

Faculté de Droit,  
d'Économie  
et de Finance

**A Banking Union without  
Criminal Law Enforcement  
The Challenges Ahead**

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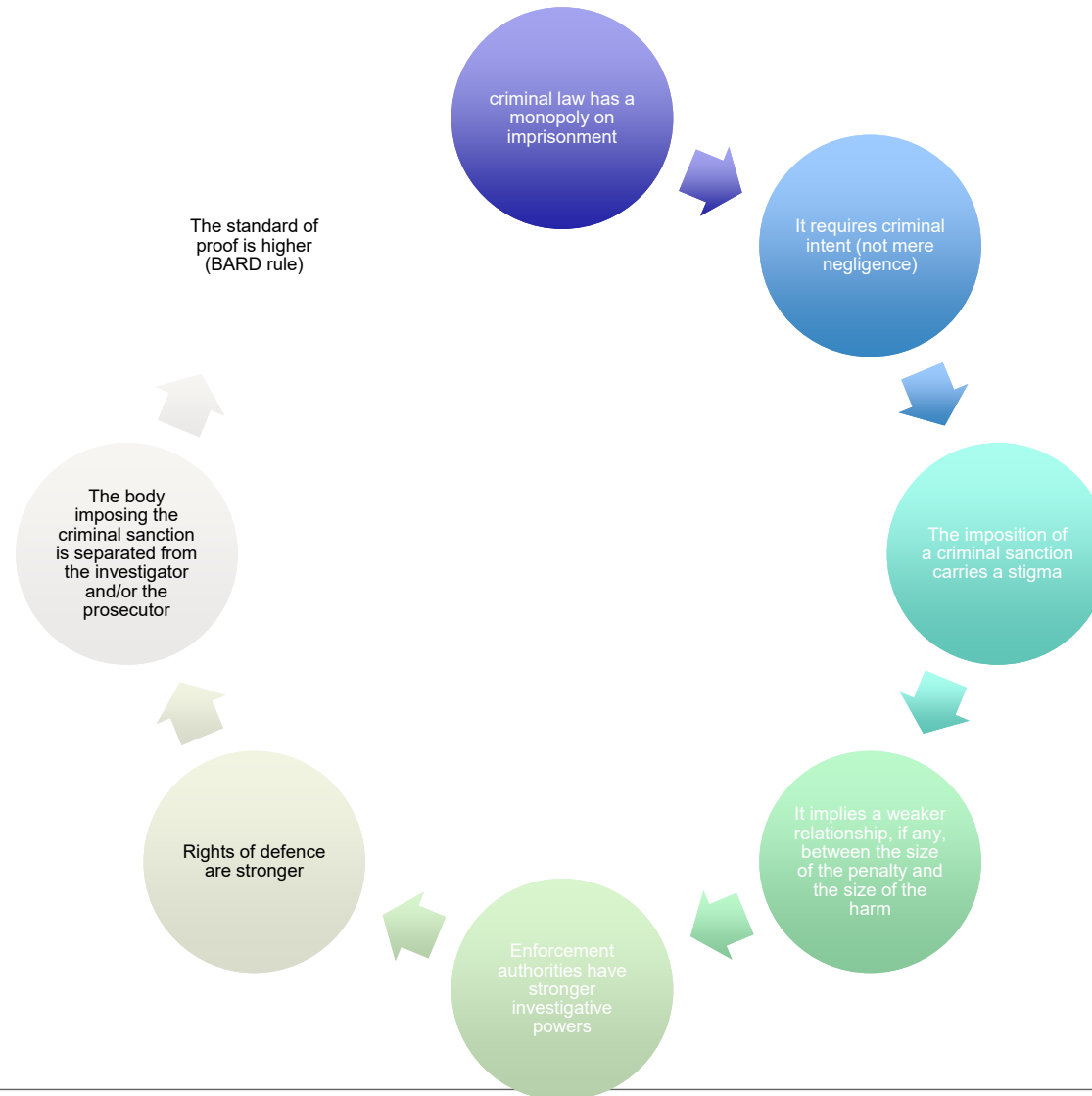
# I: Interactions



## II. Is there a need for a stronger criminal law response?

- Why only administrative sanctions in the EBU and in particular in the SSM?
  - Treaty limits
  - Flexibility
  - Only legal entities
  - Individuals criminal liability as a response to the “too big to jail”
  - Completeness and efficiency imply a stronger criminal law response

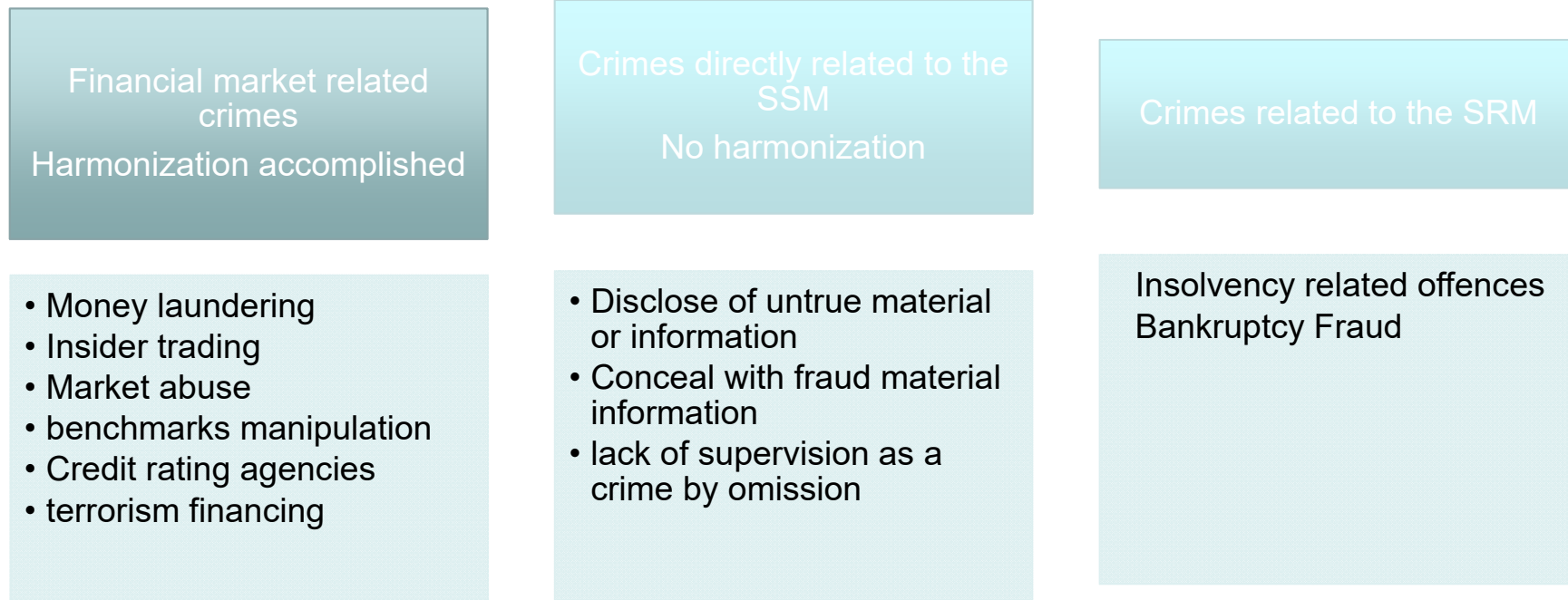
# II. Characteristics of criminal law:



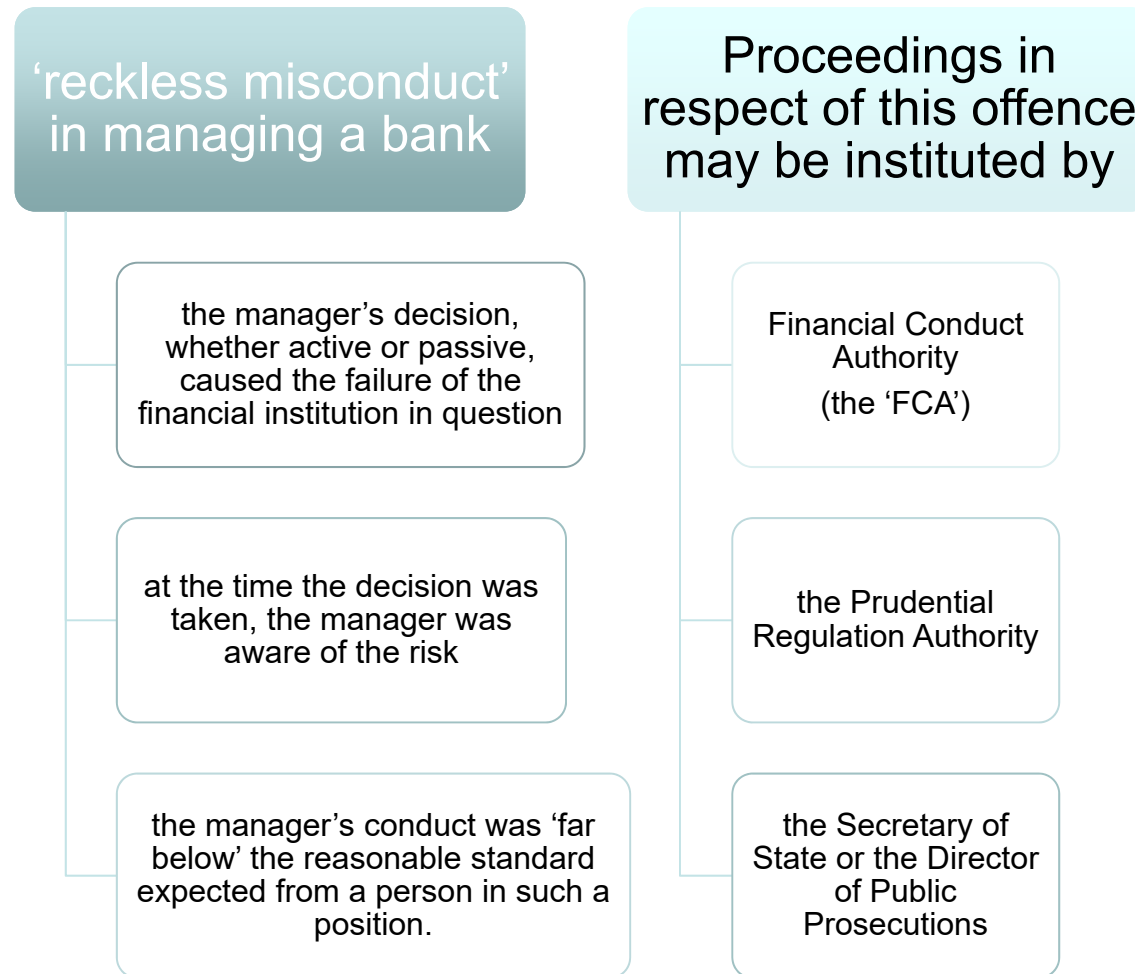
## II. Impediments to criminal law enforcement:

- Transmission of the relevant documents
- Need for special investigative techniques and lack of specific legal basis
- Lessons from the Libor case: courts need to prove whether manipulation actually or could have produced “artificial prices”
- Difficulties in gathering evidence on excessive risk assessment (technological robots-control not applicable)
- Risk to lower the *mens rea* requirements
- *Ne bis in idem*: first come, first served is not adequate
- Cross-border cases: European harmonization of crimes is limited

# III. Lack of harmonization of which crimes?

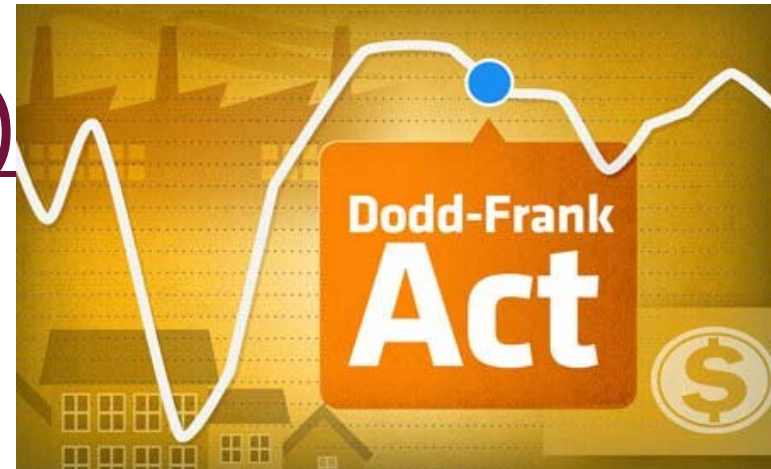


# IV. UK Banking Act (2013): Section 36(1)





## IV. Dodd-Frank Act (2010)



- Two dozens of federal criminal provisions
  - Old offenses but extending criminal liability to include :
    - new financial instruments
    - new actors
  - New offenses
- Centralised enforcement

# V: Current challenges

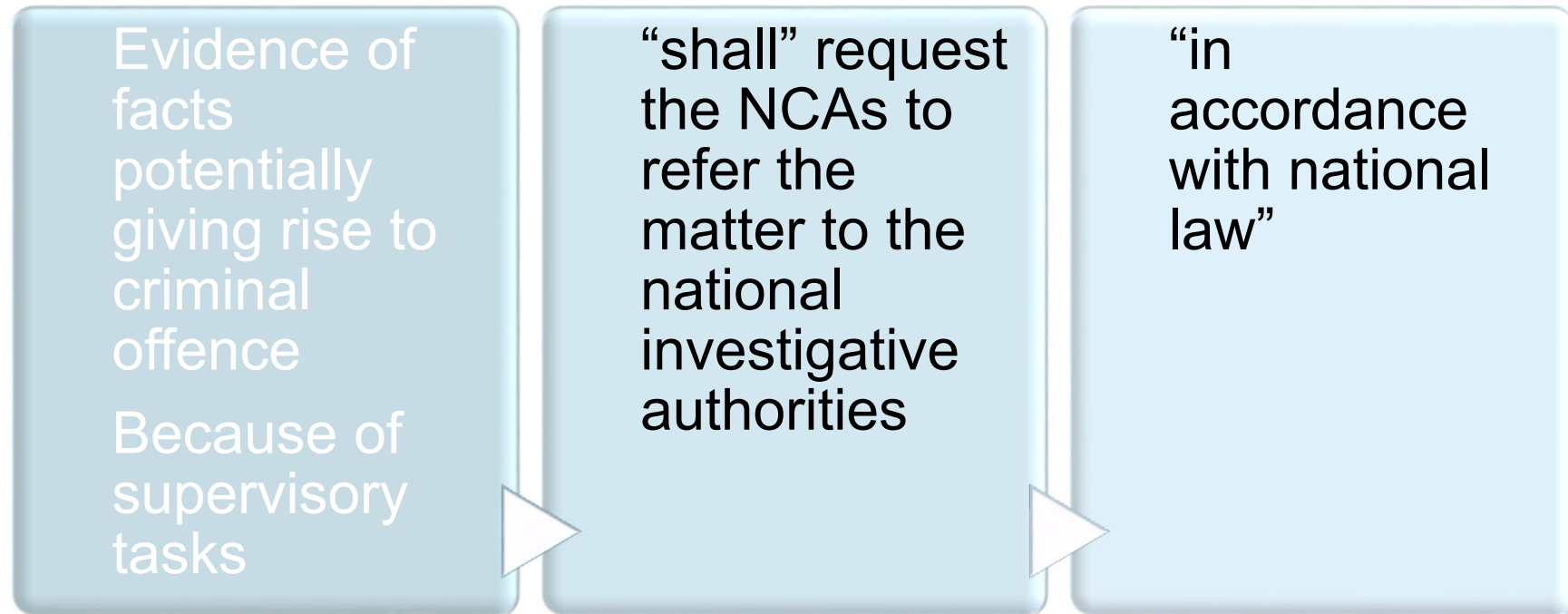
## Interaction between administrative and criminal investigations

- Duty to report
- Administrative investigative measures
- File sharing
- Secrecy

## Interaction between administrative and criminal sanctions

- Nature of administrative sanctions
- Ne bis in idem

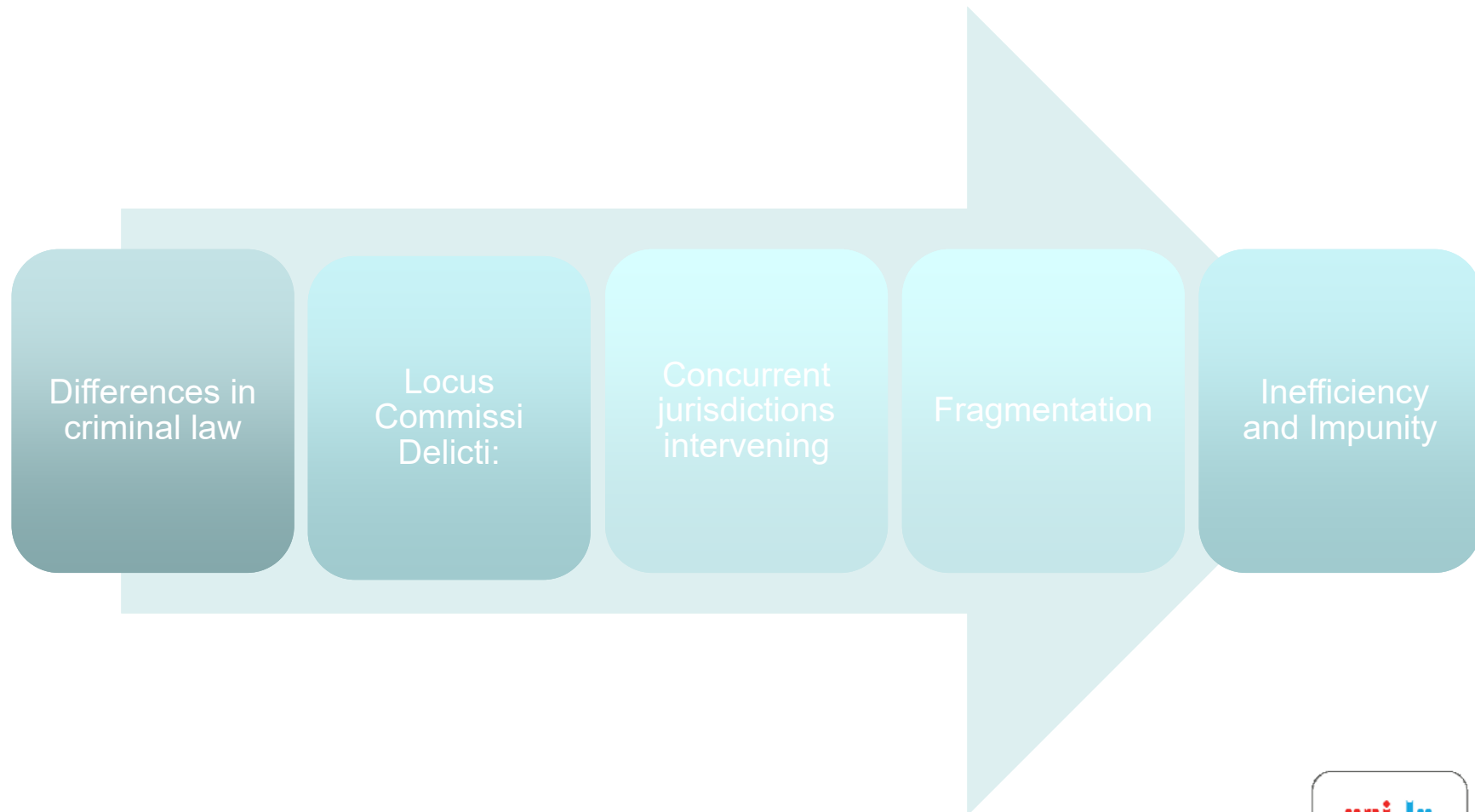
# V. Duty to report: Article 136 SSMR



# V. "in accordance with national law"



# V. Consequences:



# V. Consequences of the lack of harmonization

- **Euribor manipulation**
- SFO accused 4 Deutsche Bank employees of benchmark-rigging
- SFO issues an arrest warrant (March 2016)
- Parallel investigation by Frankfurt prosecutors dropped because alleged rigging of Euribor does not constitute a criminal offence under German law
- SFO Christian Bittar said that the authority will see if the four will “submit voluntarily” to the UK court process



# V. Lack of specific offences protecting the duty to cooperate with the ECB/SSM



# V. Fragmentation implies:

ECB “centralised” administrative enforcement v decentralized criminal law enforcement



ECB attempt to centralise information management: Control over the information disclosure to national investigative authorities by NCAs and NCBs

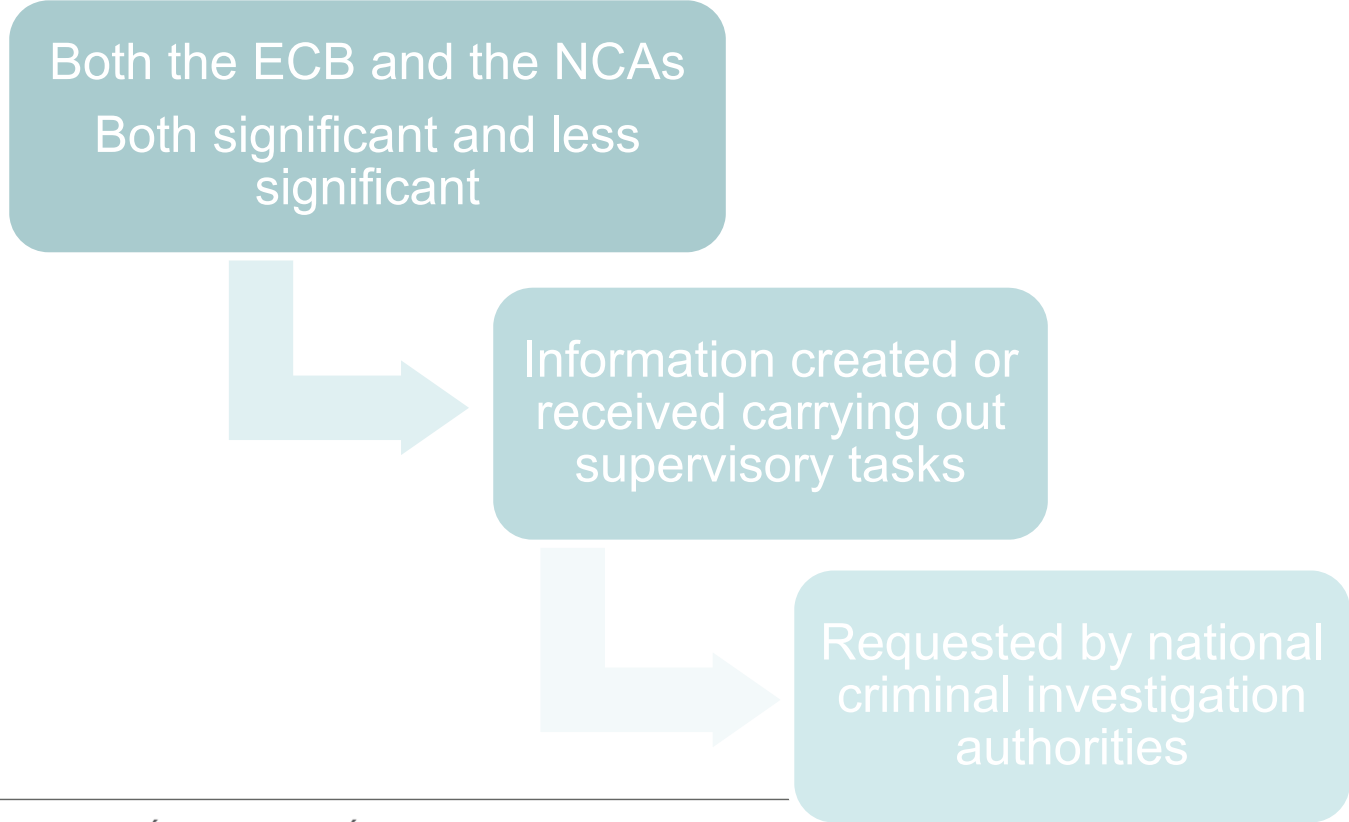


Indirect “supervision” of criminal investigations in the Eurozone member States

Decision(EU) 2016/1162 of the ECB on disclosure of confidential information in the context of criminal investigations (ECB/2016/19)



# V. Confidentiality: Decision (EU) 2016/1162 of the ECB on disclosure of confidential information in the context of criminal investigations (ECB/2016/19)



# V. Union law binding provisions

Principles

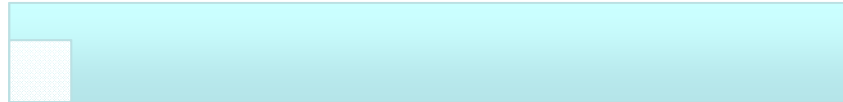
- Sincere cooperation
- Cooperation in good faith
- Interest of the Union
- Interference with the functioning or the independence of the ECB
- Exchange information within the SSM
- Personal data protection
- Professional secrecy
- Private interests...

Obligations



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## Requests received by the ECB



-NCAs should answer on behalf of the ECB

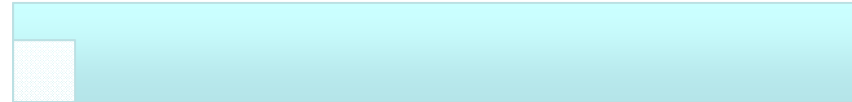
express obligation to disclose

no overriding reasons:

- To safeguard the interest of the Union  
 - To avoid any interference with the functioning or the independence of the ECB



## Requests received by the NCAs or NCBs

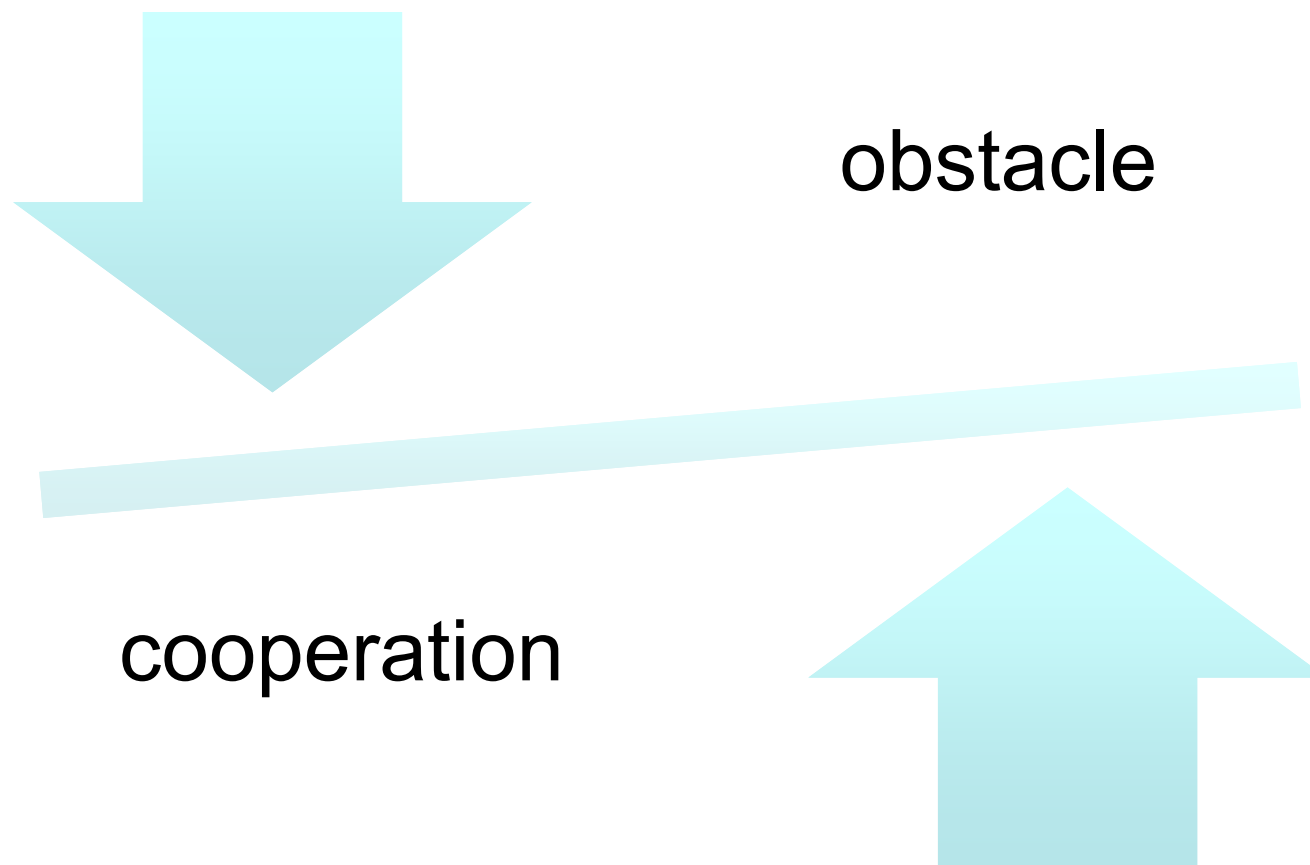


Duty to inform the ECB of every information disclosed (no difference between significant and non significant credit institutions)

Duty to consult the ECB that “shall advise” as to whether the information may be disclosed



# Administrative v Criminal



# VI. A blueprint for an integrated enforcement model

Clear distinctive criteria between administrative breaches and criminal offences

Respect of fundamental rights in the administrative investigative measures in order to facilitate/allow the “file sharing”

**Integrated Enforcement**

**Mixed composition of the investigative units and flow of information**

Avoid double penalties (prevention of ne bis in idem)

*Thank you for your attention!*

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