessed as compliant or non-compliant with substantive regulation, i.e. concerning the substance of legal categories of fraud (insider trading, disclosure or use of false information, etc.). As the AMF became a more stable organization with established routines, it reined back its commitment to substantive control

[1] OECD states that the prudent investor has a "duty of care": "The duty to act prudently imposes a standard of behaviour on trustees and other fiduciaries under which they must exercise such care and skill as persons of ordinary prudence would exercise in dealing with their own property. " (OECD, 2002).

and focused increasingly on issues of intra-organizational control of financial firms (brokers, portfolio managers, investment funds, etc.). This backshift, from outcomes to firms' internal organization, reveals a gradual but major transformation of the AMF's precedents for regulating financial markets. It should be noted that such a tendency is not specific to the AMF. Several case studies, for instance in the U.K., put the emphasis on the unsuitability of a legal response based on criminal law for dealing with final fraud or misconduct in the current context. Since financial markets regulators seem uncertain of being able to prosecute such behaviors successfully, they tend to focus on persuasive and self-regulatory approaches alternatives to sanction and deterrence (Lokanan, 2015). The deterrence model is increasingly giving way to one based on procedural regulation.

Section 1 gives a brief overview of the AMF. Section 2 presents key empirical results. Section 3 expands on the analytical and theoretical issues raised by our argument in terms of procedural regulation.

Section 1- Institutions and Regulatory Framework

1. Formation of the AMF

From a legal viewpoint, the AMF is an independent administrative agency vested with the power to sanction non-compliance with financial regulation, as laid down in France's Financial and Monetary Code. It is also vested with the power to sanction non-compliance with the law. The AMF's policy is laid down in various documents posted on its website, including the General Regulation and other policy documents.

The AMF was established by the Financial Security Act passed in August 2003[2]. The formation of the AMF rationalized and unified an institutional blueprint that had previously been dispersed among three among three institutions – *Conseil des marchés financiers*, *Commission des opérations de bourse*, and *Conseil de discipline de la gestion financière* – responsible for punishing financial misconduct and fraud.

The AMF can decide two types of sanction, disciplinary and pecuniary, which can be decided by a body called the

[2] Loi n° 2003-706 de sécurité financière.

Enforcement Committee. Pecuniary sanctions are intended to be dissuasive, while disciplinary sanctions punish non-compliant or fraudulent behavior by finance professionals, and ban individuals from the market on a temporary or permanent basis.

The maximum amount of pecuniary sanctions has been revised several times since the AMF was formed in 2003. Initially, the law set a ceiling of 1.5 million euros. The Economic Modernization Act passed in August 2008 increased the maximum possible pecuniary sanction to 10 million euros (or ten times the profit earned from the unlawful practice)[3]. In 2010, a new law, the Banking and Financial Regulation Act (loi n° 2010-1249 du 22 octobre 2010 de régulation bancaire et financière), passed in the context of the subprime crisis, raised the ceiling to 100 million euros (or ten times profits earned from non-legal practice[4]).

It should be noted that these figures concern a segment of the profession only, namely investment services providers, regulated professionals, and natural or legal persons convicted of market abuse. French law separates market abuse from failure to comply with professional duties, which is considered less serious. For natural persons acting on behalf an investment services provider or for regulated corporate entities, the maximum penalty is 15 million euros (compared with 1.5 million euros before 2010).

2. Legal Policy on Financial Markets

"The AMF regulates participants and products on French financial markets, including: financial markets and market infrastructures, listed companies, financial intermediaries authorized to provide investment services and financial investment advice (credit institutions authorized to provide investment services, investment firms, investment management companies, financial investment advisers, direct marketers),

[3] Loi n°2008-776 de modernisation de l'économie.

[4] Note that the legal provisions make sense in a deterrence framework. According to Gary Becker (1968), the optimal fine should be defined as the additional gain earned from rule-breaking, divided by the probability of being sanctioned. In other words, if the probability of being fined by the courts is 10%, the optimal sanction in terms of deterrence will be ten times the improper financial gain.

[and] collective investment products invested in financial instruments." (AMF website, as at June 23, 2014).

Alongside the Financial and Monetary Code, the AMF has issued several influential communications and guides, the most important being the General Regulation, which is binding. Together with a series of instructions, positions, and recommendations posted on its website, the AMF rulings are part of a more comprehensive gap-filing process, insofar as the way it interprets the general and abstract rules of the Code is made known to the financial industry: "When read in conjunction with past decisions handed down by the Enforcement Committee and the grounds for certain individual decisions, the AMF's published policy allows market participants to understand how the AMF applies – under the supervision of the courts – the laws and regulations governing matters within its jurisdiction." (AMF website, as at July 28, 2014).

Since the AMF is an administrative agency, its remit is to police the market. From a legal and administrative viewpoint, its main tool is sanctions. Owing to its institutional status, the AMF is a disciplinary administrative agency. However, senior AMF executives claim that the agency's remit is to deter infringements of laws and regulations. Several key official reports (e.g. Nocquet, 2013) and newspaper interviews confirm the prevalence of this policy of deterrence[5].

It is worth emphasizing how much the AMF's soft law influences its decisional practices and leeway in terms of regulating the financial industry. The effective legal framework is the product of soft law stemming from guidelines, communications, and statements of the regulator's own decisional practice. If these elements are grounded in statute law, they offer significant margins of discretion for an independent administrative authority, offering additional legal resources that can enhance deterrence. The legal resources

[5] Note that the prevalence of the deterrence approach in the fining policy often emerges gradually through decisional practice and is ultimately confirmed through soft law. This has been the case with European competition law. The deterrence objective was enshrined by the Court of Justice in its ruling "Musique Diffusion Française" (June 7th, 1983), which upheld a Commission decision imposing a significant fine for a breach of competition law. Subsequently, the Commission's 1996 guidelines defining its methods for setting pecuniary fines confirmed the overriding importance of this objective.

stemming from soft law can enhance deterrence (by determining how the fines are set) or can provide stakeholders with additional information and legal certainty for alternative ways to close cases. As a consequence the regulatory powers of the AMF exceed the sole capacity to deter non-compliant behaviors through fines. Soft law is part of a less vertical model of regulation, which puts greater emphasis on the procedural dimension and less on sanctioning outcomes (see for instance Brunner, 2015). Thus the AMF can depart from its deterrence policy and opt for a more remedy-based approach. Negotiated procedures, such as *composition administrative* (settlement), make sense from this perspective because the stress is on compliance policy. It may also be noticed that the capacity to incentivize financial market participants to adopt this regulation mindset depends heavily on whether the threat of fines is effective. In other words, a deterrence policy is a necessary first step towards implementing such a procedure-based regulation model.

However the role of soft law and the increasing proportion of cases closed through settlement raise the issues of the discretionary power of the AMF as an independent administrative body and of its judicial control (Conseil d'Etat, 2014).

Last but not least, the AMF's regulatory practice is more complex than its institutionally-defined missions, involving a mix of punishment, dissuasion, compensation, and cooperation with the financial industry to repair some of the latter's major organizational failures. This aspect will be addressed later on. Notice that the deterrence policy is not at all empirically testable. Compensation of victims (savers and investors) is rarely explicit in the decisions issued by the Enforcement Committee. The disgorgement of illegal profits is explicitly analyzed in some rare cases.

Section 2- Empirical Analysis

We now turn to an empirical analysis of AMF sanction decisions. We collected all the decisions issued in 2006, 2008 and 2011 from the AMF's website on the grounds that since the AMF was set up in mid-2003, we considered that 2006 corresponds to more than two full years of sanction practices

constituting an organizational learning process. In terms of numbers of decisions, 2008 marked a peak, while 2011's decisions concerned the infractions that occurred during the financial crisis starting in 2007 in the wake of the subprime collapse. Since a sanction procedure lasts between two and three years, the decisions issued in 2011 relate to events that occurred in 2008-2009.

	2006	**2008**	**2011**
Mean	518,746	610,334	376,351
Median	50,000	150,000	175,000
Min (individuals)	5,000	5,000	10,000
Max (individuals)	1,770,480	5,000,000	300,000
Min (firms)	5,000	10,000	10,000
Max (firms)	7,117,668	1,000,000	4,470,000

Table 1- Pecuniary sanctions (in current euros)

1. Data

The decisions we collected have been coded. The extracted data concern: the identity and type of incriminated individual(s) and organization(s), the date an investigation was opened, the number and type of claims made against the correspondents and finally enforced, the type of sanction, and the size of the fine. Since the claims are defined by law, we were able to obtain a precise view of the infractions committed by each natural and legal person involved in a proceeding.

2. Results

2.1.Overview

The first issue we raise here is whom does the AMF sanction? Sanctions can be taken against both individuals and legal entities. Both kinds of person can be sanctioned in a same decision. Figure 1 shows the distribution of sanctions, with a peak for individuals in 2008, regardless of whether these penalties were issued in a specific decision, or in conjunction with those issued to corporate entities. By contrast, the number of individuals falls sharply in 2011, seemingly evidencing a tendency by the AMF to de-personalize its penalties. The same trend can be also observed in the U.S.A. This is especially important because these cases are commonly closed through settlement procedures in which firms first negotiate immunities

for their staff (McDonald, 2012). This kind of procedure effectively corrects market practices but may be questioned in terms of incentives, since the fine negotiated by a firm can be seen as its cost of doing business![6]

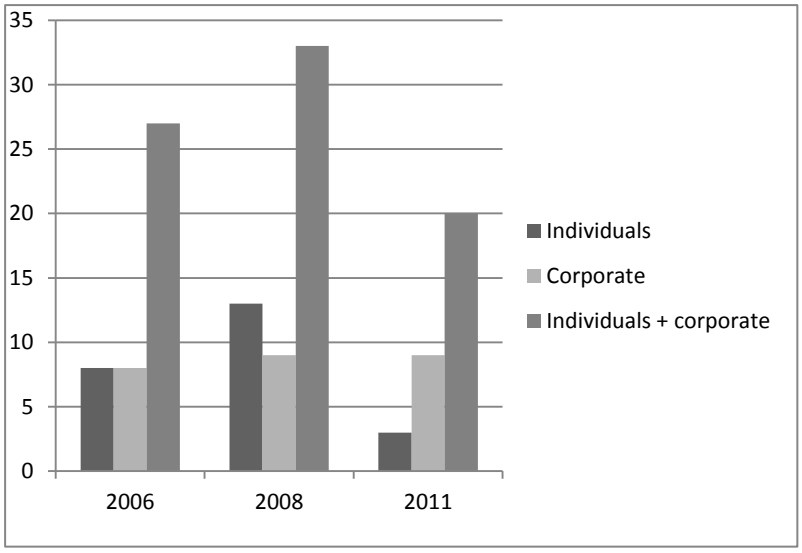


Figure 1 – Types of persons sanctioned

Going into more a more detailed analysis, it is worth distinguishing between legal persons and individuals. Figure 2 exhibits the types of legal persons sanctioned. We see a clear trend towards sanctioning the financial industry (investment service providers and investment funds), while the number of sanctions on listed companies breaching regulations of mergers and acquisitions and insider trading decreases.

[6] "Not only does the corporation get to avoid reputational harm and any collateral risks that such harm may impose, but the individuals involved—charged or uncharged—are able to walk away virtually untarnished", McDonald, p.433.

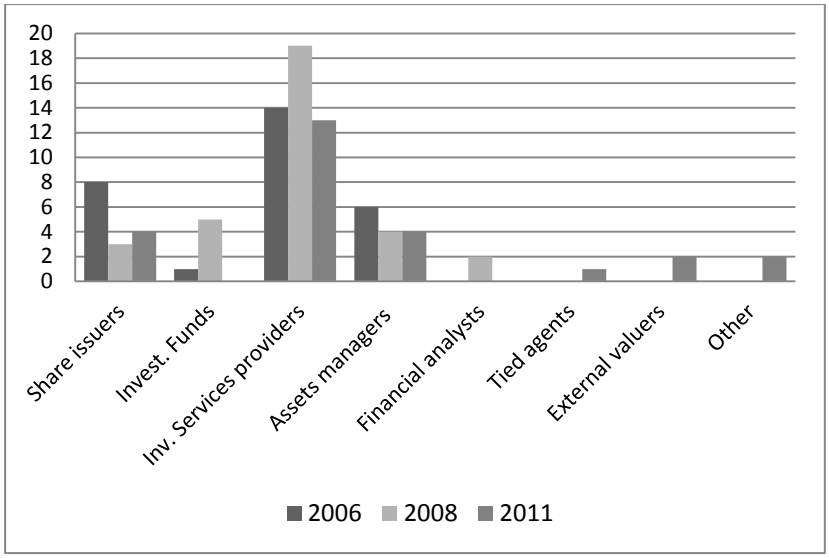


Figure 2– Categories of legal persons sanctioned

Concerning private individuals, we note a diversification of the status and functions of those sanctioned (Figure 3). Before 2008, no executives, lawyers, or private investors were involved in a sanctioning proceeding. CEOs and high-level managers are, in relative terms, sanctioned to a lesser extent in 2011 than in previous years.

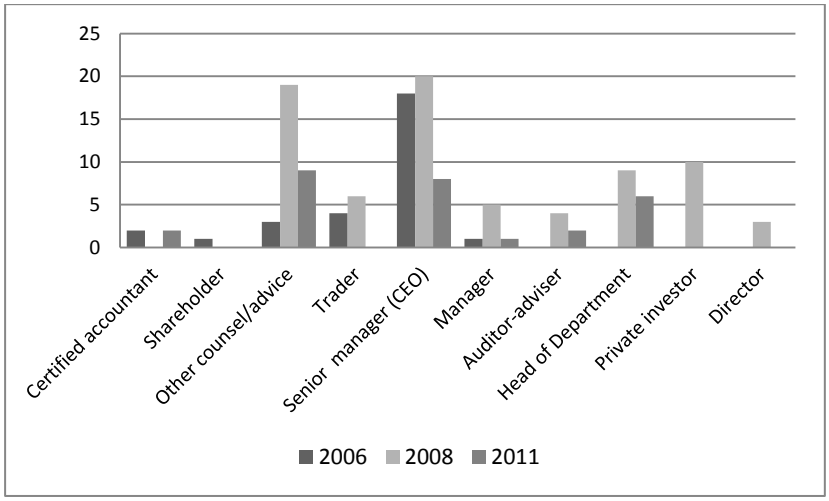


Figure 3 – Types of individual sanctioned

The most common sanction is a pecuniary penalty (Figure 4). A combination of fines and disciplinary sanctions was scarce for all three years under review. From 2011 onward the proportion of Enforcement Committee decisions including at least one clearance of liability and, subsequently, no sanction is smaller than previously. This may be interpreted as an indicator of the stricter policy on misconduct that the Committee adopted in the wake of the 2007-2008 subprime crisis.

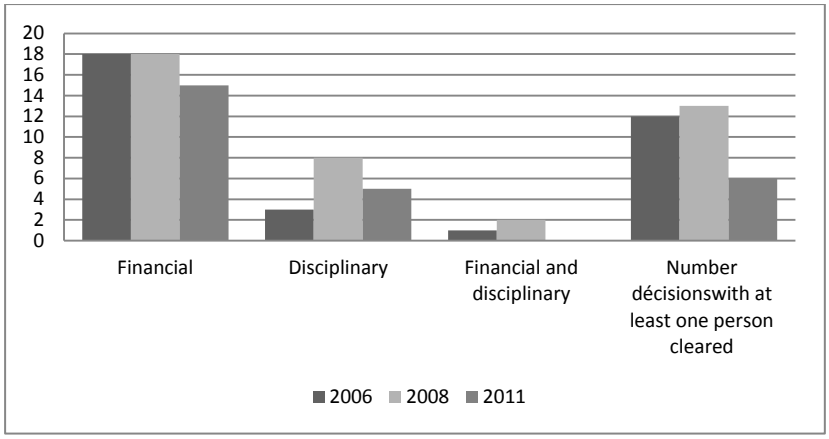


Figure 4 –Types of sanctions

We now turn to the kinds of misconduct that the AMF sanctions.

2.2.A Process of Judiciarization of Internal Organization

Below we describe practices characterized as market offenses or offenses related to deficiencies in firms' internal organization:

- Market offenses relating to fraud and misconduct which directly affect the information disclosed to the market. These consist of insider trading, disclosure or use of privileged information, manipulation of information, stock-price manipulation, and breach of the duty to inform customers.
- Internal organizational deficiencies arising within financial firms, and consisting of a series of internal shortcomings, such as: mis-management of conflicts of interest (absence of "Chinese walls"), lack of internal and compliance control (lack of appropriate human or technological capabilities, non-referral to an ethics or compliance officer, etc.), insufficient risk management and lack of compliance with prudential rules, non-respect of investment rules, deficiencies in compliance management standards (investment, diversification, hedging, etc.), breach of rules governing the trading (delivery, entry in functional accounts, data recording and retention…)

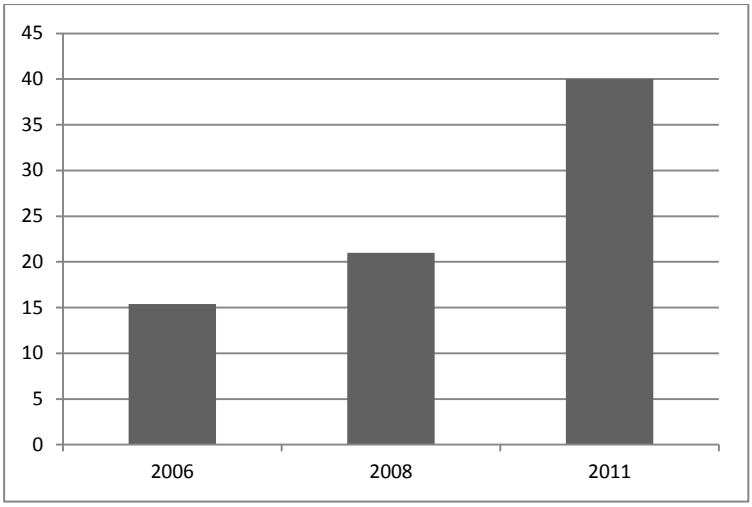


Figure 5 – Deficiencies in internal organization and control (% of total sanctions per year)

While sanctions for professional misconduct in terms of internal organization and control account for 15.4% of decisions in 2006, this rises to 21% in 2008 and almost doubles to 40% in 2011.

We thus observe a shift from sanctions punishing dissemination of misleading financial information (on the financial position of companies issuing securities, primarily on the secondary market) to penalties for shortcomings in practical risk control and compliance monitoring by the financial industry and firms' internal organization. In the U.S., the enforcement actions taken by the Securities and Exchange Commission (SEC) against broker-dealers in 2005, 2006 and the first four months of 2007 focus to a significant extent on violations related to organizational failures. More precisely, as shown by Gadinis (2012), violations such as failure to maintain appropriate books and records, and to supervise employees, along with internal control failures, and late trading, are mainly dealt with in administrative proceedings rather than court action. According to Gadinis's data, these types of violations account for 34.9% of the cases handled through administrative proceedings, and only 0.4% of those that go through the courts (Gadinis, 2012:94-96). Gadinis argues that "…the SEC assigned fraud-based violations predominantly to courts, while violations relating to supervisory failures were more likely to result in administrative proceedings" (Gadinis 2012:94).

As a matter of fact, a series of decisions taken in the recent years sanction internal control failures (De Vauplane, 2012):

- A fund manager was sanctioned for outsourcing internal control but failing to ensure its effectiveness. However, the external accounting firm to which control had been outsourced "did not provide a sufficiently comprehensive and regular management activity control" while for the Enforcement committee "any fund manager must always have the resources, organization and procedures of control and monitoring in line with its activities." (AMF – Enforcement Committee, decision October 23, 2008)
- A fund manager was sanctioned for having insufficient resources to value portfolios, since any fund manager is required to have adequate and sufficient means to fulfill the obligation to conduct its own asset valuation both at the time of acquisition and throughout the life of the financial asset, especially in the case of complex products such as Euro Medium-Term Notes (AMF – Enforcement Committee, decision April 7, 2011).
- Two fund managers were punished for control and monitoring failures related to the fraud orchestrated by Bernard Madoff until 2008. The Committee found that both companies had failed in their duties of care and professionalism in controlling risky investments for third parties."(AMF – Enforcement Committee, two decisions, October 21, 2011).
- Société Générale Asset Management (SGAM) was sanctioned for the way it managed its enhanced cash funds at the beginning of the financial crisis in 2007-2008. These funds invested in subprime-related assets without informing customers. Société Générale had bought back shares and units from customers wishing to exit the funds, but this was done under organizational conditions sanctioned by the AMF: SGAM involved its risk control and compliance team in the cash management process. Staff from the risk control and compliance office were closely involved at several key moments in the process of determining the sale price of the assets. Thus, no one was able to control the process, and assets were mis-valued. (AMF Enforcement Committee, two decisions, October 7, 2011).

It is worth underlining that the AMF mitigates its sanctions if the incriminated entity changes its internal organization while an Enforcement Committee proceeding is underway. Thus in 2011 several of the Committee's decisions clarified a new AMF policy, which consists in reducing a penalty when the entity in question, whether an investment services provider or a fund manager, has made tangible changes to its internal organization or its stock-pricing and valuation technology. (B*Capital, 5 May 2011; Société X, 7 April 2011; EMI France, 21 October 2011; OFI Asset Management, 30 June, 2011). These examples illustrate the trade-off within the sanction policy between fines and behavioral penalties. Even if the latter can replace the former in a procedural regulation framework, they remain essential in terms of compliance incentives.

Section 3- Law and Financial Markets

Enforcement of financial regulation deserves to be considered as part of the broader issue of interconnection between law and finance. Broadly speaking, the changing pattern of sanctions analyzed so far provides evidence of a dynamic relationship between the public institution responsible for enforcement and the market. The AMF's sanctioning practice is grounded only marginally in laws and regulation; it relies mostly its own rules and precedents[7]. Having a certain degree of discretion, the AMF Enforcement Committee has been able to implement a learning process about what is considered the best way to regulate securities markets and their participants through sanctions proceedings. In other words, the changes in the AMF's enforcement precedents and practice over time are the sign of a reflexive relationship between the regulator and the market participants it oversees (Black, 2013).

In addition, the process of legalization of financial entities' internal organization stresses the fuzziness of the boundaries between law and markets. Like antitrust and competition law, legal regulation is built on the principle of punishing non-compliant behaviors on the market. Our argument of a beyond-market-behavior regulation converges with the idea that a new policy of risk prevention seems to be expanding. The

[7] The soft law issued by independent administrative authorities, such as guidelines for fining policy, are not binding on the courts responsible for judicial control of those authorities' decisions. However, as illustrated by EU competition law, even judicial control tends to adopt a procedural approach, confining it to an assessment of whether the agency's decisions comply with its own guidelines.

proceduralization of regulation may be considered as a process for building a risk prevention system. In this regard, Michael Power (2013) deserves attention. Developing upon a Foucauldian approach to the apparatus (*dispositif*) of fraud risk, he argues that the idea of preventing risk rather than punishing a risk that has occurred is a major shift in regulatory policies: regulation encourages the creation of internal organizations capable of preventing the risk of fraud. Power's analysis echoes our own in the field of financial regulation. Paradoxically, however, this focus on internal organization could damage the interest of savers and investors due to the separation of financial activities and compliance management.

Furthermore, the normativity of law extends beyond the scope of the market and enters into the internal organization of firms. This result is in line with the main arguments of law and organization analysts such as Edelman & al. (1999) or Sitkin and Bies (1993). The process of legalization of internal organization schemes in the private sector finance also underscores the hybrid character of finance (i.e. between State and market) (Pistor, 2013). Edelman and Stryker (2005) recognize that "organizations are highly responsive to their legal environments on the law-related aspects of organizational fields" (2005: 532). In their perspective, "legal environments" have a variety of components: formal law, and the sanctions associated with it, informal practices and norms regarding the use or non-use of law, and ideas about the meaning of law (Edelman and Stryker 2005: 532). However, the construction of internal control mechanisms within financial firms is largely structured by formal law and, in France, by AMF sanctions. In specific cases, these sanctions are in addition to international, European and nationally binding provisions – from Basel Committee principles to the French Financial and Monetary Code regarding the control of risks in banking and finance. The empirical study reported here gives more evidence on the role of formal law and sanctions than on informal practices and ideas about what law is. The AMF policy actually consists in putting legal pressures on financial firms so that they take corrective actions when designing their organizational and decisional arrangements.

Enforcement of regulation is a key issue for socio-legal research. Coglianese and Kagan (2007) stress the prevalence of two dominant perspectives: legalistic and social. Enforcement

as a legal process means that the regulatory agency punishes violations of law. This implies an adversarial, non-cooperative regulatory practice. The second view is social: enforcement becomes a social process implying a dialogue between the regulator and regulated entities, with a dose a cooperation and a focus on problem-solving rather than punishment. Coglianese and Kagan consider that "many regulatory agencies claim that they strive for a flexible enforcement style: legalistic and punitive when needed, but accommodative and helpful in others […]." (Coglianese & Kagan, 2007, xviiii). Legalism and punishment on one side, cooperation on the other, are complementary in regulatory practice. As a matter of fact, the practice of the AMF Enforcement Committee consists less in punishing fraud and misconduct as such than in inducing financial firms to achieve intra-organizational changes. One the main tools used by the AMF is mitigating its pecuniary sanctions if a firm makes necessary changes in the course of a proceeding before the Enforcement Committee. The AMF's precedents are closely looked at by auditing firms and consultants, who issue advice about the regulator's expectations on internal control, compliance officers, risk management, and other key intra-organizational issues. The growing number of recommendations on internal control made by auditors and consultants, although not investigated as such in this paper, give a significant idea of their contribution to the process of managerialization of the law (Power, 2013). This process echoes the increasing tendency of regulatory agencies to implement negotiated procedures that are more or less based on horizontal-type bargaining with stakeholders. This can lead to contractualization, as demonstrated by the U.S. model of settlement.

The proceduralization of financial regulation can also be interpreted in terms of delegation of enforcement. As stated earlier, beyond in addition to sanctioning organizational failures within financial firms, the financial regulator also mitigates the amount of fines if the firm improves its internal organization in the course of a sanction proceeding. These facts evidence a process of delegating regulation from the financial supervisor to financial firms themselves. Through proceduralization, the supervisor gives incentives and responsibilities to firms, encouraging them to behave in a more socially responsible way, and to be more legally compliant when operating in the market.

As a matter of fact, when a firm improves its contested organizational arrangements during a sanction proceeding, the AMF Enforcement Committee regards this cooperative behavior as a legitimate motive for lowering the fine. The AMF's recent settlement policy underscores its shift towards procedural control[8]. Indeed, since 2011 the AMF has been vested with the power to reach a settlement with an entity whose misconduct is not harmful enough to justify a costly and lengthy sanction proceeding. If accepted by the wrongdoer, the settlement does not imply a recognition of guilt; both parties negotiate the introduction of a compliance plan and the payment of an amount of money to the State.

This trend can be analyzed within very different theoretical frameworks. In microeconomic terms, it could be seen as an optimal expedient for the regulator to delegate monitoring to a second body – the financial firm itself. As external regulation of firm behavior is both costly and difficult – if not impossible – to implement, the regulator may provide efficient incentives to firms' executives and managers by adopting this kind of procedural regulation. Within a principal-agent framework, the firm's management becomes a delegated principal that monitors the agent. The interests of both the regulatory body and financial firms are more efficiently aligned since the burden of proof is considerably lightened for the administrative authority. At the same time, this model of delegation may prevent incoherent incentive schemes. The possibility that firms will be fined because of shortcomings in their internal control system tends to make them less inclined to set up evaluation or remuneration systems that might encourage staff to take excessive risks or play dangerously with the rules. In consequence, operational staff are less likely to be exposed to conflicting incentives vis-à-vis market rules. In addition, such a delegation scheme may address the issue of the "fraud triangle" consisting of internal pressures to maximize financial returns, rule-breaking opportunities due to weak internal controls, and a professional culture that refuses to see financial regulations and the associated sanctions as legitimate.

However, an alternative story can be told. The choice of a procedural regulation model may be driven by efficiency. In this case, however, efficiency is not to be understood from the

[8] Decree n° 2011-968 of 16 August 2011 on the sanctioning powers of the AMF and the settlement procedure.

standard perspective of economic optimization. Rather, it is a pragmatic adjustment to the fact that regulators are finding it harder and harder to punish increasingly complex financial misconduct because they lack the budgetary, technical, and human resources to do so. Putting the accent on internal control failures makes it possible to alleviate the burden of proof and to close cases more quickly and efficiently. Likewise, relying on soft law sources and promoting negotiated procedures – such as *composition administrative* – reduces the risk of appeals and also enhances the legal certainty associated with the regulatory body that is making the ruling. This solution may allow the regulator to concentrate its resources on cases that are more important.

Conclusion

Legalization of the internal organization of private financial firms is an ongoing process in connection with sanction-based financial regulation in France. As noticed by Edelman & al. (1999) within the socio-legal field of law and organization, the internal structure of private entities does not stand outside the law. This specifically confirms the insightful statement made by Katharina Pistor, who promotes a legal theory of finance, that "finance is legally constructed; it does not stand outside the law" (Pistor, 2013: 315).

Critical accounting theorists put the emphasis of the fact that fraud is a social construct, with the legal dimension as an important component of the social construction (Cooper, Dacin, Palmer 2013: 441). In this regard, what is fraud varies according to context and over time. It therefore is of major importance to contextualize fraud within a specific political, economic, social and legal pattern, and to recognize the social construction of fraud and associated categories of wrongdoing. The focus of this paper is on the variation of the AMF's construction of fraud over time; its variation across space may be the subject of further comparative research.

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