

Editors' Introduction

MADS ANDENAS* AND GIUSEPPE BIANCO**

This Special Issue aims to enquire into the behaviour of financial markets. It analyses the relationships between market participants, regulators, and the wider public. The respective roles of self-regulation, international and domestic laws, public enforcement, and criminal prosecution are discussed.

Since the works of John Locke, economics has gained ground as an autonomous discipline, distinct from morality. The full emancipation from morality was achieved with Adam Smith, and his *Enquiry into the Wealth of Nations* of 1776.

However, the ensuing “ethics-less view of economics and business” can be contested on historical grounds.¹ Furthermore, the epistemological separation from morality did not imply that laws and rules should be subordinated to the economy. Indeed, Smith himself warned against this danger:

“The interest of the dealers...in any particular branch of trade...is always...different from, and even opposite to, that of the public. ...To widen the market and to narrow the competition, is always the interest of the dealers. ... The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution... It comes from an order of men, ..., who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.”²

This sheds a negative light on all claims to self-regulation by economic actors, who will have an interest opposed to that of the general public.

Matters have become more complex with the recent developments in finance. A change occurred with the turn to financial capitalism in the 1970s-1980s.³ In the little world of bankers of the *good old times*, rules were passed on orally. Those who infringed the rules were shunned.

With the deregulation and internationalization of markets, deontological rules started to be codified. This also marked the beginning of financial ethics. Codes of

* Mads Andenas, Professor of Law, University of Oslo.

** Giuseppe Bianco, Research Fellow, University of Oslo – Université Paris 1 Panthéon-Sorbonne.

¹ Amartya Sen, *Does Business Ethics Make Economic Sense?* 3 *Business Ethics Quarterly* 46 (1993).

² Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book I, Ch. XI “Of the Rent of Land”, Conclusion, § 264 (London; Methuen, 1904). Available at: <http://www.econlib.org/library/Smith/smWN5.html> accessed 5 June 2015.

³ Judith Assouly, *Morale ou finance ? La déontologie dans les pratiques financières* (Paris; Presses de Sciences Po, 2013).

conduct for banks and other financial actors have then materialised everywhere. Internal control has somehow replaced State control, in Gunther Teubner's paradigm.

Corporate culture has begun playing a more significant role. The behaviour of individuals and firms in the financial sector can have a sizeable impact on society's welfare. This is particularly true for banks, as its "employees often face decisions in situations for which rules are ambiguous or allow for discretion, which may lead to an expectation that bad behavior will go unpunished and good behavior unrewarded".⁴

According to some commentators, self-regulation is needed to fill in gaps, as law is almost necessarily insufficient. In this technical, evolving field, the rule has to follow the economy. It has been argued that self-regulation is effective, as the market itself provides incentives for its agents to operate ethically. The need to preserve one's reputation is considered a key element in this respect.

Others warn against self-regulation, and point to the danger of the private sector's self-imposing its rules in order to avoid regulation from above. Moreover, today's globalised financial markets are arguably too wide and anonymous for such self-discipline to work effectively. Thus, many propound a tighter set of rules to be imposed top-down.

Finally, there are many instances of a hybrid mix of "co-regulation" between public authorities and financial actors, a middle ground between self-regulation and top-down regulation.

Thus, some of the questions that permeate this Special Issue are: Do financial markets operate in an ethical way? What is the reality of the relationships between businesses and public institutions? What has the global financial crisis revealed? Do financial markets comply with ethical norms or do they need more binding provisions? What are the best practices and the most important challenges going forward?

The contributions of the Special Issue address these questions across a host of diverse fields. They bring together scholarship in international law, law and economics, and behavioural studies, as well as experiences from international organizations and domestic courts. The occasion that brought the authors together was a seminar organised in June 2015 by the Research Project on "International Financial Market Regulation, Institutions and Efficiency", part of the research group "Companies, Markets, Society and the Environment", at the Department of Private Law of the University of Oslo, funded by the Finance Market Fund (managed by the Norwegian Research Council), and with support from the *Institut français de Norvège*.

The global financial crisis begun with the collapse of Lehman Brothers in 2008 is a cross-cutting theme. Depending on the area, it has revealed hidden dysfunctions, posed new issues or exacerbated underlying predicaments. It has also acted as a catalyst for international, statutory, and regulatory action. Whereas the light-touch approach, with overreliance on market discipline, internal governance and controls, had led to excessive risk taking and recklessness, renewed attention has been drawn to regulation, supervision, and enforcement activities. The articles of this Special

⁴ International Monetary Fund, *Global Financial Stability Report. Risk Taking, Liquidity, and Shadow Banking: Curbing Excess While Promoting Growth* 129 (Washington, DC: IMF, 2014).

Issue offer a critical assessment of the results achieved thus far and of the remaining challenges for the roles of ethics, self-regulation, and law in financial markets. The ever changing, and unpredictable, developments on the global political stage might shortly put the new regulatory framework (both domestic and international) to the test.