Double Jeopardy and Concurrent Proceedings for Financial Wrongdoing

Monday, 11 September 2017  •  Anita Clifford  •  BLL Portal

Speed read: Anita Clifford considers the issue of double jeopardy in the context of financial wrongdoing attracting both a regulatory and criminal response. The discussion is situated in the context of the European Central Bank’s power to impose administrative penalties and refer matters for criminal investigation, and follows a presentation by Jonathan Fisher QC and Anita Clifford on this topic at the ERA Academy of Law Summer Course on EU Regulation and Supervision of Financial Markets in Trier, Germany between 19 – 23 June 2017.

In November 2014, the European Central Bank (“ECB”) acquired direct supervision powers over Europe’s largest banks. The rationale for the Single Supervisory Mechanism (“SSM”), giving rise to the ECB’s supervisory powers over significant financial institutions, is to “help rebuild trust in the European banking sector and increase the resilience of banks” in the wake of the financial crisis.[1] In furtherance of this objective, the ECB has since 2014 been able to undertake its own investigations and take direct enforcement action against significant institutions. ECB investigations must relate to potential breaches of EU law, ECB decisions and regulations as opposed to national laws but its powers are similar to those afforded to national investigative agencies. It can request documents for examination, seek explanations, as well as conduct interviews and site inspections. Enforcement action may extend to administrative pecuniary penalties. Further, although the ECB lacks criminal jurisdiction, it may instruct national authorities to open proceedings under national law with a view to imposing appropriate penalties.

One recent example of the ECB doing this is its instruction of the Central Bank of Ireland to open civil proceedings against KBC Bank, resulting in a penalty of €1.4 million, but referrals to national authorities for the purposes of criminal investigation are possible. Article 136 of the SSM Regulation expressly empowers the ECB, where it suspects the commission of a criminal offence, to request that the relevant national competent authority refer the matter to national authorities for investigation and possible prosecution.

Concurrence

Notably, the potential for the ECB to request that a national authority commence a criminal investigation and a decision by the ECB to impose an administrative sanction on a financial institution does not appear to be mutually exclusive. Article 132 of the SSM Regulation contemplates the imposition of administrative penalties notwithstanding a potential criminal prosecution – ECB decisions on administrative penalty need not be published forthwith if it could “jeopardise…an on-going criminal investigation.” This raises the possibility of concurrent proceedings in relation to the same matter, namely administrative proceedings brought by the ECB and criminal proceedings brought by national enforcement authorities. Consequently, an issue of double jeopardy could well arise.

Ne Bis in Idem

A universal understanding of double jeopardy is elusive but broadly the principle against double jeopardy (non bis in idem) prohibits the possibility of a defendant being prosecuted or punished twice on the basis of the same offence, act or facts. At the European level, the principle is protected by Article 4 of Protocol No. 7 of the European Convention on Human Rights and Article 54 of the Schengen Convention. The latter enlarges the conventional position, namely that the principle only operates in relation to prosecutions within the same State, by providing that a person whose trial in a Contracting Party has been disposed of cannot be prosecuted in another Contracting Party. In 2014, the European Court of Justice clarified the meaning of “disposed of”
when it concluded in Spasic (C-129/14) that an individual could still face prosecution in Germany for a fraud in circumstances where he had already been sentenced in absentia in Italy for the same conduct and had paid a fine but not served the custodial sentence that had also been imposed. The decision, in turn, represented a possible inroad into double jeopardy protection. Spasic, however, is but one of several recent European decisions which have considered the principle in the context of financial wrongdoing, indicating that it is in a state of evolution.

Notably, also in 2014, in Grande Stevens & ors v Italy (18640/10, 18647/10, 18663/10 et al, 4 March 2014) the Grand Chamber of the European Court of Human Rights ("ECtHR") considered whether a violation of Article 4 of Protocol No. 7 was established where two Italian companies and their chairman had been handed significant administrative penalties by the Italian regulator and subsequently prosecuted by a different body for market manipulation. Italy's attempt to narrow the double jeopardy protection as applicable to situations where a person was twice found guilty of an offence classified as "criminal" according to Italian law was unsuccessful. In the Court's opinion, although the initial penalties were labelled administrative the procedure shared similarities with a criminal process and clearly concerned the same conduct, date and persons as the subsequent criminal prosecution. Accordingly, a breach of Article 4 of Protocol No. 7 had occurred.

A similar outcome was achieved in Kiieveri v Finland (53753/12, 10 February 2015) and also Johannesson & Ors v Iceland (22007/11, 18 May 2017), although both concerned successful individual rather than corporate applicants.

In Kiieveri, the Fourth Section of the ECtHR unanimously agreed that a managing director who was the subject of administrative proceedings after the taxation authorities had discovered a failure declare a considerable amount of tax had had his rights infringed when he was subsequently also convicted of aggravated tax fraud. Similarly, in Johannesson, two applicants who were the subject of tax surcharges after the authorities discovered a failure to declare, and were subsequently convicted of aggravated tax fraud succeeded in contending before the First Section of the ECtHR that their right to protection against double jeopardy had been infringed. The Court agreed that the severity of the tax surcharges imposed demonstrated their penal or criminal character[2] and that the facts underlying their imposition and the subsequent convictions were identical. Both were based on the same failure to declare income and a breach was established.

Complementary approach

The above decisions demonstrate that the potential for concurrent administrative and criminal proceedings in cases of financial wrongdoing has given the European courts plenty to consider. The decisions highlight that considerable difficulties can arise when authorities pursue a 'dual track' approach. It should be noted, however, that as a general proposition the ECtHR has not criticised the availability of concurrent proceedings. Specifically, in Johannesson (cited above) at paragraph [49], the Court referred in detail to the Grand Chamber’s judgment in the case of A and B v Norway (24130/11 and 29758/11, 15 November 2016) where it was clarified that, “Article 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, provided that certain conditions are fulfilled…” Expanding upon the requisite conditions, the Grand Chamber in A and B considered that the dual proceedings were required to be closely connected in substance and in time and “have been combined in an integrated manner so as to form a coherent whole”. The duality of proceedings should be a foreseeable consequence throughout which pursue complementary purposes and address “different aspects of the social misconduct involved”. Elaborating on the timing connection, the Grand Chamber further considered that although it is not necessary for the two proceedings to have been conducted simultaneously from the outset, the time between the two proceedings had to be “sufficiently close” to protect the individual from being subjected to undue uncertainty and delay.

Conclusion

Being outside of the eurozone, direct ECB supervision and enforcement does not affect UK institutions. Nevertheless, the ECB’s ability to impose administrative sanctions and refer the same conduct to national authorities for the purposes of criminal investigation brings into focus a broader question of double jeopardy in financial wrongdoing cases. Recent European consideration of this question has implications for enforcement authorities throughout the EU, including in the UK, especially when contemplating running criminal proceedings concurrently with a regulatory approach to financial sector wrongdoing, or commencing a prosecution after non-criminal sanctions have been imposed on a company and it has engaged in remediation. There is a line of European cases indicating a strengthening of double jeopardy protection where a case attracts the attention of both the regulator and the criminal investigator, and the conditions recently articulated by the ECtHR are likely to inform enforcement thinking. Although a ‘dual track’ response to financial wrongdoing very much remains available, there appears to be a greater need for enforcement authorities to ensure that any dual responses are coherent and address different issues disclosed by the central facts. Consequently, to be consistent with the double jeopardy principle, demarcation and integration is key. For practitioners, identifying overlap in issues of interest to the regulator and the prosecutor – particularly where they may co-exist in the one agency – is potentially a valuable defensive tool.


[2] Applying the “Engel criteria” concerning principles to be applied when considering a "criminal charge" or "penalty" – see Engel and Others v. the Netherlands, 8 June 1976, Series A no. 22.
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