

Challenging the regulators: Enforcement and appeals in financial regulation

Roy Gava*

School of Economics and Political Science - University of St. Gallen
Centre for Banking and Financial Law - University of Geneva

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Abstract

This paper investigates the conditions under which regulatees decide to challenge regulatory sanctions in court. Targets of enforcement have the right to make independent regulatory agencies (IRAs) accountable in court, but IRAs would prefer not to have their enforcement actions challenged. This paper argues that, when deciding whether to contest regulators through appeals, regulatees consider the costs of sanctions as well as their relationship with the regulator. In particular, regulatory litigation is hypothesised to be shaped by the frequency and expected future interactions between regulatees and regulators. The empirical analysis relies on the behaviour of sanctioned individuals and firms in more than 3'500 cases from 18 financial regulators covering 13 European countries between 2004 and 2019. Results suggest that costlier sanctions and infrequent interactions between regulators and regulatees increase the risk of appeals.

*<http://roygava.com> | roy.gava@unisg.ch. Financial support of the Swiss National Science Foundation through the project “Global Enforcement in the Financial Industry” (182252) is gratefully acknowledged. For assistance with data collection, I am indebted to Duy-Lam Nguyen, Thomas Mendelin, Shirine Rossi, Adrienne Hababou and Zeinab Asmei.

Introduction

This paper investigates the conditions under which regulatory enforcement and sanctions by agencies are contested in court. Appeals against enforcement actions reveal the extent to which independent regulatory agencies (IRAs) are challenged by those who fall under their supervision. The paper thus dives into a critical dimension of the day-to-day interaction between regulators and regulatees which has been largely overlooked in empirical studies.

The right to contest decisions from public authorities is an essential feature of democracies (Shapiro 1980). Decisions that are considered wrongful, unfounded or disproportionate can be normally challenged before an independent judicial body. Regulators are not an exception: IRAs are required to justify their enforcement actions in court if the targeted companies or individuals contest them. Appeals are then a key bottom-up mechanism to make IRAs accountable through tribunals (Baldwin, Cave, and Lodge 2012, 345–47). Both the judicialisation of public policy (e.g., Kagan 2003; Hirschl 2008) and the accountability of independent regulators (e.g., Lodge 2004; Maggetti 2010; Koop 2011; Busuioc 2013; Busuioc and Lodge 2015) have attracted substantial scholar attention. The judicial review of regulatory rule-making has also been the object of previous analyses (Coglianese 1996; Shapiro 2002).

In sharp contrast, we have fewer insights in relation to the judicial review of IRA’s rule-enforcement. This is unfortunate due to its far-reaching implications. First, policy-makers have delegated to IRAs power and leeway to enact sanctions with serious consequences for firms and individuals. Second, the punishment of infringement is an essential component of policy implementation and a defining capacity of IRAs (Jordana, Fernández-i-Marín, and Bianculli 2018). Third, enforcement actions represent a direct and consequential interaction between regulators and regulatees. This paper seeks to start addressing this gap of the literature by investigating the factors driving the challenging of regulatory sanctions in court.

In order to investigate how and the extent to which judicial review makes regulators accountable this paper dives in the motivations of the targets of enforcement. Judicial review is triggered only if the regulatee brings her case to court. The accountability of regulatory agencies before courts is thus dependent on the action of regulatees that have been the target of enforcement. However, these regulatees face a dilemma. Regulators, as

any kind of organisation, would prefer not to be challenged in court due to the costs and reputational risks associated with judicial scrutiny. Regulatees sanctioned for misconduct do not ignore this fact. Under what conditions are regulatees likely to put their relationship with the regulator under further stress?

This paper argues that the stakes involved and the type of relationship between regulators and regulatees are key factors to understand whether targets of enforcement choose to appeal. Concretely, the paper investigates how the cost of sanctions as well as relational distance (D. Black 1976; Ayres and Braithwaite 1992; Boer and Eshuis 2018) affect the likelihood of appeals against IRA’s decisions. By so doing, the paper seeks to contribute to both theory and practice. First, in contrast to the substantial body of empirical studies on IRA’s accountability before elected-policy makers, the interaction between the judicial and regulatory arena remains underexplored. Procedural appropriateness is one of the basis of IRA’s legitimacy (Baldwin, Cave, and Lodge 2012; Maggetti 2010) and administrative courts have the mandate of controlling it (Busuioc and Lodge 2015). The paper sheds light on behaviour and incentives of regulatees, on which the triggering of judicial accountability primarily depends. Second, judicial review is a potential source of headaches for IRAs. They consume agency resources and increase their reputational risk. Investigating the conditions under which targets of enforcement may be more inclined to appeal offers insights on the kinds of enforcement decisions having a higher risk of being contested.

Theoretical expectations based on the role of cost and regulatory relations are put to empirical test with an original dataset of enforcement actions by IRAs in charge of the supervision of financial services¹. Three hypotheses explore different conditions that are presumed to affect targets’ decision to go to court: the type of regulatory sanctions imposed, the corporate or individual character of sanctioned entities, and whether intensively supervised firms confront their primary regulator. Whether targets of sanctions decide to contest regulatory sanctions in court is examined empirically by means of more than 3’700 cases. The sample comprehends enforcement action by 18 European regulators from 13 countries between 2004 and 2020. Financial regulators

¹It should be noted that participants in financial markets are also bound by other domains of criminal and business law, such as anti-corruption, competition or economic sanctions rules. Enforcement for these domains may thus fall under the responsibility of criminal prosecutors and other public enforcers (e.g., competition authorities) and are thus out of the scope of the paper.

from the Eurozone, Sweden and Switzerland are included. The impact of the palette of sanctions available to regulators, including (but not only) financial penalties, is assessed. The paper investigates theoretically and empirically the conditions under which sanctioned individuals and firms contest enforcement actions. The theoretical section begins with a discussion on how IRAs are made accountable before courts through a bottom-up mechanism. The motivations and behaviour of targets of enforcement, which are the actors on which this mechanism is delegated, is considered next. Special attention is given to the way in which judicial appeals affect the regulator-regulatee relationship and how this is considered by potential plaintiffs. Hypotheses on the lodging of an appeal by the targets of regulatory sanctions are then formulated. A section describing the enforcement of financial regulation in Europe provides a general background for the empirical analysis. Data and methodological issues are discussed next. A series of regression analyses puts the theoretical expectations to empirical test. The final section highlights the takeaways and proposes next research steps.

Regulatory accountability through judicial review

The global diffusion of IRAs (Jordana, Levi-Faur, and Fernández-i-Marín 2011; Jordana, Fernández-i-Marín, and Bianculli 2018) has motivated scholars to question their legitimacy and accountability (Lodge 2004; Maggetti 2010). The transfer of power from elected policy-makers to non-elected regulators creates the risk of a “democratic deficit.” The justification for this transfer is two-fold (Majone 2001, 77; Maggetti 2010, 3–5). First, regulator’s “output-oriented” legitimacy is based on their credibility to make better regulatory decisions due to superior technical expertise. Second, “procedural” legitimacy comes from the belief that IRAs act “more lawfully, transparently, openly and fairly than ordinary bureaucracies” (Maggetti 2010, 3; see also Baldwin, Cave, and Lodge 2012, 29, 340). Given their technocratic credentials, independent regulators are expected to excel at explaining and justifying their actions.

Courts are accountability forums (Bovens 2007, 450). The ex-post or retrospective control of administrative action is a primary task of the judiciary (Busuioc 2013, 196–97; Busuioc and Lodge 2015, 256). In particular, administrative courts are the stronghold of procedural appropriateness. Appeals against regulators before a judicial body are

designed to guarantee the lawfulness of regulatory action and to prevent “arbitrary and capricious” decisions or other abuses of power. By correcting mistakes and harmonising implementation (Shapiro 1980; Shavell 1995), judicial oversight is believed to contribute to the equal and fair treatment of regulatees.

Much of the attention on the interactions between regulators and courts has been on the judicial review of rule-making (Bignami 2016, 300–301). In particular, what we know about regulators and judicial review comes primarily from the study of the US ‘notice and comment’ rule-making process (Coglianese 1996; Kagan 2003, 188–90; Schmidt 2004; Rose-Ackerman 2008, 11–13).

Despite its substantial implications, the judicial review of regulatory enforcement has been overlooked. Regulators enjoy substantial discretion when it comes to enforcement (Ayres and Braithwaite 1992; MacNeil 2015). Sanctioning is a key component of enforcement and one of the defining capacities of IRAs (Jordana, Fernández-i-Marín, and Bianculli 2018). In contrast to rule-making, what is at stake are not abstract and general rules but concrete decisions based on accusations of misconduct against individuals or firms. Policy-makers have thus trusted independent regulators the power to make decisions that can have drastic consequences for corporations and professional careers. Courts control the plausibility of the infringement accusations, whether they fall under the mandate of the regulator, the respect of due process rights, as well as the fairness and proportionality of sanctions (Bignami 2016, 300–301).

Previous research has thus remained largely silent on the initial decision to challenge regulators. The very few studies dealing with enforcement and judicial review in Europe and adopting a large-N strategy privileged a descriptive and single-country approach² (e.g., Bajakić and Kos 2016; Zulauf and Gava 2019; for an exception comparing two countries, see Mejia 2020). Their main focus was on the performance of regulators in court (i.e., success rate) and the unveil of unlawful regulatory action. Empirical analyses tended to focus only on those regulatory decisions that were the object of an appeal rather than on all regulatory decisions.

Investigating the lodging of appeals is of critical importance for the study of interactions

²See also Busuioc’s (2013) qualitative analysis of the evolution of judicial review practices for five regulatory agencies at the EU level.

between regulators and courts because the accountability provided by judicial review works in a “bottom-up” fashion. In other words, the process needs to be triggered by a plaintiff. As Magill (2014, 410) explicitly reminds: “one feature of judicial controls that is both obvious and worth emphasizing is that these controls are purely ‘reactive.’ Judicial review is not available when no party challenges government action, even if it might otherwise be subject to challenge in court.” When it comes to regulatory enforcement, the circle of potential plaintiffs is limited to targets of regulatory sanctions.

Regulatory capitalism is built on a chain of delegation (Maggetti 2010). The activation of judicial review as an ex-post accountability mechanism is in turn delegated to the targets of regulatory sanctions. When facing an enforcement action, regulatees have to choose between voice or loyalty before the regulator.

Sanctions, appeals and regulatory relations

Regulatory sanctions strain the regulator-regulatee relationship. On the one hand, the uncovering of misconduct hinders the regulator’s trust. On the other hand, sanctions impose costs for the regulatees. Furthermore, sanctioning is the most formal and legalist dimension of enforcement. Formalism and legalism is believed to increase the perceived distance between regulators and regulatees (D. Black 1976; Grabovsky and Braithwaite 1986; Coglianese 1996; Kagan 2003; Etienne 2012).

An appeal in response to a regulatory sanction puts additional strain to a relationship negatively affected by the detection and sanctioning of misconduct. The unilateral involvement of third parties, in this case courts, is a signal of distrust and defiance in regulatory relationships (Coglianese 1996; Etienne 2012). Moreover, judicial litigation brings additional formalism and legalism to an already harmed relationship.

The lodging of an appeal by a regulatee introduces the risk of a judicial reversal against the regulator. Regulators are averse to such a prospect (Söderberg, Menezes, and Santolino 2018, 303; Gailmard and Patty 2016). Irrespective of the appeal’s final outcome, the challenging of regulatory in sanctions in court are bad news for regulators for multiple reasons.

First, appeals impose costs on the regulator (Coglianese 1996). Enforcement cases pushed

out the door come back in through the window. Agencies' resources that could be deployed elsewhere need to be reallocated to litigation and the scrutiny of past decisions.

Second, when an appeal is lodged, the regulatee unilaterally shifts the case from the regulatory to judicial arena. This shifting erodes the regulator's control over the case and expands conflict (Schattschneider 1975). Conflict expansion is a strategy pursued by those actors seeking to undermine the position of opponents that are dominant in a given arena. As courts enter the picture in response to regulatees' demand, regulators' work is externally scrutinised and the outcome of the case is no longer on their sole hands.

Third, regulators benefit from discretion to define and implement their enforcement policy. Deciding on the frequency, type and severity of sanctions are crucial aspects of regulators' enforcement strategy (Ayres and Braithwaite 1992). Courts respond to appeals and scrutinise regulators' behaviour retrospectively and on specific cases. Nevertheless, courts' judgements might have a prospective impact beyond the specific cases that were contested. In particular, judicial reversals pointing out a lack of procedural appropriateness could force regulators to revise entire enforcement policies under pressure and against their preferences.

Finally, an appeal against an enforcement decision is a source of reputational risk for the regulator. Regulators care about their reputation because it is a key source of organisational power (Carpenter 2010; Gilad and Yogev 2012). A judicial defeat for regulators is more newsworthy than a victory and may attract negative attention from various audiences (i.e., other regulatees, elected policy-makers and the media). The public exposure of regulator's mistakes or wrongful decisions tarnish its reputation within and outside the regulatory community (see Mejia 2020, 3). In this regard, judicial reversals triggered by challenges from sanctioned regulatees may prove particularly harmful. First, regulatory enforcement and sanctioning are among regulators' primary tasks. The perception of mistakes or failings in core functioning tasks have a particular strong and negative effect on organisational reputation (Busuioc and Lodge 2015, 253). Second, courts holding public officials into account tend to focus on their field of specialisation: legal procedures rather than technical expertise (Baldwin, Cave, and Lodge 2012, 345; Busuioc and Lodge 2015, 256). Courts are thus likely to highlight failures in procedural appropriateness, which is one of the keystones of IRA's legitimacy.

Regulators have thus a strong preference for not having their enforcement actions contested. An adversarial strategy in response to a regulatory sanction brings additional tension to the regulatory relationship. Targets of enforcement may weight this drawback differently when deciding whether to engage in regulatory litigation.

Regulatory litigation: Empirical expectations

Regulatees are aware that regulators would prefer not to be challenged in court. Nevertheless, they may still pursue this route if the stakes are sufficiently high. In other words, targets of sanctions may lodge an appeal if the price of further deteriorating their relationship with the regulator is worth paying. Three factors affecting the cost imposed to targets by enforcement actions are investigated: what is at stake in terms of enforcement measures, whether the target of enforcement is an individual or a firm, and the kind of ties between firms and the sanctioning authority.

Regulatory sanctions

Regulatees go to court seeking reversals that would mitigate or compensate damages and losses imposed through enforcement actions. The cost for targets derived from enforcement is critically determined by what is at stake in terms of regulatory sanctions. Both targets and regulators perceive some sanctions as relatively *more costly* than others, as illustrated by the influential pyramid of sanctions (Ayres and Braithwaite 1992). Thinking of sanctions in hierarchical terms is thus useful to grasp the cost imposed on targets of enforcement. This approach is however not without challenges due to the fact that the same type of sanction may carry degrees of severity (e.g., amount of fine) and that multiple types of sanctions may be combined. In addition, the total burden resulting from regulatory sanctions is difficult to estimate (e.g., non-pecuniary sanctions, reputational damage, potential loss of income), even for the protagonists.

Public statements of misconduct are among the least severe form of disciplinary action available to regulators (e.g., J. Black 2001, 19–20). These *public reprimands*, that can be contested in court, might be imposed singly or in combination with other sanctions. However, publicly disclosed enforcement actions can be considered *de facto* public statements of wrongdoing. The potential additional impact of reprimands on the cost of targets (e.g.,

negative publicity) can be thus considered relative low.

Other types of regulatory sanctions have a more drastic impact on targets. Regulatory authorities punish often through the imposition of pecuniary sums. *Financial penalties* take different forms, such as administrative fines, compensations to injured parties or the disgorgement of profits. Other things being equal, the cost of sanctions for targets increase with the amount of pecuniary sums.

One key feature of regulated industries is the requirement of licences or authorisations to be active in business. In response to infringement, regulators can restrict the terms of participation or even exclude actors from the market. This relates to the *gatekeeping* capacity of regulators to control market access (Jordana, Fernández-i-Marín, and Bianculli 2018). Examples include temporary or permanent restriction of business activities, professional bans against individuals and the withdrawal of licences. Such drastic measures are usually reserved for serious breaches and may push targets out of business (Ayres and Braithwaite 1992).

In parallel to these regulatory sanctions, some regulators dispose of leeway when it comes to the disclosure of offenders' names (van Erp 2011b, 2011a; European Banking Authority 2015). Following the logic of *naming and shaming*, the negative publicity associated with being pointed out publicly as an offender brings an additional cost for regulatees.

Regulatory sanctions affect thus the cost of enforcement. Targets may have stronger incentives to go through the negative consequences of a deteriorated relationship with an authority as the cost imposed by enforcement increases. First, all things being equal, the burden inflicted by financial penalties is signalled by the amount due. Higher financial penalties may thus encourage targets to go to court. Second, restrictions in terms of market access reduce sources of revenue. Faced with such limitations, targets may be more inclined to pay the price of damaging their relation with the regulator and confront it in court. Third, targets whose name is disclosed pay an additional reputational cost in the form of negative publicity before third parties. This may push them to appeal more than those that remain anonymous. To sum up, the general expectation reads as follows:

H1: The greater the cost imposed by regulatory sanctions, the greater the tendency of targets to challenge regulators.

Individuals and Firms

Regulators of economic activities monitor and enforce the compliance of market participants. Market participants can be firms or individuals (in their capacity as self-employed professionals or board/management members). In some industries, such as financial services, a substantial part of the enforcement activity of regulatory authorities is targeted at individuals. Individuals and firms may differ when deciding whether to accept or contest regulatory sanctions.

Previous research suggests that, when confronted to an enforcement action, individuals are more likely to adopt an adversarial response against regulators (Jordanoska 2019). Individuals that are personally liable before the regulator have their “skin in the game.” A personally liable sanction is likely to tarnish individuals’ prestige and cause long-lasting damage to their professional careers and prospects within the industry (Jordanoska 2019, 10–12; van Erp 2011b; MacNeil 2015, 17–18). Consequences for daily lives in terms of income, identity and status can be drastic (Benson 1990). Staying in the industry and/or finding a new job under the supervision of the sanctioning authority may be an unlikely prospect³.

In contrast to individuals, firms may have less incentives to pursue the adversarial path. Regulatory sanctions have a less stigmatising effect for firms. Most firms continue to operate after a regulatory sanction and keep entertaining interactions with the sanctioning authority. In addition, the cost of regulatory sanctions may be widely perceived in some contexts as simply another cost of doing business. Given the relative longer time horizon of their relationship with the regulator in the aftermath of a sanction, firms should be more inclined to adopt a cooperative stance than individuals (Scholz 1984, 189). Restraining from judicial review in order to rebuild the regulatory relationship may be thus more appealing to firms than individuals.

H2: Individuals are more likely to challenge regulators than firms.

³For example, in their study of enforcement actions against financial misrepresentation in the US, Karpoff et al. (2008) show that 93% of sanctioned individuals lost their jobs and had severe complications in their subsequent careers.

Regulatory relations: Primary regulators

The type of relation between regulators and regulatees may play a crucial role on regulatees' decision of challenging regulators in court. Drawing on relational distance (D. Black 1976; Grabovsky and Braithwaite 1986), the prospect of future encounters (Scholz 1984), as well as on the relative importance of regulatory relations for firms, it is proposed that firms are more likely to renounce to appeal against their primary regulators.

Relational distance (D. Black 1976) refers to the scope, frequency and length of interactions between actors. Legal scholars point out that the closeness of the relationship between actors and its expected future are key to understand whether actors choose to litigate. Litigation is seen as a form of “social defection” expected in distant, temporary or ending relationships (Coglianese 1996, 737–39). “Strangers” or those minimizing the value of future interactions (D. Black 1976, 42; Merry 1979, 920) are believed to be more prone to litigation. Actors enjoying a close relationship seek to solve disputes out of court in the expectation of future cooperation. In a similar vein, the scope and frequency of encounters between regulators and regulatees and the expectation of their future continuity shapes their interactions (Ayres and Braithwaite 1992, 55). “The perceived probability in any given round that there will be another round” (Scholz 1984, 189) encourages long-term gains despite short-term losses.

In their study of enforcement by business regulatory agencies in Australia, Grabovsky and Braithwaite (1986, 207) argued that regulators were more likely to resort to formal sanctions as the relational distance between them and regulatee increased. Adopting the regulatee's perspective, targets of enforcement may be more prone to adopt a formal adversarial stand as their distance with the regulator widens.

Interestingly enough, Coglianese (1996) reviews this “relational theory” of litigation to assess how these assumptions may *not* apply to the regulatory context. By means of empirical analysis, he discusses the puzzling result that those interest groups that collaborate more intensively and closer with the US Environmental Protection Agency are those that bring them more often in court. However, the particular setting in which this empirical assessment was made requires a revisit. First, the study focused on judicial review of rule-making rather than rule-enforcement. The stakes (i.e., general rules vs. targeted sanctions) and types of actors (i.e., interest groups vs. market participants)

are substantially different. Second, the study deals exclusively with the US, a jurisdiction where regulatory relationships are exceptionally adversarial and legalist (Kagan 2003). In contrast, European regulatory relationships tend to be more informal and less judicialised. Given that dealing with regulatory affairs in court is relatively less frequent, appeals may be interpreted in the European context as a particular strong signal of defiance.

From the firm's standpoint, the cost of deteriorating regulatory relations increases with the relative importance of the regulator for the firm. Firms interact with multiple regulatory authorities as a result of their activities across market segments and jurisdictions. Still, firms develop denser relations with some regulators over others. The strategic value of these different relationships for firms depend on the scope of regulators' competencies (i.e., licensing, supervision, market segments, jurisdiction) over firms' activities. In the case of finance, densely regulated firms such as banks and insurance groups have a primary supervising authority. The higher the oversight of regulators over firms' activities, the higher the value of the relationship for the firm.

Nurturing a good relation with their primary regulator is a particular valuable asset for firms expecting to continue to interact with the authority on diverse topics and in the long-run. An appeal may negatively affect present and future interaction on other issues. The negative implications of challenging decisions in court may thus seem relatively more costly to firms when facing a sanction from their primary regulator.

H3: Firms are less likely to challenge their primary regulator.

Enforcement of financial regulation in Europe

Financial regulation offers an ideal setting to investigate the triggering of judicial review by firms and individuals in response to enforcement. First, in most countries around the globe, independent regulatory agencies have been trusted to supervise this key economic sector. In comparison to other policy areas, regulators of financial markets enjoy from relatively high levels of autonomy from policy-makers (Jordana, Fernández-i-Marín, and Bianculli 2018). Second, these regulators supervise a diverse population of market participants. Notably, individuals and different types of firms may be the target of enforcement action. Actors ranging from global banks to non-financial listed companies or individuals working as independent financial advisors are concerned. Third, heavily supervised firms such

as banks entertain continuous and multidimensional relationships with their primary regulator that includes frequent formal and informal interactions (Rex 2018). Fourth, while their financial penalties often make headlines, financial regulators have a varied palette of sanctions in their enforcement toolbox.

The mix and severity of sanctions available to regulators depend on the specific rules that have been breached (J. Black 2001, 19). A substantial amount of the rules enforced by financial regulators in Europe emanate from the EU level. The EU financial regulatory framework is built around specific issues⁴. Since the Global Financial Crisis of 2007-08, there has been a growing number of breaches and sanctions that have been defined at the EU level. The European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) oversee and promote the common implementation of the EU single rulebook by national authorities. National regulators remain responsible and enjoy discretion for enforcing transposed EU law (Carletti 2017, 15; Götz and Tröger 2017, 10–12; Resti 2017, 17–18; Meléndez-Huelin 2017, 286–88). As in other policy areas (Scholten 2017), EU agencies -the European Central Bank (ECB) and the ESMA- have progressively gained direct enforcement powers. However, these agencies deal with specific breaches of directly applicable EU law, which has a relative narrow scope compared to nationally transposed regulation. It is then unsurprising that the lion’s share of enforcement actions still takes place at the national level.⁵

Financial regulators can be responsible for enforcement in diverse issue areas. These include, among others, capital and liquidity requirements, consumer and investor protection, anti-money laundering, market abuse and disclosure requirements. Institutional arrangements for these responsibilities vary across countries and time. The three ideal-typical models that are often used to describe such arrangements (Ferran 2015) can be found at the national level in Europe: a single regulator for all issues and market participants, two agencies splitting responsibilities along prudential and business conduct supervision (i.e., twin-peaks) and agencies focusing on one of the three main financial sectors (i.e., banking, securities and insurance).

⁴These include a series of Directives and Regulations, for example on Capital Requirements (CRD), Anti-Money Laundering (AMLD) or Markets in Financial Instruments (MiFiD), Transparency (TD) or collective investments (UCITS)

⁵Following the unit of analysis privileged in this paper (see below), the ECB issued enforcement actions against 8 firms in the period 2017-2020. The number increases to 12 for the ESMA during the period 2014-2020.

Corporate financial market participants do not face the same intensity of regulation and supervision. When it comes to financial regulation, the extent and intensity of oversight depends on firms' activities. In particular, the activities of banks and insurance groups have been traditionally more tightly framed by regulatory requirements than those of other types of firms (i.e., investment firms, asset and fund managers, dealers and brokers). While other financial market participants are still subject to financial regulations, such as registration, market conduct or consumer protection rules, the perimeter and intensity of supervision from regulators is substantially lower.

Banks and insurance groups develop dense ties with the authority that is responsible for their microprudential supervision in their home jurisdiction (so-called “primary” or “home” regulators). Prudential requirements have historically been imposed to banks and insurance groups to prevent excessive risk taking due to their interconnectedness and vital role in the economy. It is the most comprehensive form of supervision and covers the most onerous types of obligations (e.g., capital requirements, risk management) that can be imposed on financial market participants (Verdier 2020, 14–16). In addition, special supervisory obligations are often reserved in the field of financial regulation to the primary regulators of bank and insurance groups that are active cross-border. Due to the broad character of their business activities, banks and insurance groups firms do interact with other financial regulators (e.g., foreign regulators or domestic securities regulators). However, they can still be assumed to attach particular value to the relationship with their primary regulator due to the scope, nature and intensity of both regulation and supervision.

Data and methods

Determinants of appeals against enforcement actions are investigated by retaining the individuals and firms sanctioned by a financial regulator as unit of analysis. The outcome of interest is thus whether the targets of enforcement decided to appeal against the sanctioning authority. The sample focuses on final decisions on enforcement actions that targets had the opportunity to contest by means of an appeal. The behaviour of sanctioned entities is examined through more than 3'700 cases corresponding to 18 regulators from 13 countries. Sanctioned entities were identified from enforcement actions disclosed by

the regulators in their respective websites⁶. The empirical analyses are based on a series of logistic regressions.

Table 1 around here

Table 2 around here

The regulatory authorities retained are in charge of financial regulation enforcement in European economies following the civil law tradition⁷. Table 1 lists the agencies and jurisdictions covered and Table 2 offers more information on the data for each regulator. The countries included cover both major (e.g. Germany, France, Italy) and minor (e.g., Malta, Slovenia, Lithuania) members of the Eurozone⁸. Regulators in Sweden (non-Eurozone) and Switzerland (non-EU), responsible for relative important financial markets in the European context, are also included. Enforcement actions span between 2004 and 2020. Coverage across time varies substantially between regulators due to data availability limitations.

The manual content of the enforcement actions disclosed allowed to identify a series of attributes. Whether the targets of enforcement lodged an *appeal* is the outcome of interest. The dependent variable has thus a binary form and indicates whether the sanctioned entity contested the enforcement action in court. A dichotomous variable, *type of target*, refers to the form of the entity that has been the target of enforcement: either an *individual* or a *firm*.

A series of variables capture the regulatory sanctions imposed on the targets of enforcement. First, the total amount of *financial penalties* are indicated in EUR. Second, a *gatekeeping* binary variable refers to enforcement measures restricting market access (e.g., industry

⁶Financial regulators around the globe tend to disclose information about their formal enforcement actions on their websites. However, the form and degree of detail in which this information is made public differs substantially across authorities, even within Europe (See Götz and Tröger 2017, 17). On the one hand, some regulators publish the entire full text of their enforcement decisions. On the other hand, some regulators disclose summaries with varying degrees of detail, ranging from documents of multiple paragraphs to a succinct row in summary table. Despite this heterogeneity, the disclosure of enforcement actions and the mentioning of whether they have been contested by an appeal in disaggregated form allow to assess a crucial encounter between regulators and regulatees across time and jurisdictions.

⁷In contrast to the US (MacNeil 2015, 18), settlements between targets of enforcement and authorities are not widespread in Europe. Notable exceptions are financial regulators in United Kingdom, Ireland and Belgium, that rely systematically on settlements to deal with regulatory breaches. Settlements are normally offered by regulators and exclude the possibility for targets of enforcement to contest sanctions in court. They are thus out of the scope of this study.

⁸Due to difficulties in accessing enforcement decisions and/or appeal information, the remaining financial regulators active in the Eurozone are not included.

bans, withdrawals of license). Third, the *naming* binary variable indicates whether the identity of the offender was disclosed by the regulator. Information on the (non-)anonymity and identity of individuals was not part of the original data collection. Hence, the dataset includes this information for firms but not for individuals. The additional cost on targets imposed by the *public reprimands* used by some of the authorities can be considered relative low due to the fact that the dataset is based on publicly disclosed enforcement actions. The binary variable *reprimand* is thus retained as a control variable. It is also used to compute the total *number of measures* imposed to an entity.

Five commercial databases with contrasting comparative advantages in terms of coverage were used to obtain information about the firms included in the dataset: (1) Orbis and (2) BankFocus from Bureau van Dijk, (3) Eikon Datastream from Thomson Reuters, (4) SNL Financial from S&P Global and (5) The Banker Database from the Financial Times.

Primary regulator is a dummy reserved for cases in which banks and insurance groups are sanctioned by their primary regulator. Three important implications are worth noting. First, the same firm may receive different values on this variable depending on the sanctioning authority. For example, the variable gets the value of “yes” when a French bank or insurance group is sanctioned by the French ACPR. The same French bank or insurance group is not sanctioned by its primary regulator when it is sanctioned by the French AMF or by the Italian BDI (“no”). Second, regulators specialised on securities and/or conduct (e.g., French AMF, Spanish CNMV) do not have prudential responsibilities over banks and insurance groups. The variable is thus coded as “no” for the enforcement actions of these regulators. Third, firms that are neither banks nor insurance groups have this variable set to “no.”

Two additional dichotomous variables with information on firms are included as control variables. *Bank or Insurance* indicates whether the target of enforcement was a bank or an insurance group⁹. *Foreign firm* points out whether the firm is headquartered in the same jurisdiction as the sanctioning regulator. The literature on the “liability of foreignness” emphasise that firms active abroad suffer particular challenges in legal and institutional

⁹Banks and insurance groups were initially identified by the NACE statistical classification of economic activities from Orbis. This was manually completed and cross-checked with the classification of the other four databases. Note that the vast majority of cases relate to banks: insurance groups represent less than 10% of the cases positively identified with this variable. Additional analyses excluding these observations yielded similar results.

arenas (Wu and Salomon 2017).

The *size* of firms is taken into consideration as a control variable. The size of firms is captured by means of two alternative indicators. The first indicator provides a categorical distinction (“small” vs “large”) and offers a wider coverage of firms. The second provides finer grained quantitative information, but is only available for a subset of firms.

First, based on Orbis’ firm size categorical classification, a binary distinction of *firm size* is made between “small” and “large” firms. While this arguably represents a rough distinction, comparative financial information on private-held or small firms is extremely difficult to obtain across countries and time. According to the Orbis size classification, firms meeting any of the following conditions are classified here as “large”: a) operating revenue larger or equal to 100 million EUR; b) total assets larger or equal to 200 million EUR; c) more than 1000 employees or; d) listing in a stock exchange. Firms not reaching at least one of these conditions are considered “small.” Second, firms’ *total assets* is retained as a proxy of firm size if the data was available in any of the five commercial databases mentioned above for the year prior to the enforcement action.

Differences in the time periods covered, as well as the contrasting targets and types of sanctions privileged by the different regulators included, severely limit assessments based on descriptive statistics. A series of logistic regression models are employed to empirically investigate the likelihood of appeals by targets in a multivariate setting. The models include fixed effects (i.e. regulator and year) with standard errors clustered by target. The choice of this modelling strategy can be justified by two reasons. First, the hypotheses focus on similarities rather than on differences across regulators. A fixed effects approach allows for controlling for regulator characteristics. Second, the number of regulators and jurisdictions is relatively low for adopting a multilevel strategy.

A final set of additional control variables are considered when investigating the stability of results in robustness tests. First, *repeated offender* indicates whether the firm has been sanctioned previously by the same regulator during the time-period covered. Second, temporal variation in terms of *enforcement intensity* (Coffee 2007) is captured through the annual number of enforcement actions by regulator. This variable has been normalised by the maximum value by regulator and informs about surges in enforcement activity.

Figure 1 around here

Due to the data required to test the different hypotheses and the lack of information for a certain number of observations, the dataset is divided into four samples (See Figure ??). Summary statistics for each of these samples are available in the appendix (Tables A1 to A4). The original sample (“A”) has the most comprehensive coverage, including firms as well as individuals. Sample “B” focuses on firms, both anonymous and non-anonymous. The distinction between sample “C” and “D” resides on the availability of the indicator to control for firm size (i.e., small/large or total assets). Note that the sequential loss in the number of observations for firms is not random. Information on small, non-listed and currently inactive firms is harder to find on commercial databases. While one should bear in mind this limitation for the analyses, the aggregate appeal rate remains comparable between samples “B,” “C” and “D.”

The appeal rate refers to the share of targets that have formally contested the sanctions before an independent judicial body. In around 28 % of the cases the regulator was challenged in response to an enforcement action (See Figure 1). There is nevertheless considerable variation between regulators (Table 2). Appeal rates range from a low of 5% for the Italian BDI to a high of 44% in the case of the Spanish BDE. Given the unbalanced time coverage, as well as the different types of targets prioritised, these aggregated appeal rates by regulator should be considered with care.

Firms (62%) are more often the target of enforcement than individuals (38%) in the dataset (Table A1 in the Appendix). Once again, significant variations across regulators should be noted here (Table 2). For instance, firms are the primary target of authorities like the Lithuanian LB (96%), the Finnish FSA (96%), the French ACPR (91%), the Italian BDI (89%), the Slovenian ATVP (88%) or the Dutch DNB (87%). At the other extreme, the lion’s share (77%) of the Austrian FMA enforcement falls on individuals. Other regulators have a more balanced distribution in terms of target type.

Financial penalties (70%), often in the form of administrative fines, are the most common type of regulatory sanction (Table A1 in the Appendix). Nevertheless, it should be noted that the variation between regulators is also high when it comes to the frequency and types of measures issued (Table 2). These variations are related not only to differences in enforcement policies but also to the specific legal frameworks in which regulators are

embedded¹⁰. In the vast majority of the cases the names of corporate offenders are publicly disclosed (86%). Most regulators name the corporate targets of enforcement and decide only exceptionally not to do it. The clear outlier is the Swiss FINMA, which follows the exact opposite policy by rarely disclosing the identity of sanctioned regulatees.

The amount of financial penalties vary substantially across regulators (See Table A5 in the Appendix). In order to grasp the relative importance of financial penalties, the analysis relies on a complementary categorical variable. Financial penalties are classified into five categories. The amount of penalties were ranked on sample “A” by regulator and target type (i.e., individuals and firms) before being distributed into four bins, from the bottom 25% to the top 25%. A fifth category is reserved for cases with no financial penalty. Looking at penalties in the context of each regulators’ practice, while distinguishing between firms and individuals, enhance relative comparisons.

Bivariate analyses of appeal rates and the main variables of interest based on aggregated data (see Tables A6 - A9 in the Appendix for an overview) offer limited value. This is due to the variation in the number of observations, enforcement measures, target populations and time-periods covered across regulators. A multivariate strategy is thus privileged to empirically investigate the factors associated with the challenging of regulators’ decisions in court.

Findings

The likelihood of targets lodging an appeal against regulatory enforcement is estimated by means of series of logistic regression models presented in Table 3¹¹. Model 1 focuses on firms and individuals and Model 2 on anonymous and non-anonymous corporate targets. Models 3 and 4 dig deeper on firms’ behaviour. They notably differ on the proxy indicator retained to estimate firm size. Average marginal effects are plotted in Figure 2¹² to better grasp the extent to which the variables related to the three hypotheses affect the likelihood of an appeal. They inform about the magnitude of changes on the probability of an appeal

¹⁰For instance, the Swiss FINMA does not have the capacity to levy administrative fines. When it comes to financial penalties, it can only order a disgorgement of profits.

¹¹The reference category for the categorical *Financial penalty* variable is *bottom 25%*. Figure A1 in the appendix provides VIF scores to assess potential multicollinearity in all the models. The values remain below the recommended rules of thumb (i.e., 5 or 10) (James et al. 2013, 101–2)

¹²95% confidence intervals calculated via bootstrapping with replacement (10,000 replications).

for a discrete change in the covariates of interest.

Table 3 around here

Figure 2 around here

According to the theoretical expectations (*H1*), the likelihood of appeals against enforcement actions should increase with the cost brought by enforcement measures. Models 1-4 provide empirical support in that direction. Three complementary pieces of evidence suggest that targets may be driven by the cost of measures when deciding whether to appeal or not.

First, the risk of an appeal increases substantially as the amount of financial penalties goes up. For instance, relative high financial penalties have a higher risk of being contested than those that are relatively low. When moving from a bottom 25% to a top 25% financial penalty, the risk of an appeal by sanctioned entity increases on average by 26 percentage points (see Model 1 in Figure 2).

Second, gatekeeping measures also seem related to a higher risk of appeal. Restrictions in terms of market access impose costs on targets of enforcement. The cost imposed by regulators through gatekeeping can be particularly severe: temporary or definitive bans may push individuals or firms out of business. In line with (*H1*), the results suggest that targets facing gatekeeping sanctions are more likely to go to court. The probability of an appeal against the regulator increases on average by 9 percentage points according to Model 1 (see Figure 2).

Third, reputational damage increases the cost for the sanctioned entities. Due to negative publicity, being identified as the target of a sanction is costlier for targets than remaining anonymous. Results from Model 2 show that, at least for firms, targets are more likely to appeal when their names are publicly disclosed. The risk of an appeal is thus higher when regulators disclose sanctions against firms nominally rather than anonymously (+16 percentage points, see Figure 2).

Activating the accountability of regulators through judicial review is not without costs for targets of enforcement. Considered together, the results presented above indicate that not all sanctions are contested in the same way. Regulatees are more likely to go to court if the harm caused by regulatory action is relatively high and worth deteriorating the

relationship with the regulator.

While the previous results highlight similarities between firms and individuals¹³, Model 1 in Table 3 reveals differences. According to *H2*, the cost of regulatory sanctions is relatively higher for individuals than for firms, which should lead to a higher risk of appeal for the former. The results go in this direction: individuals are more inclined to take regulators to court than firms. According to the estimations plotted in Figure 1, the probability of an appeal is 7 percentage points higher on average for individuals than for firms.

The differential costs of regulatory litigation for individuals and firms seem to matter for the decision to appeal. The cost of being sanctioned for misconduct was supposed to be higher for an individual than for a firm. Pursuing an adversarial strategy is thus more attractive for individuals than for firms. These results signalling a stronger tendency of individuals for contesting regulatory enforcement are in line with those of Jordanoska (2019) in the UK. They are particularly worth noting because individuals have fewer resources than firms in the judicial arena (Galanter 1974). In other words, despite having in principle less chances to win, individuals still seem more prone to take regulators to court.

According to *H3*, ties with a primary regulator are particularly valuable for intensively and frequently supervised firms. Firms sanctioned by their primary regulator should be less likely to take it to court. Given that lodging an appeal puts the regulatory relationship under pressure, the cost of going to court is relatively higher for this type of regulator-regulatee interactions. Models 3-4 provide evidence in that direction. According to Model 4, firms for which the sanctioning authority represents their primary regulator are 15 percentage points less likely to appeal than other firms (Figure 2).

These results reveal another way in which the cost sustained by targets guide their propensity to choose litigation. The price of confrontation is higher for those firms that are sanctioned by their primary regulator. Due to the scope and intensity of interactions, the regulatory relation is particularly valuable for these firms. Confronted to a relative higher cost, these firms refrain more often from litigation. Grabovsky and Braithwaite (1986) noted that regulators were more likely to adopt a formal approach to enforcement

¹³Additional analyses restricted to the sample of individuals confirmed these results.

as relational distance with regulatees increased. These results hint that, in turn, regulatees may follow a similar logic when it comes to the contestation of enforcement decisions.

Turning to the control variables, the inclusion of public reprimands does not seem to increase the tendency of targets of enforcement to appeal. While large firms tend to contest enforcement actions less often than small firms, the strength of the relation varies across the samples. Banks and insurance groups appear less likely to contest financial regulators than other type of firms, but the effect is not significant when one considers simultaneously whether they are facing their primary regulator or not. In addition, foreign firms seem less likely to challenge regulators.

The stability of the results were put into test by a series of robustness checks. First, models 1-4 were estimated with an additional set of control variables. This include the total number of measures that were included in the enforcement action and the level of enforcement intensity. For models 3-4, this was further supplemented with the consideration of whether firms had been previously sanctioned by the same authority during the time-frame under study. Second, models 3-4 were estimated with alternative specifications to differentiate between types of firms¹⁴. Third, the models 1-4 were estimated without the Swiss FINMA. This regulator, contributing with a non-negligible number of observations to the sample, could be considered an outlier due the lack of financial penalties and its policy of naming targets of enforcement only exceptionally. The results reported above remained substantially the same throughout these multiple tests.

Conclusion

This paper investigates the accountability of regulatory enforcement through courts with a “bottom-up” perspective. The focus is on the behaviour and incentives of targets of enforcement, which are responsible for triggering the accountability of enforcement through judicial review. Given regulators’ preferences for not having their enforcement practices scrutinised in court, appealing against their decisions is not without consequences for the sanctioned entities. Targets of enforcement are thus likely to go to court only if the price of doing so is worth paying.

¹⁴For example with categorical variables distinguishing between three types of firms (e.g., (1) banks and insurance groups, financial firms and non-financial firms or (2) banks and insurance groups facing primary regulator, banks and insurance groups not facing primary regulator, other financial firms).

According to the empirical analyses, sanctioned entities are more likely to go to court as the cost imposed by enforcement measures increases. The results indicate that the probability of an appeal increases with the amount of financial penalties, the application of gatekeeping measures and the nominal disclosure of enforcement actions. The analyses also suggest that individuals, for which the burden of enforcement is expected to be higher, are more likely to bring regulators to court than firms. Intensively supervised firms, that are assumed to be particularly close and keen in keeping a good relation with regulatory authorities, are less inclined to appeal against their primary regulators.

The paper is one of the few large-N and multiple country studies focusing on judicial rather than political IRA's accountability. Several of its limitations may guide further research.

First, some considerations have been left aside due to the lack of data. Finer-grained indicators on the frequency and density of interactions between regulators and regulatees may provide with a more accurate picture of the perceived value of regulatory relations. The lack of complementary information about the role and position of individuals is another area of improvement. In particular, it would be useful to investigate if the breach took place in the context of independent activities or while working in specific types of firms. The expected chances to win, captured by the past court record of regulators, may encourage or discourage targets' decision to litigate. The proportionality of the sanction in relation to the breach may also be relevant.

Second, while the paper privileged similarities across regulatory contexts, future studies could go beyond by looking at how characteristics at both the regulator and jurisdiction levels may explain differences in the risk of appeals. Variations in the perceived independence and credibility of both regulatory and judiciary authorities may hide interesting insights.

Third, the unbalance in the periods covered for each regulator hindered the consideration of temporal trends and dynamics. More research is thus needed to assess how the appetite for appeals evolve over time.

With its focus on regulatee's incentives, the paper leaves many unanswered questions on the regulator's side. How is the risk of appeals taken into consideration by regulators

in their enforcement policy? Does it affect the severity of specific decisions if the risk of appeals is high? Are regulators more lenient with firms for which they have primary responsibility? (Verdier 2020) If yes, is it because of prudential concerns or regulatory capture? These are still open and relevant questions that are, however, challenging to assess in a large-N setting.

The paper has scratched the surface on the interactions between regulatory and judiciary arenas by investigating the conditions under which targets of enforcement challenge regulatory authorities. Attention to these questions become ever more pressing as the accountability of agencies and experts is increasingly under public scrutiny.

References

- Ayres, Ian, and John Braithwaite. 1992. *Responsive Regulation: Transcending the Deregulation Debate*. New York; Oxford: Oxford University Press.
- Bajakić, Ivana, and Veseljka Kos. 2016. “What Can We Learn about Regulatory Agencies and Regulated Parties from the Empirical Study of Judicial Review of Regulatory Agencies’ Decisions? The Case of Croatia.” *Central European Journal of Public Policy* 10 (1): 22–34. <https://doi.org/10.1515/cejpp-2016-0021>.
- Baldwin, Robert, Martin Cave, and Martin Lodge. 2012. *Understanding Regulation*. Oxford; New York: Oxford University Press. <https://doi.org/10.1093/acprof:osobl/9780199576081.001.0001>.
- Benson, Michael L. 1990. “Emotions and Adjudication: Status Degradation Among White-Collar Criminals.” *Justice Quarterly* 7 (3): 515–28. <https://doi.org/10.1080/07418829000090711>.
- Bignami, Francesca. 2016. “Regulation and the Courts: Judicial Review in Comparative Perspective.” In *Comparative Law and Regulation: Understanding the Global Regulatory Process*, edited by Francesca Bignami and David Zaring. Cheltenham; Northampton: Edward Elgar.
- Black, Donald. 1976. *The Behavior of Law*. New York: Academic Press.
- Black, Julia. 2001. “Managing Discretion.” <https://www.lse.ac.uk/law/people/academic-staff/julia-black/Documents/black21.pdf>.
- Boer, Noortje de, and Jasper Eshuis. 2018. “A Street-Level Perspective on Government Transparency and Regulatory Performance: Does Relational Distance Matter?” *Public Administration* 96 (3): 452–67. <https://doi.org/10.1111/padm.12517>.
- Bovens, Mark. 2007. “Analysing and Assessing Accountability: A Conceptual Framework.” *European Law Journal* 13 (4): 447–68. <https://doi.org/10.1111/j.1468-0386.2007.00378.x>.
- Busuioc, Madalina. 2013. *European Agencies*. Oxford; New York: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199699292.001.0001>.

- Busuioc, Madalina, and Martin Lodge. 2015. "The Reputational Basis of Public Accountability." *Governance* 29 (2): 247–63. <https://doi.org/10.1111/gove.12161>.
- Carletti, Elena. 2017. "Fines for Misconduct in the Banking Sector: What Is the Situation in the EU?" Scrutiny paper on the Single Supervisory Mechanism provided at the request of the Economic and Monetary Affairs Committee, PE 587.402. European Parliament.
- Carpenter, Daniel. 2010. *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA*. Princeton; Oxford: Princeton University Press.
- Coffee, John C. 2007. "Law and the Market: The Impact of Enforcement." *University of Pennsylvania Law Review* 156: 229–311. <https://doi.org/10.2307/40041391>.
- Coglianesi, Cary. 1996. "Litigating Within Relationships: Disputes and Disturbances in the Regulatory Process." *Law & Society Review* 30 (4): 735–66.
- Etienne, Julien. 2012. "Ambiguity and Relational Signals in Regulator-Regulatee Relationships." *Regulation & Governance* 7 (1): 30–47. <https://doi.org/10.1111/j.1748-5991.2012.01160.x>.
- European Banking Authority. 2015. "Report on the Publication of Administrative Penalties on an Anonymous Basis." EBA OP/2015/18.
- Ferran, Eilis. 2015. "Institutional Design: The Choices for National Systems." In *Oxford Handbook of Financial Regulation*, edited by Niahm Maloney, Eilis Ferran, and Jennifer Payne. Oxford; New York: Oxford University Press. <https://doi.org/10.1093/oxfordhb/9780199687206.013.6>.
- Gailmard, Sean, and John W. Patty. 2016. "Participation, Process and Policy: The Informational Value of Politicised Judicial Review." *Journal of Public Policy* 37 (3): 233–60. <https://doi.org/10.1017/s0143814x16000106>.
- Galanter, Marc. 1974. "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review*, 95–160.
- Gilad, Sharon, and Tamar Yogev. 2012. "How Reputation Regulates Regulators: Illustrations from the Regulation of Retail Finance." In *The Oxford Handbook of Corporate Reputation*, edited by Timothy Pollock and Michael Barnett. Oxford; New York:

- Oxford University Press. <https://doi.org/10.1093/oxfordhb/9780199596706.013.0016>.
- Götz, Martin R., and Tobias H. Tröger. 2017. “Fines for Misconduct in the Banking Sector: What Is the Situation in the EU?” Scrutiny paper on the Single Supervisory Mechanism provided at the request of the Economic and Monetary Affairs Committee, PE 587.401. European Parliament.
- Grabovsky, Peter, and John Braithwaite. 1986. *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*. Oxford: Oxford University Press.
- Hirschl, Ran. 2008. “The Judicialization of Politics.” In *The Oxford Handbook of Law and Politics*, edited by Gregory A. Caldeira R. Daniel Kelemen and Keith E. Whittington. Oxford; New York: Oxford University Press. <https://doi.org/10.1093/oxfordhb/9780199208425.003.0008>.
- James, Gareth, Daniela Witten, Trevor Hastie, and Robert Tibshirani. 2013. *An Introduction to Statistical Learning with Applications in r*. New York: Springer.
- Jordana, Jacint, Xavier Fernández-i-Marin, and Andrea C. Bianculli. 2018. “Agency Proliferation and the Globalization of the Regulatory State: Introducing a Data Set on the Institutional Features of Regulatory Agencies.” *Regulation & Governance* 12 (4): 524–40. <https://doi.org/10.1111/rego.12189>.
- Jordana, Jacint, David Levi-Faur, and Xavier Fernández-i-Marin. 2011. “The Global Diffusion of Regulatory Agencies.” *Comparative Political Studies* 44 (10): 1343–69. <https://doi.org/10.1177/0010414011407466>.
- Jordanoska, Aleksandra. 2019. “Regulatory Enforcement Against Organizational Insiders: Interactions in the Pursuit of Individual Accountability.” *Regulation & Governance*. <https://doi.org/10.1111/rego.12280>.
- Kagan, Robert A. 2003. *Adversarial Legalism: The American Way of Law*. Cambridge; London: Harvard University Press.
- Karpoff, Jonathan M., D. Scott Lee, and Gerald S. Martin. 2008. “The Consequences to Managers for Financial Misrepresentation.” *Journal of Financial Economics* 88 (2): 193–215. <https://doi.org/10.1016/j.jfineco.2007.06.003>.

- Koop, Christel. 2011. "Explaining the Accountability of Independent Agencies: The Importance of Political Salience." *Journal of Public Policy* 31 (2): 209–34. <https://doi.org/10.1017/s0143814x11000080>.
- Lodge, Martin. 2004. "Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments." In *The Politics of Regulation*, edited by Jacint Jordana and David-Levi Faur. Cheltenham; Northampton: Edward Elgar.
- MacNeil, Iain. 2015. "Enforcement and Sanctioning." In *The Oxford Handbook of Financial Regulation*, edited by Niamh Moloney, Eilis Ferran, Jennifer Payne, and Iain MacNeil. Oxford; New York: Oxford University Press. <https://doi.org/10.1093/oxfordhb/9780199687206.013.12>.
- Maggetti, Martino. 2010. "Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review." *Living Reviews in Democracy*. <http://www.livingreviews.org/lrd-2010-4>.
- Magill, Elizabeth. 2014. "Courts and Regulatory Capture." In *Preventing Regulatory Capture*, edited by David Carpenter and A. Moss. New York: Cambridge University Press.
- Majone, Giandomenico. 2001. "Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach." *Journal of Institutional and Theoretical Economics* 157 (1): 57. <https://doi.org/10.1628/0932456012974747>.
- Mejia, Luis E. 2020. "Judicial Review of Regulatory Decisions: Decoding the Contents of Appeals Against Agencies in Spain and the United Kingdom." *Regulation & Governance*. <https://doi.org/10.1111/regg.12302>.
- Meléndez-Huelin, Oscar. 2017. "La Supervision, Inspeccion y Sancion de Las Entidades de Credito: Especial Referencia Al Mecanismo Unico de Supervision." In *Los Mercados Financieros*, edited by Ana Belén Campuzano Laguillo, Fernando Conlledo Lantero, and Ricardo Javier Palomo Zurdo. Valencia: Tirant lo Blanch.
- Merry. 1979. "Going to Court: Strategies of Dispute Management in an American Urban Neighborhood." *Law & Society Review* 13 (4): 891–926.
- Resti, Andrea. 2017. "Fines for Misconduct in the Banking Sector: What Is the Situation

in the EU?” European Parliament.

- Rex, Justin. 2018. “Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remediating Capture.” *Regulation & Governance*. <https://doi.org/10.1111/rego.12209>.
- Rose-Ackerman, Susan. 2008. “Law and Regulation.” In *The Oxford Handbook of Law and Politics*, edited by Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington. Oxford; New York: Oxford University Press. <https://doi.org/10.1093/oxfordhb/9780199208425.003.0033>.
- Schattschneider, E. E. 1975. *The Semisovereign People: A Realist’s View of Democracy in America*. New York: Thomson Learning.
- Schmidt, Patrick. 2004. “Law in the Age of Governance: Regulation, Networks and Lawyers.” In *The Politics of Regulation*, edited by Jacint Jordana and David Levi-Faur. Cheltenham; Northampton: Edward Elgar.
- Scholten, Miroslava. 2017. “Mind the Trend! Enforcement of EU Law Has Been Moving to ‘Brussels’.” *Journal of European Public Policy* 24 (9): 1348–66. <https://doi.org/10.1080/13501763.2017.1314538>.
- Scholz, John T. 1984. “Cooperation, Deterrence, and the Ecology of Regulatory Enforcement.” *Law and Society Review* 18 (2): 179–79. <https://doi.org/10.2307/3053402>.
- Shapiro, Martin. 1980. “Appeals.” *Law & Society Review* 14 (3): 629–61.
- . 2002. “Judicial Delegation Doctrines: The US, Britain, and France.” *West European Politics* 25 (1): 173–99. <https://doi.org/10.1080/713601590>.
- Shavell, Steven. 1995. “The Appeals Process as a Means of Error Correction.” *The Journal of Legal Studies* 24 (2): 379–426. <https://doi.org/10.1086/467963>.
- Söderberg, Magnus, Flavio M. Menezes, and Miguel Santolino. 2018. “Regulatory Behaviour Under Threat of Court Reversal: Theory and Evidence from the Swedish Electricity Market.” *Energy Economics* 71: 302–10. <https://doi.org/10.1016/j.eneco.2018.03.006>.
- van Erp, Judith. 2011a. “Naming and Shaming in Regulatory Enforcement.” In *Explaining*

Compliance: Business Responses to Regulation, edited by Christine Parker and Vibeke Lehmann Nielsen. Cheltenham; Northampton: Edward Elgar.

———. 2011b. “Naming Without Shaming: The Publication of Sanctions in the Dutch Financial Market.” *Regulation & Governance* 5 (3): 287–308. <https://doi.org/10.1111/j.1748-5991.2011.01115.x>.

Verdier, Pierre-Hugues. 2020. *Global Banks on Trial*. New York; London: Oxford University Press. <https://doi.org/10.1093/oso/9780190675776.001.0001>.

Wu, Zheyang, and Robert Salomon. 2017. “Deconstructing the Liability of Foreignness: Regulatory Enforcement Actions Against Foreign Banks.” *Journal of International Business Studies* 48 (7): 837–61. <https://doi.org/10.1057/s41267-017-0092-x>.

Zulauf, Urs, and Roy Gava. 2019. “FINMA’s Enforcement in Court. An Empirical and Legal Assessment of the Court Rulings Regarding the Swiss Financial Markets Supervisory Authority’s Financial Regulation Enforcement.” *Swiss Review of Business and Financial Market Law (SZW/RSDA)* 19 (2): 99–113.

Tables and Figures

Table 1: Regulators overview

Country	Short name	Name	Banking	Insurance	Securities
AT	FMA	Finanzmarktaufsichtsbehörde	yes	yes	yes
CH	FINMA	Financial Market Supervisory Authority	yes	yes	yes
DE	BAFIN	Bundesanstalt für Finanzdienstleistungsaufsicht	yes	yes	yes
ES	CNMV	Comisión Nacional del Mercado de Valores	no	no	yes
ES	BDE	Banco de España	yes	no	no
FI	FIN-FSA	Finanssivalvonta	yes	yes	yes
FR	AMF	Autorité des Marchés Financiers	no	no	yes
FR	ACPR	Autorité de contrôle prudentiel et de résolution	yes	yes	no
IT	BDI	Banca d'Italia	yes	no	no
LT	LB	Lietuvos bankas	yes	yes	yes
MT	MFSA	Malta Financial Services Authority	yes	yes	yes
NL	AFM	Autoriteit Financiële Markten	no	no	yes
NL	DNB	De Nederlandsche Bank	yes	yes	no
PT	CMVM	Comissão do Mercado de Valores Mobiliários	no	no	yes
PT	BP	Banco de Portugal	yes	no	no
SE	FI	Finansinspektionen	yes	yes	yes
SI	BSI	Banka Slovenije	yes	no	no
SI	ATVP	Agencija za trg vrednostnih papirjev	no	no	yes

Table 2: Dataset overview by regulator

Country	Regulator	N	Appeal rate	Targets			Measures			Period	
				Individuals	Firms	Primary	Fin. pen.	Gatekeeping	Naming	From	To
AT	FMA	119	0.41	0.77	0.23	0.33	0.93	0.07	1.00	2011-01	2019-07
CH	FINMA	437	0.37	0.46	0.54	0.03	0.04	0.42	0.06	2014-01	2019-12
DE	BAFIN	186	0.11	0.24	0.76	0.04	0.27	0.71	0.98	2016-01	2019-03
ES	BDE	100	0.44	0.58	0.42	0.36	1.00	0.06	0.93	2015-04	2020-06
ES	CNMV	255	0.38	0.43	0.57	NA	1.00	0.01	1.00	2014-04	2020-06
FI	FIN_FSA	95	0.07	0.04	0.96	0.27	0.69	0.04	1.00	2009-04	2020-07
FR	ACPR	82	0.15	0.09	0.91	0.32	0.87	0.12	0.89	2011-01	2020-03
FR	AMF	763	0.42	0.56	0.44	NA	0.93	0.05	0.84	2004-03	2020-11
IT	BDI	64	0.05	0.11	0.89	0.44	0.98	0.00	1.00	2017-07	2020-03
LT	LB	332	0.13	0.04	0.96	0.31	0.40	0.19	1.00	2012-01	2020-06
MT	MFSA	106	0.15	0.25	0.75	0.20	0.31	0.56	1.00	2007-04	2020-05
NL	AFM	190	0.27	0.28	0.72	NA	0.97	0.03	0.99	2009-06	2019-02
NL	DNB	82	0.20	0.13	0.87	0.27	0.99	0.00	0.99	2010-12	2020-07
PT	BP	149	0.16	0.38	0.62	0.52	0.83	0.01	0.97	2016-08	2019-04
PT	CMVM	168	0.33	0.57	0.43	NA	0.73	0.04	0.75	2006-05	2019-02
SE	FI_SE	566	0.21	0.41	0.59	0.09	0.93	0.04	1.00	2013-04	2019-08
SI	ATVP	51	0.08	0.12	0.88	NA	0.73	0.00	0.69	2016-06	2019-06
SI	BSI	67	0.34	0.31	0.69	0.20	0.03	0.03	0.78	2015-05	2020-06

Note.

Percentages on columns 7 (primary regulator of sanctioned bank or insurance group) and 10 (naming of sanctioned entity) based on firms.

Table 3: Determinants of appeals by targets of regulatory sanctions

	Model 1	Model 2	Model 3	Model 4
(Intercept)	-17.203*** (0.471)	-19.447*** (0.763)	-18.129*** (0.852)	-16.886*** (1.264)
Target type (Individual)	0.403*** (0.091)			
Financial penalty (25-50%)	0.367*** (0.141)			
Financial penalty (50-75%)	0.742*** (0.136)			
Financial penalty (Top 25%)	1.412*** (0.137)			
Financial penalty (No fine)	-0.961*** (0.231)			
Gatekeeping (yes)	0.498*** (0.162)	0.841*** (0.236)	1.712*** (0.527)	2.732*** (1.035)
Reprimand (yes)	-0.254* (0.135)	-0.179 (0.188)	-0.375 (0.280)	-0.407 (0.397)
Financial penalty (log)		0.152*** (0.021)	0.227*** (0.039)	0.296*** (0.067)
Naming (yes)		1.322*** (0.308)		
Primary Regulator (yes)			-0.837** (0.342)	-1.173*** (0.401)
Bank or insurance (yes)			-0.286 (0.231)	-0.032 (0.316)
Large firm (yes)			-0.135 (0.191)	
Foreign firm (yes)			-1.016*** (0.226)	-1.156*** (0.300)
Total assets (log)				-0.069** (0.033)
Regulator FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Num.Obs.	3772	2336	1722	996
Num.Targets	3245	1808	1226	709
AIC	3840.4	2214.5	1544.1	965.0
BIC	4096.1	2433.2	1767.6	1166.0
Log.Lik.	-1879.217	-1069.232	-731.027	-441.496

* p < 0.1, ** p < 0.05, *** p < 0.01

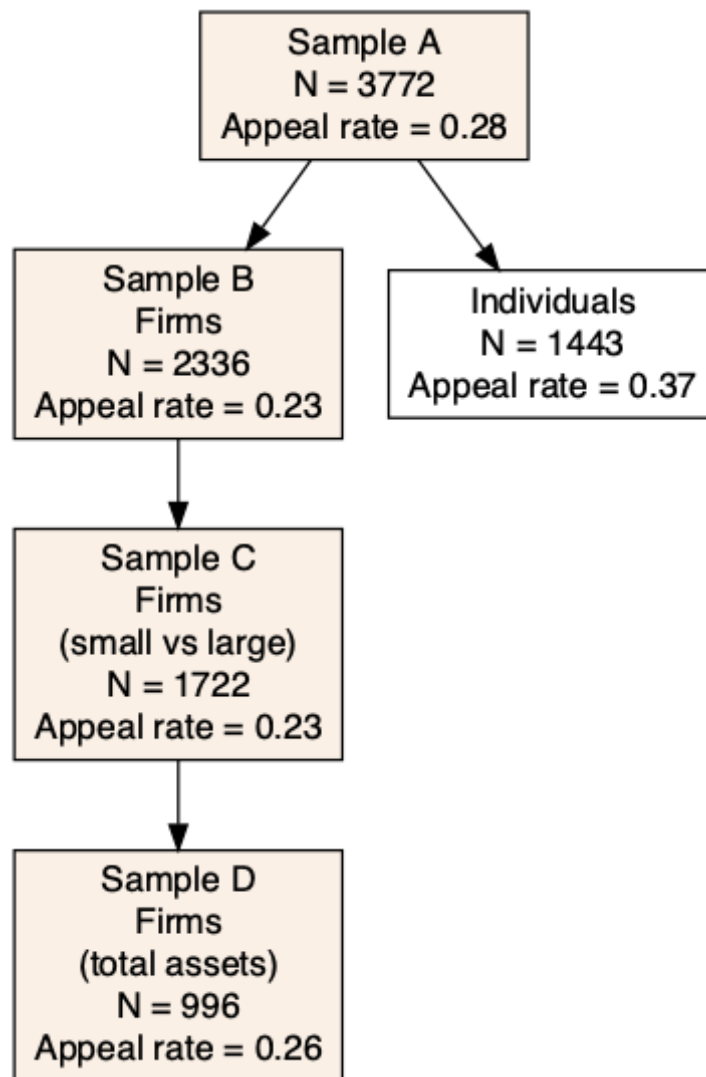


Figure 1: Dataset and samples: Overview

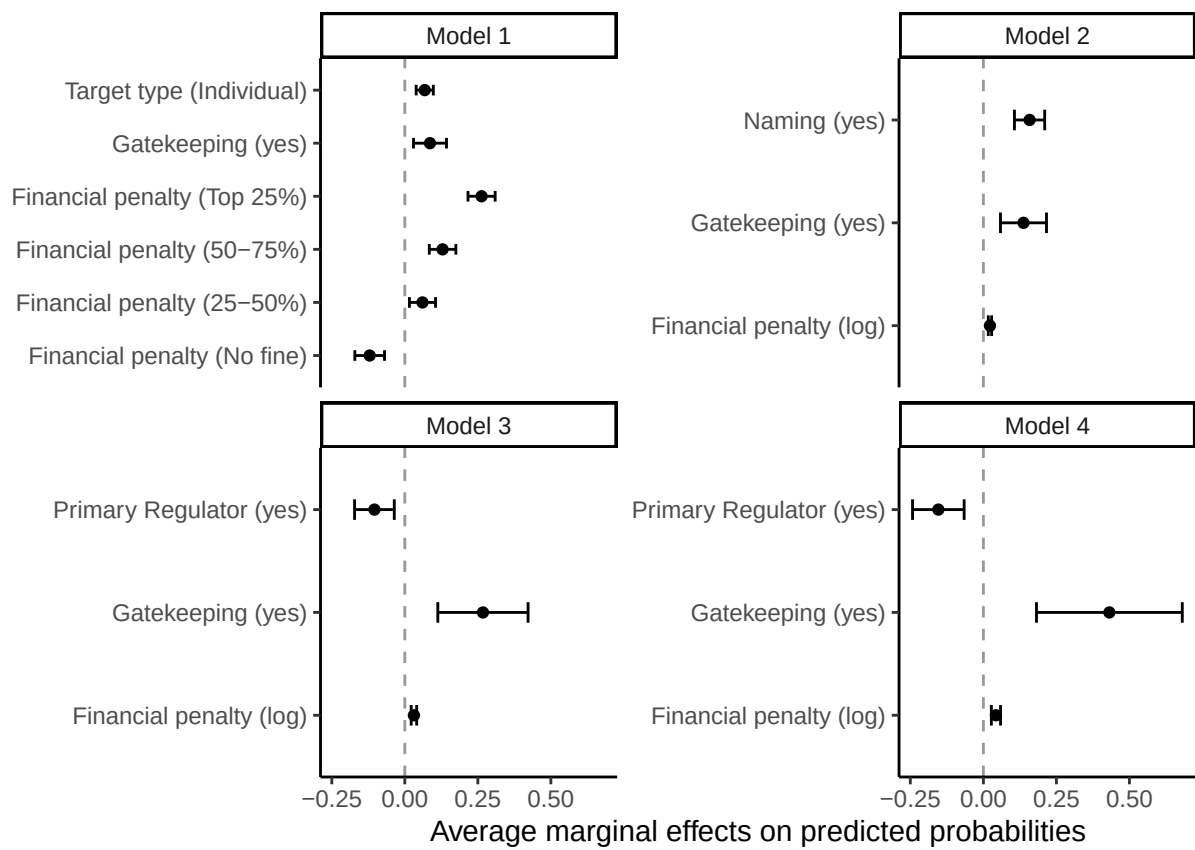


Figure 2: Average marginal effects on predicted probability of targets lodging an appeal