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## Control dynamics in rogue trading: Sovereignty and exception-to-the-rule attitudes in the contemporary financial sphere<sup>☆</sup>

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### ABSTRACT

Sovereignty, for Derrida (2005, 2009), is defined by an exception-to-the rule attitude: the sovereign is the one who decides on an exception. A sovereign can thus “go rogue” and behave as an outlaw, transgressing the rules of his own community. This article applies this conception of sovereignty to analysis of the Kerviel-Société Générale (SocGen) rogue trading affair. It examines the exception-to-the-rule attitude found in the actors of the financial sphere (the trader, the bank, the State) and the underlying control dynamics. Our results show that the trader acts as a rogue when he takes the exceptional right to place himself above his bank’s rules on position-taking. The bank is equally rogue when it reserves the exceptional right to place itself above the prudential regulations governing its sector. The State goes rogue too, granting the banking supervisory body the exceptional right to administer criminal justice. Following Boltanski (2011), our analysis explains these exception-to-the-rule behaviors by the contradictory logics that drive them. Two logics are identified in the financial sphere: the market logic, and the prudence logic. We highlight that fraud, and more generally the exception-to-the-rule attitude, result from the ambivalence generated by the coexistence of these contradictory logics of action, which are notably conveyed through control mechanisms. The study concludes that the State has a major role to play in this respect. More specifically, we raise the point that the neoliberal style of the penal State contributes to the occurrence of fraud.

### 1. Introduction

Rogue trading is a form of organizational fraud specific to trading rooms, in which a “rogue trader” transgresses his own bank’s rules by engaging in unauthorized buying and/or selling of products and/or commodities (Krawiec, 2000, 2009; Gilligan, 2011). The literature puts forward a panorama of factors to explain the occurrence of this particular type of fraud, some individual (Krawiec, 2009; Rafeld, Fritz-Morgenthal, & Posch, 2017a; Rafeld, Fritz-Morgenthal, & Posch, 2020) and some organizational (Gilligan, 2011; Jennings, 2008; Land, Loren & Metelmann, 2014; Leaver & Raeder, 2017; Rafeld et al., 2020).

In line with some prior publications on rogue trading (Gilligan, 2011; Land et al., 2014), several critical accounting and control

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studies condemn the excessive individualization of fraud (Guénin-Paracini & Gendron, 2010; Guénin-Paracini, Gendron, & Morales, 2014; Morales, Gendron & Guénin-Paracini, 2014) and/or bring out various “social” mechanisms that contribute to its occurrence: a normalized culture of corruption or “deviance” (Courtois & Gendron, 2017), co-offending and subcultures (Free & Murphy, 2015), the institutional setup (Gabbioneta, Greenwood, Mazzola, & Minoja, 2013), habitus, social position and capital (Neu, Everett, Rahaman, & Martinez, 2013), and trust (Stolowy, Messner, Jeanjean, & Baker, 2014). But these articles shed little light on the State’s role in the occurrence of fraud, despite the call by Chabrak & Gendron (2015) for examination of the systemic levels of organizational fraud. We introduce a major component of the financial sphere into this study of rogue trading: the State.

To do so, we use the concept of sovereignty, which is defined by Derrida (2005, 2009) as lying in an exception-to-the-rule attitude. Sovereignty, says Derrida (2009, p. 38), “is the exceptional right to place oneself above right, the right to non-right”. A sovereign can then go rogue, acting as an “outlaw” and transgressing the rules of his own community (2005, p.93). Based on this conception of sovereignty, this article aims to examine the sovereign behaviors of actors in the financial sphere through one case of rogue trading, with the particular objective of showing that the trader’s exception-to-the-rule attitude exists within the exception-to-the-rule approach developed by other actors in his social environment, namely the bank and the State.

The article also sets out to explain these exception-to-the-rule attitudes by their underlying control dynamics. To that end, we refer to the work of Boltanski (2011) on the managerial elite’s relativist attitude to rules. In particular, we take up the idea presented by Boltanski (2011) that the elites develop an exception-to-the-rule attitude because they are placed in a context beset with contradictions. Borrowing the concept of “logics of action” from de Gaulejac (1987) and Gendron (2002), like Boltanski (2011) we take the view that these contradictory logics of action – conveyed through control mechanisms – can give rise to an exception-to-the-rule attitude in elites.

The empirical study presented in this article concerns a notorious case of rogue trading: the Kerviel-SocGen affair (2008–2016). Following the same empirical approach as Courtois & Gendron (2017), Gabbioneta et al. (2013), Laguecir & Leca (2019) and Neu et al. (2013), we cross-compare and interpret data drawn principally from administrative and judicial sources.

Analysis of these data shows that the trader acts as a rogue when s/he takes the exceptional right to place himself above his bank’s position-taking rules. The bank is equally rogue when it reserves the exceptional right to place itself above the prudential regulations governing its sector. The State goes rogue too, granting the banking supervisory body the exceptional right to administer criminal justice. Our findings also show that these exception-to-the-rule behaviors are interlinked: the fraud by the trader takes place in the framework of SocGen’s own breaches of the regulations, which themselves are facilitated by the criminal justice system established by the State to discipline banks. Such exception-to-the-rule attitudes are made possible by the contradiction between two logics we highlight: a market logic, and a prudence logic, both notably conveyed through the control mechanisms in operation in the financial sphere.

By taking a multi-level approach to rogue trading – the individual, the organization, the State – and shedding light on control dynamics inside the financial sphere, we believe this research contributes to the literature on rogue trading and the critical accounting and control literature on three points. The first relates to the figure of the rogue trader: the conception of the “rogue” suggested by Derrida (2005, 2009) is used to redefine the rogue trader in a way that diminishes the term’s individualizing impact. The second relates to the role control mechanisms play in fraud: following Boltanski (2011), we believe that the occurrence of fraud – and more generally, the exception-to-the-rule attitude – may result from the ambivalence generated by the coexistence of contradictory logics of action, which are notably communicated through control mechanisms. The third point relates to the neoliberal style of State regulation of the banking sector. We bring out a new dimension of this neoliberal regulation: the dimension of criminal justice, as laid down by the State and administered by state bodies. Above all, we highlight how this style of penal State intervention contributes to the occurrence of fraud.

## 2. Literature review and theoretical perspective

### 2.1. Rogue trading: bad apple or bad barrel?

The Cambridge dictionary defines a rogue as “a person, organization, or country that does not behave in the usual or acceptable way”. In the world of finance, the term became popular in the 1990s thanks to the case of Nick Leeson, the rogue trader of Barings Bank (Krawiec, 2009; Gilligan, 2011). A rogue trader is “a market professional who engages in unauthorized purchases or sales of securities, commodities or derivatives, often for a financial institution’s proprietary trading account” (Krawiec, 2000, p. 302). Rogue trading is thus a form of organizational fraud that is specific to trading rooms. The literature advances two principal explanations. The first refers to the idea of the “bad apple”, attributing unethical organizational behavior to one or a few unsavory, immoral individuals (Treviño & Youngblood, 1990, p. 378). The second refers to the idea of the “bad barrel” and argues that something in the organizational environment “poisons” the individuals therein (Treviño & Youngblood, 1990, p. 378).

Several publications on rogue trading highlight the individual characteristics of the rogue trader (Rafeld et al., 2017a, 2017b, 2020; Krawiec, 2009). Describing rogue traders as greedy, opportunistic individuals, Rafeld et al. (2017b), for example, claim that Leeson (Barings Bank), Kerviel (SocGen) and Adoboli (UBS) all experienced triggering factors such as an inability to accept defeat, or the desire for autonomy and income. The desire for autonomy is presented as a particularly crucial factor in understanding the rogue trader’s attitude (Krawiec, 2009; Rafeld et al. 2017a, 2017b). Based on Tittle’s “Control Balance Theory” (Tittle, 1995), Rafeld et al. (2017b) explain that deviance is triggered by a trader’s desire to rebalance their control ratio, i.e. the perceived ratio between the control to which they are subjected (such as the banks’ permanent controls) and the control they exercise over their own environment (such as the ability to circumvent the same permanent controls). Tittle (1995), in particular, asserts that white-collar crime tends to

result from excessive control, and indeed the studies by Rafeld et al. (2017a, 2017b) conclude that the rogue behavior displayed by Leeson, Kerviel and Adoboli was driven by the surplus control they perceived themselves as holding.

The literature on rogue trading also emphasizes the influence of organizational factors (Rafeld et al., 2020; Jennings, 2008; Gilligan, 2011; Land et al., 2014; Leaver & Raeder, 2017). Here, Rafeld et al. (2020) separate forces relating to the social group, from forces relating to the organization itself. Group forces include, for example, friendships with corrupt or “toxic” colleagues, or pressure from superiors who care more about the results than the methods used. With regard to organizational/structural forces, Rafeld et al. (2020) note that organizational structures are imperfect and ambiguous, and there are failings in risk management and weak control systems. In a similar vein, Leaver & Raeder (2017) draw on safety culture theory to explain that the failure of risk management in financial trading is due to organizations’ inability to establish a safety culture. They observe in particular that deviant behavior by traders can be supported by profit-oriented (rather than safety-oriented) management priorities, inadequate, fragmented safety and control systems, and a lack of training and communication.

Beyond identification of these organizational forces indicative of a “bad barrel” that arguably makes rogue trading possible, some studies underline the ambiguous role played by the organization (Gilligan, 2011; Land et al., 2014). Gilligan (2011) writes that the financial sphere shows a certain tolerance for organizational misconduct that has become normalized. He observes that in several cases of rogue trading, the investigation revealed that the organization chose to ignore operational risk alerts, and he explains that this tolerance is due to the enormous profits that risky behaviors could bring to the organization and its executives. Following Wexler (2010), Gilligan (2011) thus deduces that rogue trading results less from ingenuity by an individual trader taking advantage of weaknesses in the safety and control systems, and more from the trading room logic itself.<sup>1</sup> That logic encourages risky profit-seeking to the detriment of safety, and thus blurs the boundary between the “star trader” and the rogue trader (Gilligan, 2011; Land et al., 2014). Land et al. (2014) take the view that the difference between the two is rarely clear, and depends on the outcome of their trading operations. After all, the expression “rogue trader” is always used retrospectively, when things have gone wrong (Gilligan, 2011; Land et al., 2014).

The “rogue trader” accusation has a political dimension that is often founded on the “bad apple” metaphor. Wexler (2010) and Gilligan (2011) both argue that this metaphor is also used with the aim of concealing normalized fraudulent trading practices, to reassure external investors and alleviate criticism of the bank, or even of the financial system as a whole. In pointing the finger at the “bad apple”, the bank and the other actors in the financial sphere try to reassure observers that there is nothing wrong with the “tree”, the “barrel” or the “orchard” (Gilligan, 2011; Wexler, 2010). More than demonization, the point of the expression “rogue trader” is to sacrifice one element of the financial system so that the organization, and the financial industry in general, can reaffirm its legitimacy (Land et al., 2014). Responsibility for a scandal can be laid at the door of an individual actor, a scapegoat, with the aim of stabilizing the system and preserving the established order and its interests (Land et al., 2014).

## 2.2. Fraud and control mechanisms

With a few exceptions (Laguecir & Leca, 2019), the accounting and control literature contains little research specifically focusing on rogue trading. Fraud in general, however, has been covered by a varied group of studies (Courtois & Gendron, 2017; Dellaportas, Perera, Gopalan & Richardson, 2019; Free & Murphy, 2015; Gabbioneta et al., 2013; Lokanan, 2018; Morales et al., 2014; Murphy & Free, 2016; Neu et al., 2013; Stolowy et al., 2014).

In their study on the Kerviel-SocGen case, Laguecir & Leca (2019) analyze the strategies of visibility used by the trader to circumvent the bank’s controls. They highlight the individual’s ability to play a role: allowing operations to be seen or keeping them hidden, and adapting to the different audiences watching him. Laguecir & Leca (2019) emphasize two points about this role-playing: Kerviel had higher technical literacy than the departments in charge of controlling him, and there was a lack of coordination between control systems. They argue that the fraud committed by Kerviel resulted from essentially individual factors, relating to his ability to give himself some “space for agency”, and to take advantage of weaknesses in the organization’s control. This focus on the perpetrator of fraud – someone who takes advantage of gaps in the control systems – is founded on an individualizing conception of fraud (Guénin-Paracini & Gendron, 2010; Guénin-Paracini et al., 2014; Morales et al., 2014), which considers fraud as a dishonest act committed by an immoral individual, often for personal gain. As a result, organizations are encouraged to prevent and detect fraud by tightening up their surveillance systems in order to control the risks arising from the alleged moral weakness of individuals (Morales et al., 2014).

Such individualization of fraud (and the associated solution in the form of tighter controls) neglects the social context in which the fraud has taken place, and has been called into question by several articles on accounting and control. Guénin-Paracini et al. (2014) criticize this individualizing conception of fraud, explaining that focusing on one (or more) individuals and holding them responsible is effectively scapegoating. It casts responsibility for fraudulent behavior on the scapegoat, and thus spares the system in which the fraud occurred from any criticism (Guénin-Paracini & Gendron, 2010; Guénin-Paracini et al., 2014; Morales et al., 2014; Tremblay & Gendron, 2011).

As well as criticizing individualization, several studies have shown the role played by certain “social” mechanisms in the occurrence of fraud: co-offending and subcultures (Free & Murphy, 2015), the institutional setup (Gabbioneta et al., 2013), habitus, social position and capital (Neu et al., 2013) and trust (Stolowy et al., 2014). In the wake of those studies, Courtois & Gendron (2017) examined the process through which individuals come to embrace a culture of corruption that had become normalized in their environment. They

<sup>1</sup> Rocchi & Thunder (2019) temper this idea somewhat with the observation that working as a trader does not inevitably have to involve giving in to trade room pressures and abandoning professional integrity and personal virtue.

identify the influence of the “sociocultural and legal environment” – which includes social control, regulatory control (established by the State and its regulation bodies) and organizational control – and consider that the first of these types of control plays a particularly important role in the occurrence of fraud. Referring to Ross (1901), Courtois & Gendron (2017, p. 17) define social control as “a diffuse web of social practices (e.g., formal education but also informal gestures arising in the context of human interaction such as being congratulated or criticized) that tend to engender and maintain individual conformity to prevalent norms within a given group or community”. Instead of the “fraud triangle” (Morales et al., 2014), Courtois & Gendron (2017) propose a “control triangle” consisting of three pillars (organizational, regulatory and social), as a basis for the analysis of organizational fraud.

Part of the accounting and control research on rogue trading, then, wants to move away from the individualizing conception that dominates the study of fraud. But, its emphasis is mainly on organizational factors and social controls that contribute to fraud, and the role played by the State in the occurrence of fraud still requires elucidation. In response to the call by Chabrak & Gendron (2015) for greater consideration of the systemic levels of organizational fraud, we introduce a significant additional component: the State. Some critical accounting and control research approaches the State as an actor in the financial sphere and studies its neoliberal style of regulation (Baud & Chiappello, 2015, 2017; Munzer, 2019). While this article subscribes to that approach to the neoliberal State, we examine a different aspect of its performance: the sanctions applicable for breaches of banking regulations. We do this by studying a case of rogue trading. In this type of fraud, a trader “goes rogue” and transgresses his bank’s rules on purchases and sales of products and commodities. Following Derrida (2005, 2009), we consider in this article that fraud is a rogue behavior characterized by an exception-to-the-rule attitude. We also aim to position organizational fraud within exception-to-the-rule attitudes developed by other actors in the financial sphere: the bank and the State (which are no less rogue than the rogue trader), and to that end we use the concept of sovereignty discussed by Derrida (2005, 2009), defined by an exception-to-the-rule attitude.

### 2.3. The sovereign and the rogue: Being an exception to the rule

Derrida (2005, p. 93) defines a rogue as an “outlaw”. He notes that the word can be translated into French as *voyou*, but this translation is an attenuated version of the English term and has the drawback of only being applicable to human beings. This is why Derrida prefers to use the English word *rogue*, which in English literature, as far back as Spenser and Shakespeare, refers to “*beggars and homeless vagabonds of various kinds but also [...] all sorts of riffraff, villains, and unprincipled outlaws.*” The meaning is then extended “*to all nonhuman living beings, that is, to plants and animals whose behavior appears deviant or perverse.*” The word *rogue* is used for wild animals which, like rogue elephants, “*behave like ravaging outlaws, violating the customs and conventions, the customary practices, of their own community*” Derrida (2005, p. 93).

Through the term *rogue*, Derrida (2005, p. 80) arrives at the figural expression of the *rogue State*: “*states accuse other states of being Etats voyous or rogue states. They intend to draw the conclusion, the armed conclusion, of this, namely, to use force to confront them in the name of a presumed right*”. The expression *rogue State* has been used primarily by the United States, particularly under the Bill Clinton administration, to discredit States that violate the spirit or the letter of international law. Many countries have paid the penalty for this description: Libya, Iraq, Nicaragua, Sudan, etc. (Derrida, 2005, p. 97). But, the accused States, stresses Derrida, often turn the accusation around to direct it against their accusers, or more specifically against the United States, which they claim are the first rogue States. Some books whose titles mention *rogue States* (Blum, 2000; Chomsky, 2000) are at pains to demonstrate this. But Derrida (2005) sees no need to refer to the indictments of the United States’ actions in the world produced by Chomsky (2000) or Blum (2000) to identify them as *rogue States*. The United States is a rogue state due to its most legitimate sovereignty, and its inability to let go of it (Derrida, 2005, p. 101). Sovereignty is defined by “*the right to suspend rights and law*”, or to decide on an exception to the law. It is “*the exceptional right to place oneself above right, the right to non-right*”, declares Derrida (2009, p. 38). Because of this exception-to-the-rule attitude to rights and the law, the sovereign is a rogue. And, Derrida concludes: “*There are thus only rogue states. Potentially or actually. The state is voyou, a rogue, roguish*” (2005, p. 102). Consequently, there are more rogue states than we think or claim; the logical conclusion is that rogue states no longer exist since all states are rogue, in the opinion of Derrida (2005). Hence the “*intrinsic necessity of rendering useless the meaning and range of the word rogue*”; the word is simply a pernicious accusation (Derrida, 2005, p. 103).

Outside the political field, in *The beast and the sovereign*, Derrida turns his attention to the figure of the sovereign in general. The sovereign, says Derrida (2009), has something in common with the beast and the criminal: “*being outside the law*”. All three are in some sense at a distance from the law. The beast, just like the criminal, is situated in the “*place where the law does not appear, or is not respected, or gets violated*” (p. 39). The sovereign may come to resemble the figure of the beast, since the sovereign’s defining feature is an exception-to-the rule attitude. “*The sovereign is the one who decides exceptionally and performatively about the exception*”, states Derrida (2005, p. 154).<sup>2</sup> This status as an exception to the rules can “[*carry*] the human sovereign above the human, toward divine omnipotence [...] and, because of this arbitrary suspension or rupture of right, runs the risk of making the sovereign look like the most brutal beast who respects nothing, scorns the law, immediately situates himself above the law” (Derrida, 2009, p. 39). Sovereignty thus appears to be the relationship of omnipotence to the law (Zarka, 2007). Historically, this omnipotence belonged to the sovereign-king (an individual), until it was transferred to the sovereign state (an organization). The concept of sovereignty cannot thus be reduced to an exclusively State-focused analysis structure. Sovereignty, says Derrida (2009, p. 35), can be “political” (of the State), but also “social” or “individual” (of the father or husband over wife and family for example). Derrida even evokes animal sovereignty when he cites “*Akela, the sovereign chief of the wolves*” (p. 31).

<sup>2</sup> Derrida is adopting an idea presented by Carl Schmitt in 1922. On this point, see Zarka (2007).

This conception of sovereignty is mobilized in this article to examine the exception-to-the-rule attitudes of actors in the financial sphere (the individual, the organization, the State) in a case of rogue trading. To complement this analysis, we seek to explain this type of attitude to the rules, referring to Boltanski (2011) on the relativist view of the rules taken by the managerial elite who make up the new dominant class of our society. This elite consists of “leaders (responsables)” with the capacity to take action that affects the lives of others and the construction of reality. The said elite have a common characteristic: “a very particular position with respect to rules”. It is even “common knowledge” that its members “can scarcely avow to themselves”: on the one hand, that “it is indispensable that there should be rules – law, procedures, norms, standards, regulations and so forth”; and on the other, that “one can do nothing really profitable (translated into their language: ‘really useful’), that one simply cannot act, in an uncertain world, if one follows these rules” (Boltanski, 2011, p. 146). In this context, allowing oneself to be guided by the rules can be considered a drawback.

This “relativist relationship to the rules” is facilitated by factors associated with the aims that guide leaders and the rules that govern their activity. Leaders pursue “very general objectives which are often rather vague and mutable”, and they do so by “exploiting variegated systems of often contradictory rules” (Boltanski, 2011, p. 146). In these circumstances, the leaders are constantly exploiting new “differentials” specific to contemporary capitalism. Boltanski gives the example of the “impossible task” facing “ethicists” in an investment bank, who must increase the level of transparency without affecting the profit rate, in a sector where “profits in large part derive from asymmetries of information” (2011, p. 148).

Boltanski (2011) thus puts forward the idea that leaders develop an exception-to-the-rule attitude because they are placed in a world full of contradiction. Leaders operate in organizational and social environments where various “logics of action” (de Gaulejac, 1987; Gendron, 2002) coexist, and may conflict (financial logic, legal logic, administrative logic, etc.). The logic of action is defined as a specific way of thinking, like a specific scheme of interpretation that guides decision-makers (de Gaulejac, 1987; Gendron, 2002). Following Boltanski (2011), we suggest that contradictory logics of action – conveyed by control mechanisms – are likely to give rise to an exception-to-the-rule attitude in elite groups.

### 3. Method

This article uses a qualitative research design founded on a case study (Patton, 2014) of rogue trading. The principal aim of this design is to detect and explain exception-to-the-rule attitudes in actors in the financial sphere (the trader, the bank, the State). This method section is presented in two steps. First, we present the empirical case and its context. We then explain our choice of case and our research approach, present and justify our documentary sources and describe how we analyze them.

#### 3.1. The empirical study

##### 3.1.1. The facts

At the SocGen<sup>3</sup> head office during the night of 18/19 January 2008, a task force was set up to scrutinize the portfolio of one specific trader: Jérôme Kerviel. Its work uncovered a speculative trading initiative on a vast scale: the positions taken by Kerviel exceeded €50 billion at that date, which was 1.5 times the bank’s equity value. Kerviel had been at SocGen Corporate & Investment Banking (Appendix 1) since August 2000, when he joined the Resources Division, specifically the “middle office”. The middle office liaises between the traders and another section of the Resources Division’s operating department, the back office. The back office handled accounting and administration for the traders’ deals. In this structure, the mission of the operating department with its two sections, the middle office and the back office, was to monitor and control the market operators, i.e. the front office. Kerviel moved to the front office in January 2005 after being promoted to the position of trader in the Delta One Listed Products (LP) team. That team was one of the front-office components of the trading activity by Global Equities and Derivatives Solutions, a part of the bank’s other division, the Business Division (Appendix 1). In the Delta One LP team, Kerviel essentially traded in derivatives, especially options, futures and forwards. These products are founded on underlying instruments, in this case stock market indexes (Dax, Eurostoxx, FTSE). This was the setting in which Kerviel took the unauthorized positions that were discovered on 18 January 2008. Most of them were closed between 21 and 23 January 2008 by SocGen itself, leading the bank to register a loss of nearly €4.9 billion (Appendix 2).

On 24 January SocGen made a public announcement about the positions taken by its trader. The same day, two formal complaints were filed by SocGen and one of its shareholders at the French public prosecution office. The initial police inquiry led to a formal investigation targeting Kerviel. Meanwhile the SocGen was also subjected to an administrative investigation by France’s Banking Commission (*Commission Bancaire*), a public body for control and discipline of credit institutions in the event of noncompliance with the sector’s regulations.

##### 3.1.2. The administrative and judicial proceedings

Two types of decision were issued in the Kerviel-SocGen affair, respectively administrative (by public administrations) and judicial (by the courts). As shown in Table 1 below, some related to criminal law and others to civil law. These different decisions call for two comments.

The first comment concerns the two different orders that took charge of the affair. One is the administrative order, represented by the Banking Commission. This was an Independent Administrative Authority (*Autorité administrative indépendante*) invested with one

<sup>3</sup> Société Générale (SocGen) has a long history (it was founded in 1864), and is one of France’s principal banks.

**Table 1**  
Administrative and legal proceedings.

Dates	Issuing authority	Decisions
28 January 2008	Investigating magistrate ( <i>Juge d'instruction</i> )	A formal investigation is opened targeting Kerviel.
3 July 2008	Banking Commission ( <i>Commission bancaire</i> )	Criminal sentences (against SocGen): <ul style="list-style-type: none"> <li>• A reprimand</li> <li>• A fine of €4 million</li> </ul>
31 August 2009	Investigating magistrate ( <i>Juge d'instruction</i> )	The case against Kerviel is sent to the first-level criminal court ( <i>Tribunal correctionnel</i> ) and the judge declares that there are no grounds to prosecute him for <i>escroquerie</i> (fraud) for personal gain.
5 October 2010	District Court ( <i>Tribunal de grande instance</i> )	Criminal sanctions: Kerviel is declared guilty of the offences of: <ul style="list-style-type: none"> <li>• Breach of trust;</li> <li>• Entry of data into an automated processing system for fraudulent purposes;</li> <li>• Forgery and use of forged documents. And given a 5-year prison sentence, of which 2 are suspended.</li> </ul> Civil sanctions: Kerviel is ordered to pay SocGen, plaintiff in the civil dimension of the case, compensation of €4,915,610,154.
24 October 2012	Paris Court of Appeal ( <i>Cour d'appel de Paris</i> )	Criminal sanctions: the guilty verdict and sentence issued by the district court are upheld. Civil sanctions: all decisions by the district court on the civil dimension of the case are upheld.
19 March 2014	Court of Cassation ( <i>Cour de cassation</i> )	The decision by the Paris Court of Appeal is overturned and cancelled, but only as regards the civil action, and the case and parties are referred to the Versailles Court of Appeal.
23 September 2016	Versailles Court of Appeal ( <i>Cour d'appel de Versailles</i> )	Civil sanctions: Kerviel is declared "partly responsible" for the prejudice caused for the bank, and ordered to pay SocGen the sum of €1 million.

power over banking establishments that is traditionally exercised by court judges: the power to administer criminal justice. The Banking Commission could thus sentence banks to financial penalties. Appeals against its sentences could be brought before the Council of State (*Conseil d'État*<sup>4</sup>). Within this remit, the Banking Commission prepared a report on the control system at SocGen in March 2008 (based on an inquiry conducted after Kerviel's actions came to light), questioned representatives of SocGen (on 20 June) and decided to sanction the bank (Table 1). SocGen will never be prosecuted or sentenced in the law courts. The other order involved in this affair is the judicial order. The proceedings concerning Kerviel<sup>5</sup> led to him being sent before a first-level criminal court (*tribunal correctionnel*). His trial, which began in October 2010, went through all the possible stages: first-instance verdict, appeal, overturning of that appeal, and finally referral to another court of appeal, which issued the last ruling in this affair in September 2016 (Table 1).

The second comment concerns the two types of law involved in the Kerviel-SocGen affair: criminal and civil. Criminal law is repressive: it punishes reprehensible actions and offences by handing out sentences. Civil law, in contrast, verifies obligations between parties, determines their responsibilities and orders the party at fault to make reparation for the prejudice caused to others. France has courts that specialize in criminal matters and courts that specialize in civil matters. But, some cases, like the Kerviel-SocGen affair, comprise a civil dimension even though they are criminal cases that are handled by criminal courts. Also, in this particular affair, the criminal dimension was not dealt with exclusively by the normal criminal law channels, i.e. in court before a judge. The criminal dimension of the case involving Kerviel as an individual trader was handled by the normal criminal court, while the criminal dimension involving the bank was handled by the Banking Commission. Although this Commission constituted an administrative body, its decisions administered criminal justice (Wester-Ouisse, 2013).

### 3.2. Choice of case and research approach

The case studied here, the Kerviel-SocGen affair (2008–2016), is an extreme case. It was the first large-scale rogue trading affair in France, and one of the most spectacular in financial history. As Stolyow et al. (2014, p. 360) assert with respect to the Madoff fraud, studying extreme cases provides a better understanding of certain mechanisms that are simple, but hard to discern in more ordinary cases where they take less visible forms. The Kerviel-SocGen rogue trading affair shows us the control dynamics in investment banks, and in the financial sphere more generally.

Our approach consists of examining and cross-comparing data drawn principally from the two types of proceedings – administrative and judicial – that took place in the Kerviel-SocGen affair. This is similar to Laguecir & Leca (2019) who refer to judicial documents concerning the same affair, and Gabbionetta et al. (2013) who study the Parmalat affair using sources that include information from the Italian public prosecution department. Our research is also fueled by the approach adopted by Neu et al. (2013) and Courtois & Gendron (2017), who respectively mobilize the investigations by the Gomery and Charbonneau commissions in Canada. Particularly in major scandals, it often happens that the investigation (by the normal judicial channels or by specially appointed commissions) and trials involve production and collection of documentation containing a wealth of information, although a critical eye is still required (Neu et al., 2013; Courtois & Gendron, 2017). Following in the footsteps of Laguecir & Leca (2019), we do not consider

<sup>4</sup> The French Council of State exercises the function of the highest administrative court. <https://www.conseil-etat.fr/le-conseil-d-etat/missions>

<sup>5</sup> In France, judicial proceedings take place in two stages. The first (in criminal cases) is the investigation, led by the investigating magistrate, which may lead to a court trial. The second stage (in criminal and civil cases) is the trial, which in the first instance takes place before a court. Appeals against the court's verdict are possible before the Court of Appeal (*Cour d'Appel*) initially, and subsequently before the Court of Cassation (*Cour de Cassation*), which when relevant may order the matter to be sent before a different Court of Appeal.

our data neutral; each document type has its own specific standpoint and logic.<sup>6</sup> We thus strove to cross-compare the data, study them with reference to the context and the logic of the party that produced them, and complement them with other data where necessary.

### 3.3. Data sources: Presentation and justification

The judicial sources used for this article consist of the following documents: the *ordonnance de renvoi* referring Kerviel for trial before the first-level criminal court (on the basis of the initial police inquiry and the ensuing investigation), the first-instance verdict, the decisions by the Paris Court of Appeal, the Court of Cassation and the Versailles Court of Appeal (Table 2). These documents issued by the judicial authorities describe the events of the case, compare statements by the persons involved (notably Kerviel and SocGen), and enable examination of the bank's control system through the reports used by the courts, particularly reports from administrative bodies.

The administrative sources used for this article (Table 2) include the Banking Commission's report of 28 March<sup>7</sup> and its decision of 3 July 2008, and the Lagarde report (by the French Finance Minister Christine Lagarde) on the Kerviel affair. For a clearer picture of the Banking Commission's status and how it exercised the disciplinary power conferred on it by the State, we refer to several administrative reports: the 2009 report by the Court of Accounts (*Cour des Comptes*) on Independent Administrative Authorities, and the 2001 report by the Council of State on the same bodies. These sources are complemented by parliamentary reports (by the French Senate) and laws, particularly the provisions of France's Monetary and Financial Code (*Code monétaire et financier*). Press articles are also used, as they provide data that is not found in our documentation (Table 2).

### 3.4. Data analysis

To make sense of this data, we conducted a three-step analysis. In the first step, the data were organized into tables by origin (judicial, administrative, other), for easier consultation. They were then read attentively in detail several times by the authors. This made it possible to organize the whole corpus of data into three major categories: the facts (the circumstances, methods and outcome of Kerviel's actions), the positions of the parties (Kerviel versus SocGen) and the stances of the external authorities (specifically the Banking Commission as regards the bank, and the court judges who gave the rulings in the trader's trials).

In the second step, we identified, and organized by level, the empirical elements relating to the control mechanisms at work in this affair. First, we identified the control system governing Kerviel's trading activity, and more specifically the rules on position-taking. To examine this individual level, we referred to the pre-trial investigation, plus the various judicial decisions. Next, we identified elements relating to the bank's control system, governed by regulation of the banking sector. This level of organizational analysis included the Banking Commission report and the related decision. Finally, we identified the empirical elements characterizing the State-established disciplinary system for banks breaching prudential regulations. At this State level, the analysis was essentially based on legal sources (the Monetary and Financial Code), administrative sources (reports by the Council of State and the Court of Accounts) and parliamentary reports (by the Senate) on the Banking Commission's status, missions and the exercise of its disciplinary power. We also referred to the Commission's decision, and the Lagarde report.

The third step, after this organization into three levels, was analysis of the data corpus in the light of the chosen theoretical framework. We began with the connection made by Derrida (2005, 2009) between the sovereign and the rogue: an exception-to-the-rule attitude. Pursuing this idea, we used the empirical information to show: 1/how Kerviel took the exceptional right to place himself above his bank's position limit procedures; 2/how SocGen reserved the exceptional right to place itself above the regulations governing its sector; 3/how the State granted the Banking Commission the exceptional right to administer criminal justice for breaches of banking regulations.

At this stage of the analysis we identified the items in our data corpus relating to the logics of action underlying the exception-to-the-rule attitude. We noted two main logics. We call the first the "prudence logic". In our data this corresponds to all the control mechanisms that relate to the principles of stability and security in the banking sector. We call the second the "market logic". It corresponds to the control mechanisms that are founded on principles demanded by the market, such as short-term profit, return on investment, efficiency, and discretion. Finally, in line with Boltanski (2011), we highlighted the contradictions between these two logics at the levels of the trader, the bank and the State, to explain their exception-to-the-rule attitude.

## 4. Results

The actors of the financial sphere (trader, bank and State) all develop an exception-to-the-rule attitude, which is explained by the contradictory logics of action conveyed by the control mechanisms at each level.

<sup>6</sup> The pre-trial investigation, for example, concentrated on evidence against Kerviel. It only examined the SocGen control system to understand "how Kerviel could keep the bank at bay" (JI, 2009, p. 42). The investigating magistrate made no effort to understand the organizational reasons for this failure. In the investigation attention was focused on Kerviel, so much so that it ended with a psychological assessment of his personality (JI, 2009, p. 71).

<sup>7</sup> As reproduced in the decision by the Versailles Court of Appeal (CAV, 2016).

**Table 2**  
Sources.

	Document	Date	Volume	Content used
<b>Judicial sources</b>	Order referring the case to the first-level criminal court ( <i>Tribunal correctionnel</i> ) and partly dismissing the charges, issued by the office of the first investigating magistrate (JI, 2009)	31 August 2009	75 pages	Kerviel's career, scope of activity, actions, the failure of SocGen's controls, the outcome of the affair, Kerviel's motives.
	Judgment by the Paris District Court ( <i>Tribunal de grande instance</i> ) (TGI, 2010)	5 October 2010	100 pages	Description of the facts (Kerviel's operating environments, his method exposed, positions of the parties), grounds and reasons, decisions.
	Decision by the Paris Court of Appeal ( <i>Cour d'appel de Paris</i> ) (CAP, 2012)	24 October 2012	105 pages	
	Decision by the Court of Cassation ( <i>Cour de Cassation</i> ) (CC, 2014)	19 March 2014	43 pages	Rejection of the Court of Appeal's arguments and explanation of the solution adopted for the civil dimension of the case.
	Decision by the Versailles Court of Appeal ( <i>Cour d'appel de Versailles</i> ) (CAV, 2016)	23 September 2016	29 pages	Description of the facts, positions of the parties, extracts from the Public Prosecutor's closing speech, assessment of the misconduct by SocGen.
<b>Administrative sources</b>	Public report by the Council of State on Independent Administrative Authorities ( <i>Rapport public du Conseil d'État sur les Autorités administratives indépendantes</i> ) (Conseil d'État, 2001)	2001	472 pages	Definition and status of Independent Administrative Authorities in France.
	Lagarde report to the Prime Minister concerning the lessons to be learned from the recent events arising at Société Générale (Lagarde, 2008)	8 February 2008	11 pages	How the affair was handled by the supervisory authorities, weaknesses in SocGen's control system, areas for consideration to reinforce control of trading operations.
	Decision by the Banking Commission ( <i>Commission bancaire</i> ) (CB, 2008)	3 July 2008	4 pages	Evaluation of the quality of the operations control system and internal procedures in the light of the regulations, sanctions.
	Report by the Court of Accounts on Independent Administrative Authorities ( <i>Rapport de la Cour des Comptes sur les Autorités administratives indépendantes</i> ) (Cour des comptes, 2009)	2009	52 pages	Critique of how the Banking Commission's disciplinary power is exercised
<b>Other sources</b>	France's Monetary and Financial Code ( <i>Code monétaire et financier</i> )	2008–2009	Extracts	The Banking Commission's mission and its members, and how its disciplinary power is exercised
	Report on Independent Administrative Authorities ( <i>Sénat</i> , 2006).	2006 and 2016	138 and 134 pages	Critique of the status and power of Independent Administrative Authorities
	A State within the State: channelling the proliferation of Independent Administrative Authorities to better control them. A report. ( <i>Un État dans l'État : canaliser la prolifération des Autorités administratives indépendantes pour mieux les contrôler. Rapport.</i> ) (Sénat, 2015)			
	<i>Les Échos</i> business newspaper ("Kerviel affair: the prosecution denounce failings in control by Société Générale"; "Kerviel affair: Société Générale prepares for a tax battle")	17 June 2016 and 17 January 2018.	Online	Transcription of the Public Prosecutor's closing speech to Versailles Court of Appeal. Rectification proceedings requested by the tax authorities.

#### 4.1. The trader: Exception to the position-taking rules

One the principal aspects of the bank's control system is the rules on directional position-taking by traders. A directional position is an uncovered position that gambles on a product's future (upward or downward) movement, and thus generates maximum market risk. SocGen does not ban such trades outright, but has control procedures to limit their duration and amount. Different limits apply to extra-day positions, i.e. positions held for longer than one day, and intraday positions, which are closed the same day. Regarding intraday positions, Alain Declerck (head of the Delta One teams, Appendix 1), declared: "even though it wasn't formally stated in writing", the trader "could take directional positions [gross positions] of €1 million [until 2006], then [from 2007] €5 million" (JI, 2009, p. 17).<sup>8</sup> Regarding extra-day positions, the limit was described as follows by Martiel Rouyère (manager of the Delta One LP desk, Appendix 1):

"The cumulative residual risks on all the positions that could be taken by the Delta One desk [6 traders including Kerviel] couldn't exceed €125 million at the end of the day. That was a collective ceiling for trades extending beyond the day, in other words extraday operations. By the residual risk [net positions] I mean the difference between the exposure associated with the product traded and the cover. For example, for a long (buy) position of 100 million euros of Dax-indexed turbo calls and a short (sell) cover position of 90 million euros of Dax-indexed futures (firm forward sales), the residual risk is + 10 million". (JI, 2009, p. 16).

Kerviel himself acknowledged the existence of these limit systems. In particular, he made the following statement about extra-day

<sup>8</sup> All translations from the sources studied are the authors' own.

positions: “it’s true that we weren’t supposed to exceed a total limit of 125 million for the whole desk” (JI, 2009, p. 16). Yet right from the outset, Kerviel took directional positions that exceeded the authorized limits. Among his more excessive positions, the investigation document cites “a short position of €30 billion in July 2007, another short position of €30 billion in late October 2007, and a long position of [approximately] €50 billion in January 2008” (JI, 2009, p. 24) (Appendix 2).

The scale of these unauthorized positions taken by Kerviel shows that he was disconnected from the control system existing in the bank. He deliberately violated the position-taking rules, and this indicates an attitude to the rules that is specific to sovereigns. As Derrida (2005, 2009) explains, in this Kerviel embodies the sovereign stance, since he takes the exceptional right to place himself above the rules. In his eyes, they no longer apply to him; he reserves the right to be an exception. The explanation for his actions – as given by Kerviel himself during the investigation – provides details of this sovereign stance and its logic.

Kerviel told the investigating magistrate, “My objective was to earn money for the bank” (JI, 2009, p. 70).<sup>9</sup> To achieve this objective, he took risks and gambles that led him to circumvent the limit system. When his gambles “paid off”, he had no qualms about going further beyond the authorized amounts. For example, concerning the €30 billion short position of July 2007, Kerviel explained:

*“My gamble paid off and I collected a net gain of €500 million after clearing all my losses. I was pleased because I’d been right, even though I gave myself a few frights. With a cushion of €500 million I began to do intraday trades for big amounts, over €500 million.”* (JI, 2009, p. 23)

The €30 billion short position of late October 2007 was also successful, generating a profit of nearly €1 billion (€971 million) at 31 December 2007 on top of the previous €500 million gain (Appendix 2). Kerviel now felt “incredibly powerful”. When questioned by the investigating magistrate about the disastrous €50 billion long position of January 2008 (Appendix 2), the trader gave a very clear description of his sovereign behavior and his disconnection from the ordinary world:

*“Frankly I thought I’d win on that next trade. I thought I’d carry that position through to the end of February at most. I was expecting further profits [...] I was caught up in a spiral. I spent 6 months winning every day, from July to December 2007. I personally made half of the annual P&L for SocGen’s derivatives-equities-index division. I was completely disconnected, I was in a world of my own, there was no-one like me in the trading room by that stage. I was drunk on success. I was convinced that nothing terrible would happen to me on one gain.”* (JI, 2009, pp. 24/70)

Carried away by his success, Kerviel became the sole master of his own world, deciding for himself what he was authorized or not authorized to do. His behavior illustrates the dual figure that haunts the sovereign: the divine and the beast (Derrida, 2009). In his quest for glory and success, Kerviel believed he was untouchable. Although his plans were bringing him closer to omnipotence, the very same plans toppled him into the figure of the beast, a ravaging rogue. To follow Derrida (2009), Kerviel’s sovereign behavior resulted from the relationship between his sense of omnipotence (excessive profit-seeking) and the law (which notably conveys the value of prudence); this relationship was detrimental to the law.

Two contradictory logics of action are found in the traders’ work at the Delta One LP desk: a market logic and a prudence logic. Kerviel was able to ignore position limits, an incarnation of the prudence logic, because his trading activity was dominated by a market logic factor he considered more important: short-term profit-seeking. But prioritizing the market logic over the prudence logic was not a new idea invented by the trader; it was considered acceptable among the SocGen’s managerial elite, that is to say its leaders (Boltanski, 2011). The trader was simply reproducing it, and Kerviel’s actions cannot be separated from the organizational and social context that contributed to and provided a favorable setting for them.

#### 4.2. The bank: exception to the prudential regulations

There were many shortcomings at the time in SocGen’s control systems, and they were noted during the Banking Commission’s administrative investigation, especially at the level of “hierarchical controls” (CB, 2008, p. 1; Table 3). For example, “serious failings in monitoring and control of Kerviel at the first hierarchical level” were uncovered; “there was no detailed daily monitoring of the trader’s activity” (CB, 2008, p. 1; Table 3). Yet several internal and external alerts should have drawn the hierarchy’s attention to what the trader was doing: changes in the cash balance for 2007,<sup>10</sup> variances detected during reconciliation of the financial and management accounts in 2007,<sup>11</sup> requests for explanations from the German futures market Eurex<sup>12</sup>, and non-application of the existing internal

<sup>9</sup> From the beginning, the investigation found no attempt at personal enrichment by the trader, and decided that the offence of *escroquerie* (fraud) in order to earn a bonus did not apply (JI, 2009, p. 65).

<sup>10</sup> Kerviel’s unauthorized positions generated profits that directly impacted his cash flows. The cash balance of his portfolio, which the front office management could see, showed amounts and variations that were hard to explain given the operations he was authorized to do. At €1.4 billion, it was far above the €100 million that would be a trader’s normal cash balance.

<sup>11</sup> Significant variances were observed by the accounting departments (€94 million). They resulted from the difference between the operations recorded by Kerviel at front office level to mask the losses generated by his positions, and the operations recorded in the back office. Kerviel used the front office as a “buffer” to keep the recorded operations “pending” so that they did not show up in the accounts, but he was not always able to eliminate loss-masking operation entries before the quarterly accounting closing.

<sup>12</sup> As early as August 2007, the Eurex investigators noticed significant positions on the Eurostoxx and the Dax, and identified Kerviel as the person who took these positions. They wrote to SocGen’s compliance department on 19 October 2007 that it was unthinkable for a single trader to be able to make such enormous commitments.

**Table 3**  
Rule breaches and shortcomings in SocGen's control system.

Rules breaches	Points of noncompliance noted
<p><b>Art. 5 and 32 of CRBF regulation 97–02.</b> On the objectives of the control system for operations and internal procedures and appropriate resources for control of operating risks</p>	<p><b>On the hierarchical controls</b></p> <ol style="list-style-type: none"> <li>1. "There was no detailed daily monitoring of the trader's [Kerviel's] activity";</li> <li>2. "No checks were carried out based on the copy sent to the trader's superiors of the answers from the ethics department of Eurex [the German futures market] which had asked for explanation of the strategy underlying the position-taking";</li> <li>3. "The variances identified during reconciliation of the accounting and management results, of which the direct line managers were informed in March and April 2007, did not lead to any requests for justification from the trader";</li> <li>4. "There was no sufficiently thorough analysis of the origin of the profits made by this trader, despite the fact that it seemed hard to explain these very good results solely by the operations he was authorized to undertake";</li> <li>5. "The hierarchy did not make sure that the trader applied the internal procedure for taking time off."</li> </ol> <p><b>On the permanent controls exercised by other departments</b></p> <ol style="list-style-type: none"> <li>6. "The officers in the units in charge of controls, especially post-trade and market monitoring, paid insufficient attention to the issues of fraud and embezzlement, although detection was explicitly part of their missions";</li> <li>7. "Their due diligence focused on clearing up anomalies [input errors]";</li> <li>8. "The variances that occurred several times in 2007 did not trigger sufficiently thorough investigations, although the explanations and justifications provided by the trader contained anomalies and gaps";</li> <li>9. "There was no profiling system to identify a high number of anomalies attributable to a single trader";</li> <li>10. "These departments had a heavy workload of execution tasks, and showed little objectivity regarding the nature of the trades and entries examined. Also, being organized by product, with no cross-functional approach, they did not have a general overview of trades classified as pending or anomalies by the Desk";</li> <li>11. "The investigations conducted by the Risk department when dealing with variances (between the economic and accounting results) and the reaction of the Ethics department (to requests for information sent to it by Eurex, about the trades initiated by the trader) were not in line with the requirements of fraud risk prevention."</li> </ol>
<p><b>Art. 7–1 of CRBF regulation 97–02.</b> On the principle of strict independence between the front office and the back office.</p>	<ol style="list-style-type: none"> <li>12. "In practice, the assistant traders do not have the necessary independence with regard to the traders";</li> <li>13. "The traders on the Delta One LP desk have very broad rights to create, modify and delete operations in the computer system."</li> </ol>
<p><b>Art. 9–1 of CRBF regulation 97–02.</b> On the internal control resources.</p>	<ol style="list-style-type: none"> <li>14. "The resources allocated to the permanent control are insufficient, both in quantity and quality, in view of the necessity of preventing operating risk."</li> </ol>
<p><b>Art. 14 of CRBF regulation 97–02.</b> On IT security.</p>	<ol style="list-style-type: none"> <li>15. "There were significant flaws in information system security which were highlighted by the internal inspection, and this allowed Kerviel to create, modify and delete the false operations used to hide his risks and results [via the Eliot application, dating from 1994]."</li> </ol>
<p><b>Art. 32–1 and art. 34 of CRBF regulation 97–02.</b> On the limit system.</p>	<ol style="list-style-type: none"> <li>16. "The system of limits applicable to the activity of the Delta One LP desk was inappropriate for monitoring operating risk, particularly due to the absence of limits for gross positions [intraday and extraday] and intraday [gross and net] positions";</li> <li>17. "A high number of operations exceeding limits were noted";</li> <li>18. "As the limits were considered to be set relatively low, they acted more as warning signals than as strict limits required by the regulations."</li> </ol>

Source: Decision by the Banking Commission (2008, pp. 1–4) and judgment of the Versailles Court of Appeal (2016, pp. 22–26).

procedure for traders' holidays (Table 3). On this last point, it is notable that the hierarchy did not react to the fact that Kerviel took almost no time off in 2006–2007. He could not afford to leave his desk because he was absorbed in the day-to-day management of his fraud system (taking and hiding directional positions). Holidays for traders are of "specific importance for trading activities" (CB, 2008, p. 1; Table 3). The trader's systematic reluctance to take time off should have alerted his superiors that he was trying to conceal some misconduct.

All these factors, in the opinion of the Banking Commission, were indications of a breach of the applicable regulations, specifically articles 5 and 32 of regulation 97–02 issued by France's Banking and Finance Regulation Committee (*Comité de la réglementation bancaire et financière* - CRBF<sup>13</sup>) (Table 3). Also – and the Banking Commission made this point in its decision – SocGen was in breach of the same articles when it ignored the requirements for "permanent controls" to be implemented by its various departments (particularly the lack of attention to questions of fraud and the absence of standards for preventing the risk of fraud) (CB, 2008, pp. 1–2;

<sup>13</sup> The CRBF was set up by law 84–46 of 24 January 1984 to lay down the rules applicable in the banking sector. In 1997 it issued regulation 97–02 concerning the "conditions in which banking establishments' internal control is performed". Today, the CRBF's functions have been transferred to the Consultative Committee for financial legislation and regulation (*Comité consultatif de législation et de la réglementation financières*). <https://cclrf.banque-france.fr/presentation/missions-0>

## Table 3).

SocGen also ignored other “essential provisions” (CB, 2008, p. 4) of CRBF regulation 97–02: the Banking Commission established that SocGen had breached its articles 7–1 (on the principle of strict separation between the front office and the back office), 9–1 (on the necessity of allocating adequate resources to internal control) and 14 (on IT security) (Table 3). Finally, to further stress a point closely related to the Kerviel fraud, the administrative investigation noted that “*the system of limits set for the activity of the ‘Delta One’ desk was inappropriate for operational risk monitoring, particularly as there were no limits for gross positions [on intraday and extra-day trades] or intraday [gross and net] positions*” and that the limits “*worked more as alarm signals than strict limits*” (CB, 2008, p. 3). This put the bank in breach of articles 32–1 and 34 of CRBF regulation 97–02 (Table 3).

These multiple failings show the laxity of the SocGen management’s attitude to the official regulations. Such laxity in Kerviel’s superiors is a clear indication of the culture in which the trader worked. The social environment of the Delta One LP desk was described by the Banking Commission rapporteurs as “*a culture of operating risk that was as yet not very widespread*” (quoted by the Versailles Court of Appeal (CAV), 2016, p. 25). The management showed little concern for operational risk and relaxed the rules of prudence at the desk. They thus gave Kerviel the opportunity to set up his plans for fraud (CB, 2008, p. 3). “*The weaknesses noted, particularly the gaps in hierarchical controls [...] made development of the fraud and its serious financial consequences possible*” (CB, 2008, p. 3). Kerviel thus worked in a social environment that was conducive to fraud.

Given SocGen’s importance and influence in the French banking sector, it is hard to believe that such breaches of the regulations were due to poor knowledge of the sector’s rules or a lack of necessary resources to apply them. In fact, SocGen (including its CEO) was repeatedly informed of the weaknesses in its control system. As the Lagarde report revealed, SocGen had undergone 17 inspections concluding with recommendations for tighter security:

*“In the period 2006–2007, SocGen was subject to 17 inspections, notably concerning the riskiest sectors, and the transition to the Basel prudential standards [...]. These inspections led to recommendations by the Banking Commission which advised reinforcing the teams and resources dedicated to counterparties. In March 2007, a guideline letter was addressed to the CEO of Société Générale, with a follow-up letter.”* (Lagarde, 2008, p. 8)

In addition to these inspections, the Banking Commission also reported weaknesses that had been highlighted – for several years in some cases – by SocGen’s own regular internal control. In particular, this regular control had underlined weaknesses in the permanent controls and the IT system. The Banking Commission observed that:

*“Certain flaws in the permanent control system and weaknesses in IT system security were identified by the regular control, which issued recommendations aiming for example to strengthen procedures for processing confirmations and control, modification and cancellation of transactions.”* (CB, 2008, p. 2)

Despite the recommendations issued by the Banking Commission and SocGen’s regular control, “*corrective measures were not always introduced, sometimes due to a lack of resolute action to that end by the management*” (CAV, 2016). The conclusions reached by the Public Prosecutor at Kerviel’s 2016 trial are enlightening:

*“A high-ranking financial institution that is well aware of its obligations and despite the warnings given about internal flaws and risks, despite the recommendations made by its own departments to remedy these issues, carries on without making any response, and outside the scope of the regulations, is clearly not simply committing negligence, but serious misconduct [...] Acts of negligence that become deliberate, and their combination, reflect a mode of operation that is very remote from concerns of security and prudence [...] such that a form not of consent, but of tolerance, took hold. Turning a blind eye and allowing it to go on, as long as there are no problems and everyone gets something out of it.”* (Les Échos, 17 June 2016)

After being informed of irregularities in its control system, SocGen thus deliberately ignored certain recommendations made to it, and decided to carry on operating “*outside the scope of the regulations*” in a way that was “*very remote from concerns of security and prudence*”. Applying the analysis of Derrida (2005, 2009), SocGen adopted a sovereign behavior; it decided on the exception, and about the exception. Externally, the bank took the exceptional right to place itself above the regulations applicable to its sector; it positioned itself as an exception to those regulations. Internally, it made the deliberate decision to do nothing, to allow the exception represented by Kerviel to develop. It behaved as a rogue. Once again, this behavior resulted from a relationship between a sense of omnipotence (risky profit-seeking) and the law (prudential regulation) that was detrimental to the law (Derrida, 2009).

And so the regulatory controls were ignored by the bank, for SocGen “*accepted a loosening of the rules to favor short-term profitability*”; “*risk-taking for the benefit of profitability*” (CB report, quoted by the Versailles Court of Appeal, CAV 2016, pp. 14/27). Following Boltanski (2011), the SocGen’s managerial elite, specifically Kerviel’s superiors, took a relativist approach to the prudential rules in order to serve the demands of the market. In the SocGen control system, the market logic (conveyed by the management of SocGen) coexisted with the prudence logic (conveyed by organizational controls translating the prudential regulations). By the arguments of Boltanski (2011), this suggests that the SocGen’s exception-to-the-rule attitude originated in the contradiction between its managing elites’ two logics of action. Their relativist approach to the rules sent an ambivalent message to the traders, placing them in a situation that was conducive to organizational fraud. And this attitude was supported by the State-established disciplinary system for banks breaching prudential regulations.

#### 4.3. The State: an exception to the criminal justice system

In this section, we examine the system chosen by the French state to control breaches of banking regulations, and observe the

consequences of that choice.

#### 4.3.1. An exceptional criminal order...

When the Kerviel-SocGen affair broke, banking supervision in France was marked by the presence of a body with a specific status: the Banking Commission (Panel 1), which was an Independent Administrative Authority created by law 84-46 of 24 January 1984.

The Banking Commission defined itself as an administrative body,<sup>14</sup> acting in the name of the State and invested with real power, exercised independently of the government<sup>15</sup> (*Conseil d'État*, 2001). The institution of this body was a seal of approval for the independent-body regulation approach<sup>16</sup> inspired by the United States' Independent Regulatory Commissions and the United Kingdom's Quasi-Autonomous Non-Governmental Organizations (Chevallier, 2016). Bodies similar to France's Independent Administrative Authorities were also set up in other European countries, like Italy and Spain, but with significant variations of name, status, scope and powers (*Sénat*, 2015).

The French Banking Commission was in charge of verifying the banks' compliance with the sector's rules and disciplining them for any observed breaches (Panel 1, article L613-1). When carrying out its disciplinary mission – and this is the specificity of the Commission – it constituted a special administrative body whose decisions were equivalent to ordinary court judgments. The Banking Commission was therefore able to impose financial penalties (*Conseil d'État*, 2001; Panel 1, article L613-23) which were undeniably an administration of criminal justice (Wester-Ouisse, 2013). By granting the Commission this power, the State created an exception to the rule stipulating that only court judges, with their status as guarantors of rights and freedoms, can issue criminal sentences. The State thus weakened the judge's role in the field of banking, relegating the judge to second place, as controller of the legality of Banking Commission decisions, notably via the Council of State which handles higher appeals. The creation of the Banking Commission (and the definition of the way it worked) was a sovereign act. This sovereignty, if we follow Derrida (2005, 2009), derives less from the fact that it emanated from a State authority than from the exception-to-the-rule approach it demonstrates. The state was exercising perfectly legitimate sovereignty as the authority responsible for the criminal justice system. It granted the body in charge of banking supervision the exceptional right to hand out criminal sentences.

Banking (or as it is aptly called, prudential) regulation is intended to instill the principle of prudence in the establishments it governs. The security and stability of financial markets depend on it. Furthermore, the very idea of disciplining and sentencing banks for breaches of the sector's regulations upholds this prudence logic. And yet, in creating the Banking Commission as an exceptional administrative body (through its power to administer criminal justice), the State was referring to another logic, which if not contradictory is at least different: the market logic. The Banking Commission's power to administer criminal justice originated in a logic of adapting disciplinary action to the features of the market in which the banks operate, and its nature. The State justified this power, giving the Commission precedence over court judges, by the technicality and complexity of financial cases, and the need to deal with them fast. According to the Council of State, the principle was to ensure a certain efficiency: swift judgments, simple procedures, and savings on resources (*Conseil d'État*, 2001) – all features that contrast with France's traditional judicial order, perceived as slow and less efficient (*Sénat*, 2015), and also lacking in discretion. The Banking Commission operates discreetly; this makes it well-suited to the sensitive nature of the financial markets (*Conseil d'État*, 2001). The Commission publishes its decisions in an "Official bulletin", often without naming the establishments concerned (*Cour des comptes*, 2009, pp. 407–408). The State thus sets its seal of approval on this market logic, to the detriment of the prudence logic, in the definition of the Banking Commission's disciplinary power (Boltanski, 2011). Examination of the way this power was exercised sheds further light on this step, and its drawbacks.

#### 4.3.2. ...whose decisions are few, and lenient

In its decision of 3 July 2008, the Banking Commission sentenced SocGen to a reprimand and a "financial penalty" of €4 million (CB, 2008, p. 4). This did not constitute a harsh sentence commensurate with the serious nature of the bank's offences and its financial capacity. SocGen only received a reprimand (the second level of disciplinary sanction after a formal warning) for points of noncompliance, and was ordered to pay a fine that was not even set at the maximum level laid down in the Monetary and Financial

<sup>14</sup> This "administrative" nature indicates that the Commission acted in the name of the State, and that the State bore responsibility for its actions. The procedure for appointing Commission members, which were drawn from executive authorities and the country's highest legal authorities, also contributed to its administrative nature (*Sénat*, 2006).

<sup>15</sup> First, this independence of authority meant the Commission had no supervising authority or superior body (it took no orders or instructions from the government). Second, this independence translated into irrevocable appointments for its members, who worked and made decisions collectively (*Sénat*, 2006).

<sup>16</sup> The Banking Commission committee members were: the governor of the *Banque de France* (or a representative), the director of the Treasury (or a representative), the president of the insurance control authority *Autorité de contrôle des assurances et des mutuelles* (or a representative), a member of the Council of State, a member of the Court of Cassation and two members with recognized expertise in the financial sector. This composition was intended to be independent of the regulated private sector, as suggested in the principle for appointing members of Independent Administrative Authorities. However, the independence was not always real. A Senate report in 2015 pointed out departures from this principle. For example, it criticized the fact that members of these Authorities were selected from the "pool of supreme courts" (the Council of State and the Court of Cassation). The guarantees inherent to the status of members and magistrates of those courts, stated the Senate report, "clearly contribute to their independence, but do not place them definitively beyond all influence from the private sector" (*Sénat*, 2015, pp. 48–49). The assertions in this report echo the conclusions reached by Malsch & Gendron (2011, p. 473): while claims of independence are central to the diverse forms of expertise that are institutionalized in society, for example in journalism, in judicial authorities, in the world of academia and in financial auditing, those claims are nonetheless "especially fragile".

**Panel 1**

Extracts from France's Monetary and Financial Code, as applicable in 2008

## MISSIONS

**Article L613-1.**

The Banking Commission is in charge of controlling compliance by credit institutions with the laws and regulations applicable to them, and sanctioning any breaches observed. [...]

## COMPOSITION

**Article L613-3.**

The Banking Commission comprises the governor of the Bank of France or his representative, as president, the Director of the Treasury or his representative, the president of the *Autorité de contrôle des assurances et des mutuelles* or his representative, and four members or their deputies appointed by decision of the minister for the economy [...]

## EXERCISE OF DISCIPLINARY POWER

**Article L613-21.**

The Banking Commission, subject to the competences of the *Autorité des marchés financiers*, may impose one of the following disciplinary sanctions:

1. A formal warning;
2. A reprimand;
3. A temporary or permanent ban on conducting certain operations and any other restriction on performance of activity;
4. Temporary suspension of one or more of the people defined in article L. 511-13 and article L. 532-2 [the effective managers of the institution] with or without appointment of a temporary administrator;
5. Compulsory resignation of one or more of the same people, with or without appointment of a temporary administrator;
6. Striking the credit institution or investment company from the list of approved credit institutions or investment companies, with or without appointment of a temporary administrator [...]

Furthermore, the Banking Commission may, instead of or in addition to these sanctions, impose a financial penalty of a maximum amount of the minimum capital requirement applicable to the legal entity being disciplined. [...]

**Article L613-23.**

When the Banking Commission issues a decision in application of article L. 613-21, it is an administrative court. [...]

Code for this kind of organization (€5 million) (Panel 1). Despite the scope of its disciplinary power, defined in article L613-21 of the Monetary and Financial Code (Panel 1), the Banking Commission was lenient in its treatment of the legal entity SocGen and its management as individuals. The penalty issued could not be considered problematic for them. Also, we should not forget that SocGen was never prosecuted or convicted in the normal court system; it was only subjected to these Banking Commission proceedings.

When the French Finance Minister made her report to the Prime Minister on the “lessons to be learned from the recent events at Société Générale”, she made the following comments:

*“Regarding financial penalties, the maximum amount the Banking Commission can impose is €5 million for the largest establishments. In view not only of what is at stake, but also the cost of investing in effective internal control systems, these amounts are insufficient. It is therefore necessary to raise this limit substantially.”* (Lagarde, 2008, p. 11)

In criticizing the effect of the Banking Commission's decisions and the lack of deterrent offered by its administration of criminal justice, the minister established a cause-and-effect link between dysfunctional behaviors by banks and traders, and the severity of the disciplinary system for breaches of regulations in the financial sphere. That system looked even punier when compared with the arsenal of controls banks were required to have; the punishment was small in view of the investment asked of them. The Court of Accounts<sup>17</sup> similarly stressed in its report of 2009 that the maximum penalty the Banking Commission could hand out was “not much of a deterrent”. It asked for the limit to be raised, and for fines no longer to be deductible from the taxable income of the firm concerned (*Cour des comptes*, 2009, p. 407). This public report also added:

*“As well as the maximum authorized amount of sanctions, it is important for the authorities to take a stricter line in their sentencing policy [...] Between 2003 and 2008, the sentences issued by the Banking Commission were few in number and lenient, with a total 66 fines decided, amounting to a total €14.7 million.”* (*Cour des comptes*, 2009, pp. 407–408)

The laxity of the banks' supervisory body was even highlighted in public reports. Its leniency sent a clearly permissive message to the banks. The Banking Commission thus helped to spread a culture in the financial sphere in which there was little consideration of the risk associated with breaches of the regulations. This could contribute to the emergence of an exception-to-the-rule attitude in banks, as the SocGen case illustrates.

The result of the State exercising its sovereignty to create an exception to its criminal justice system (in the shape of the Banking Commission) was infrequent and lenient disciplinary controls and sentences provided little deterrent. The point of the sentences did not really appear to be to punish regulatory breaches in order to set an example, but rather to punish regulatory breaches in a way that, once again, endorsed the demands of the market. Although this market logic, which has spread throughout the financial sphere, does not completely dominate the prudence logic, it is likely to weaken it. Following Boltanski (2011), the presence of these contradictory logics placed élites in a context that encouraged a relativist view of the rules.

Furthermore, the Banking Commission's leniency towards SocGen contrasts with another decision by the public authorities: the September 2016 decision by the Versailles Court of Appeal in the civil case against Kerviel. The judges at Versailles noted that SocGen

<sup>17</sup> France's Court of Accounts is an independent court whose principal mission is to make sure public money is used properly, and inform citizens on that point. <https://www.ccomptes.fr/fr/cour-des-comptes/role-et-activites>

bore some responsibility for the fraud of which it was victim, and cancelled almost all the compensation awarded to the bank.

#### 4.3.3. Contradictions in action by the public authorities

This affair thus gave rise to two decisions by the public authorities that were contradictory, at least in the message they sent to actors of the financial sphere.

On the one hand, the only sanction the Banking Commission handed out to SocGen was a reprimand and a €4 million fine. This was in line with a longstanding logic of lenient sentencing (*Cour des comptes*, 2009, p. 407–408), sending a fairly weak message of deterrence to the banks.

On the other hand, the Versailles Court of Appeal reduced the €4.9 million of damages SocGen was expecting from Kerviel by 99.98%. This decision was not made in proceedings against SocGen, but in the civil component of the criminal prosecution of Kerviel. The judges at Versailles considered that SocGen bore proven responsibility in the actions of its former trader: “SocGen allowed a deficient system to develop and this enabled the invention and execution of the offences committed by Kerviel” (CAV, 2016, p. 27). Their decision stated that control rules for banking establishments “exist not only to protect Société Générale and its shareholders, but also the banking system as a whole, and citizens’ trust in it” (CAV, 2016, p. 27). Should this be seen as an echo of the Public Prosecutor’s closing speech, asking the Versailles court of appeal to cancel SocGen’s right to reparation outright (CAV, 2016, p. 14)? Such a decision, he argued, would be “a strong message sent to the banking institutions to prevent such things happening again” (*Les Échos*, 17 June 2016). The message from the Court indicated that the banks would find it harder to take refuge behind the status of victim in the event of internal fraud, particularly in serious cases. They would now have to demonstrate that they had not contributed to production of the prejudice suffered (Ouriemmi & Gérard, 2017). The judges thus meant to call one of the biggest French banks to order, thereby sending a message of prudence to the entire banking system. There was no equivalent to this example-setting message in the Banking Commission’s treatment of SocGen in 2008.

The 2016 court decision concerning the civil claim also contradicted another public authority decision. Between 2009 and 2010, SocGen benefited from a €2.2 billion tax credit granted by the French tax authorities under a special regime reserved for firms that had made a loss or fallen victim to fraud. As the bank’s victim status had now changed, to that of a victim with responsibility, this administrative decision became questionable. On the very day the Versailles Court of Appeal announced its decision, France’s then Finance Minister Michel Sapin asked the tax authorities to start rectification proceedings, which began in November 2016. No further progress has been made on the matter since then. SocGen has simply declared that “there is no need to make any provision” to cover this risk: should the State take steps to recover the €2.2 billion tax credit, that would mean years of further litigation before the administrative courts.<sup>18</sup>

These contradictory decisions reflect the tensions in the execution of public authority action for regulatory breaches by banking establishments. The result is that a mixed message is sent to actors in the financial sphere.

## 5. Discussion

In this article we set out to examine the exception-to-the-rule attitude displayed by actors in the financial sphere, and thus bring out the underlying control dynamics. To achieve this, referring to Derrida’s (2005, 2009) conception of sovereignty as a rogue behavior that creates an exception to the rule, we propose a multi-level approach to fraud. We consider that this approach, and the highlighting of the control dynamics at work in the financial sphere, adds to the literature on rogue trading and the critical accounting and control literature.

### 5.1. Rogue behavior in the financial sphere

The critical accounting and control literature questions the excessive focus on the individual in matters of fraud, and highlights scapegoating tactics that serve to obscure systemic problems (Guénin-Paracini & Gendron, 2010; Guénin-Paracini et al., 2014; Morales et al., 2014). In the type of fraud studied in this article, the tendency to sacrifice an individual is evident from the outset, in the very expression used for the person committing the fraud: the “rogue trader”. Research into rogue trading associates the term rogue trader with an accusation aiming to sacrifice the trader, a lone individual, in order to preserve trust in the bank, and thus in the financial sphere. In that research, the rogue is the person accused of going rogue, and that person pays the price of a power balance that is unfavorable to them (Gilligan, 2011; Land et al., 2014; Wexler, 2010). This article looks beyond the accusation represented by the rogue. Following Derrida, we argue that rogues are defined by their sovereign behavior, characterized by an exception-to-the-rule attitude. A trader acts as a rogue when he takes the exceptional right to place himself above his bank’s position-taking rules. The bank is equally rogue when it reserves the exceptional right to place itself above its industry’s prudential regulations. The State, the authority in charge of criminal justice rules, goes rogue as well in exercising its perfectly legitimate sovereignty; it grants the banking supervisory body the exceptional right to hand out criminal sentences.

In this analysis, we thus make use of the concept of the rogue to propose a critique of the financial sphere and its actors, not just individuals. After Derrida (2005) and his *rogue states*, we declare with regard to rogue trading that where there are more rogues than is said or generally claimed, there are in fact no rogues! Subscribing to the critique of excessive individualization of fraud, through our

<sup>18</sup> *Affaire Kerviel : la Société Générale se prépare à un bras de fer fiscal* (The Kerviel affair: Société Générale preparing for a tax battle) *Les Échos*, 17 January 2018.

use of Derrida's conception of the rogue we contribute to a weakening of the accusatory, individualizing scope of the term "rogue trader" in the financial sphere. The critique of the contemporary financial and economic system, which tends to reduce systemic problems and collective responsibilities to individual rule-breaking (Guénin-Paracini & Gendron, 2010; Guénin-Paracini et al., 2014; Morales et al., 2014), also involves a critique of the semantics it uses. The term rogue trader is part of that. We argue that the organizational fraud represented by rogue trading involves a responsibility that is collective, and includes the State.

### 5.2. *The ambivalence of control mechanisms*

So far, critical accounting and control research has explained the occurrence of fraud by fallible, poorly coordinated organizational control systems (Laguecir & Leca, 2019) or the existence of "social" control mechanisms (a culture of normalized deviance, co-offending, etc.) that foster fraud (Courtois & Gendron, 2017; Free & Murphy, 2015; Gabbioneta, et al., 2013; Neu et al., 2013; Stolyow et al., 2014). Courtois & Gendron (2017) outline the "control triangle" relating to fraud and identify three control mechanisms that explain and make sense of the occurrence of fraud: organizational, regulatory and social control. Failings in organizational and regulatory control appear to give criminally-inclined individuals the freedom to commit fraud (Laguecir & Leca, 2019), and social control may spread behavioral norms that encourage people to actually commit such offences (Courtois & Gendron, 2017).

Analysis of the Kerviel-SocGen rogue trading case shows that the organizational controls designed to reduce operational risks were deficient. On this point, our research echoes the study of the same case by Laguecir & Leca (2019). However, unlike those authors, we attribute those deficiencies less to poor coordination between organizational control systems and more to the presence of another logic of action in the desk's social environment. The prudence logic that marks the organizational and regulatory controls was competing with and weakened by the market logic, which translated into profit-seeking and was conveyed by the bank's management. As such, our analysis suggests that the prevalence of the market logic constituted a specific form of social control. As well as identifying the major role played by this social control in the occurrence of fraud (Courtois & Gendron, 2017), our study brings out its influence on the effectiveness of organizational and regulatory controls. We also observe that the prudence logic is not entirely supplanted by the market logic. The two logics of action coexist (de Gaulejac, 1987; Gendron, 2002). This coexistence is expressed, for example, in the way the banks are sanctioned by the Banking Commission when regulations are breached. On the one hand, the existence of this supervisory body and the very act of sanctioning uphold the prudence logic. On the other, its exceptional power to administer criminal justice, and the leniency of the resulting sentences, feed the market logic.

Following Boltanski (2011), the coexistence of these contradictory logics puts the financial sphere's elites in a situation that is conducive to a relativist approach to the rules. Finding themselves in an environment where the control mechanisms involved are sending contradictory signals that form a mixed message, these actors may well commit fraud or other offences. This is why we look beyond the failings of the organizational and regulatory control mechanisms (Laguecir & Leca, 2019) and/or the normalization of deviant behavior through social control (Courtois & Gendron, 2017). We argue that the occurrence of fraud, and more broadly the exception-to-the-rule attitude in organizations, relates above all to the ambivalence of the message resulting from the contradictory signals sent by the control mechanisms in operation.

### 5.3. *The neoliberal penal state*

Some research published in the accounting and control literature has endeavored to highlight the neoliberal nature of State regulation of the banking sector. It finds, for example, that the French State embraces this ideology in the process of legislating to separate investment and deposit activities in banks (Munzer, 2019) and in the introduction of regulation under the Basel II Accord on credit risk (Baud & Chiapello, 2015, 2017). These studies show how the State, far from disengaging in the traditional free-market style, imposes legislative and regulatory measures that are supposed to ensure respect of market features and demands. Our work echoes those concerns when it uncovers the same style of neoliberal intervention by the State, but here at a different level, the administration of criminal justice for breaches of banking regulations.

The body in charge of this function in France, the Banking Commission, was set up like a special "court" with a power traditionally vested in judges in the ordinary court system: handing out criminal sentences. In granting this power (specifically the power to issue financial penalties) to the Banking Commission, the State created an exception to the rule that only court judges, with their status as guarantor of rights and freedoms, can issue such sentences. In France, the ordinary court system is generally avoided in financial matters, since many observers consider it moves too slowly, is inefficient and lacks discretion. The Banking Commission was created with a view to responding to these drawbacks (Sénat, 2015). The State was not trying to set up a system that would allow the banks to escape punishment for regulatory breaches. It exercised its power to make sure they would be punished, in a style appropriate to the features of the market in which they operate: with fast, efficient, discreet judgments. This is what leads us to call this style of state intervention neoliberal. By pointing out that neoliberalism has penetrated as far as the criminal justice system for banks, we shed light on a dimension that has rarely been studied as yet in the accounting and control literature.

In accounting and control research, as we noted earlier, fraud is approached from a perspective that is critical of neoliberalism. Past studies have explored how neoliberalism is able to survive such criticism in settings that have been hit by fraud, notably thanks to strategies that individualize fraud (Guénin-Paracini & Gendron, 2010; Guénin-Paracini et al., 2014; Morales et al., 2014; Tremblay & Gendron, 2011). Our own research belongs to this group, but differs in that it points out the role played by the neoliberal penal State in the occurrence of organizational fraud. Our findings underline two main factors in this respect. First, the criminal sentences issued by the Banking Commission are by nature if not lax, then at least not much of a deterrent. The banks can thus position themselves as exceptions to the regulations, thereby allowing exceptions to the rule to develop inside them. Second, internal contradictions may arise

in public action, following differing decisions. We therefore believe that the observed ambivalence, which is closely bound up with the way the penal State exercises its sovereignty, can contribute to the occurrence of fraud, and more generally nurtures individual and organizational rogue behavior.

As an epilogue, it should be noted that after the Banking Commission was absorbed by a new body, the Authority for prudential control and resolution (*Autorité de contrôle prudentiel et de résolution*) (Ordinance n° 2010–76 of 21 January 2010), its operation was reviewed as a result of the Kerviel-SocGen affair. Among other steps, the new banking authority increased the severity of sanctions applicable to banks in breach of the regulations (the maximum financial penalty is now €100 million or 10% of the bank's annual sales). Although this limit is substantially higher than the initial €5 million, the fact remains that it is still relatively low compared to the financial losses that bank fraud could cause.<sup>19</sup> Be that as it may, the new banking authority continues to work like a court that takes precedence over the ordinary courts, because it has retained the power to administer criminal justice (new articles 612–16 and 612–39 of France's current Monetary and Financial Code).<sup>20</sup> The risk of contradiction in public decisions and in the message sent to the banks is unchanged.

## 6. Conclusion

This study considers fraud as a specific form of an exception-to-the-rule attitude. It thus broadens the field of fraud studies, looking beyond the individual to question the role of the organization in which he commits fraud, and the role of the penal State that issues sanctions for breaking the rules. Nevertheless, this study has some limitations, and future research could be undertaken to complement it.

Taking a qualitative approach, organizational fraud is analyzed in this article based on an extreme case of rogue trading. This research is thus not universal in scope, since it aims for “analytical” rather than “statistical” generalization (Power & Gendron, 2015). The control dynamics studied in the light of the Kerviel-SocGen affair therefore remain to be verified and explored further in different situations and contexts: less spectacular cases of rogue trading, and more ordinary types of organizational fraud (various forms of organizational corruption) in France.

Future research could also be conducted in less specific court and legal systems than this French setting. The independent-body regulation approach to which French Independent Administrative Authorities belong has now spread all over the world, across Europe and elsewhere, with country-to-country variations in the State's role and coordination between the public authorities (Chevallier, 2016). The independence of national governments enshrined in such a system could be questioned with regard to some countries. In the United States for example, the heavy fines imposed on the banks after the 2007–2008 crisis due to coordination between the US' various regulatory bodies and the Department of Justice were followed by lower fines once Donald Trump was elected in 2014.<sup>21</sup>

We are also aware that in a multi-level study (individual-organization-State) of exception-to-the-rule attitudes in the financial sphere, there is less scope for in-depth analysis of each level. It is thus possible that this article does not cover all the many facets of how being an exception to the rules is exercised at each level. They deserve to be highlighted in future research, particularly with a focus on the State, which can exercise its sovereignty in a number of ways, therefore showing other modes of developing an exception-to-the-rule attitude. The overlap between national and international banking regulations offers dynamics of sovereignty that are also worth exploring. First, the State hands over some of its sovereignty by granting supranational bodies the right to produce standards for the banking sector, as in the case of the Basel Accords. Second, the latitude left by these standards, and the exceptions the State could make for itself when they are applied nationally, reveal another way to exercise State sovereignty.

In the end, despite successive reforms, the French disciplinary system for banks that breach regulations has kept the same principles since the Banking Commission was set up in 1984. Future research could explore the reasons why this system has been allowed to continue, to the detriment of the public interest. Institutional reform can sometimes be illusory, simply making minor changes while appointing people with the same profiles for the governance of the institutions. The rhetoric of change used by the elites of the new dominant class, and their desire to lead change themselves, are a constant feature of neoliberalism in the analysis of Boltanski (2011). This rhetoric enables the elite to defy criticism and maintain the established order. In the light of this idea, future research could examine the organization of the new disciplinary body that replaced the Banking Commission, and the discourses and profiles of its members. Also, in the footsteps of Tremblay (2012) and Courtois & Gendron (2017), more studies could use the official documents of the French banking supervision reform to examine the illusory nature of the control it introduced. Most beneficially, such studies could clarify how this illusion of control, which reassures the public, plays a role in perpetuating the disciplinary system for banks.

## Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to

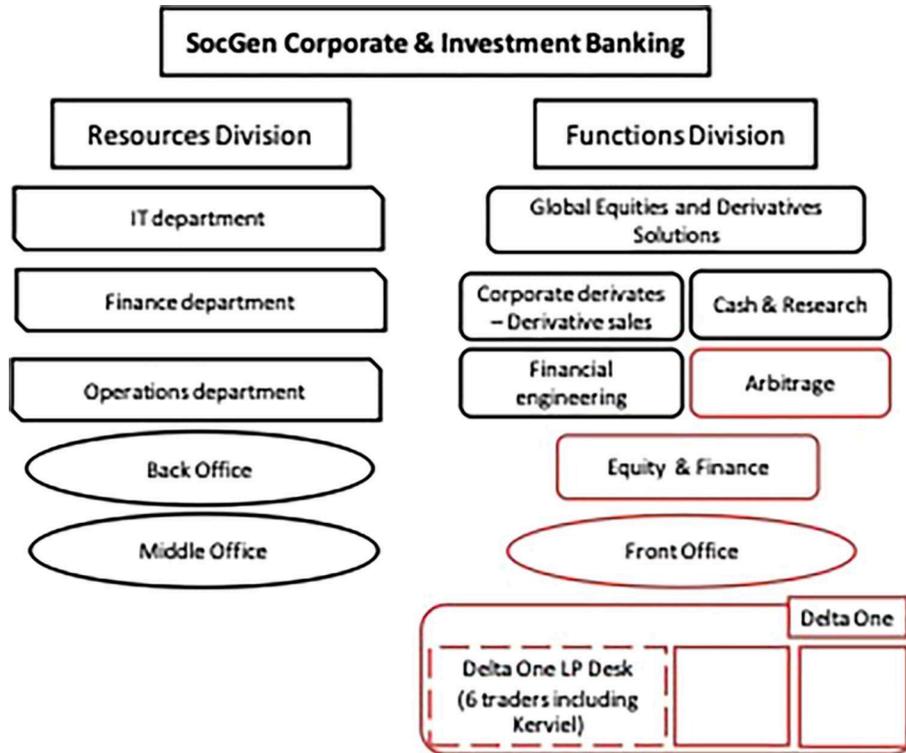
<sup>19</sup> Since this Ordinance was issued, during the period 2010–2019, the new Authority for prudential control and resolution issued 29 sentences, an average 3 per year. None of the fines imposed came close to the new limit of €100 million. Only one, for the Banque Postale, reached half of that amount. The mean financial penalty in these 29 decisions was €3.64 million. <https://acpr.banque-france.fr/sanctionner/recueil-de-jurisprudence>

<sup>20</sup> [https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006072026/LEGISCTA000006154718/#LEGISCTA000027854161](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072026/LEGISCTA000006154718/#LEGISCTA000027854161)

<sup>21</sup> [https://www.lemonde.fr/les-decodeurs/article/2017/07/07/depus-le-debut-de-la-crise-en-2007-200-milliards-d-euros-d-amendes-pour-les-banques\\_5157137\\_4355770.html](https://www.lemonde.fr/les-decodeurs/article/2017/07/07/depus-le-debut-de-la-crise-en-2007-200-milliards-d-euros-d-amendes-pour-les-banques_5157137_4355770.html)

influence the work reported in this paper.

### Appendix 1. The organizational environment surrounding Kerviel



### Appendix 2. The positions taken in the fraud by Kerviel (2005–2008)

Periods	Financial products	Nature of positions	Cumulative nominal value of positions (€)	Unrealized gain/loss (€)	Actual gain/loss (€)
July 2005	Shares in Allianz	Short (downward)	15 M		0.5 M
during 2006	Shares in Solarworld	Short	140 M		12 M
January–February 2007	Asian shares	Short	2.6 Bn		28 M
Late March 2007	Dax Futures	Short	5.6 Bn	-87.18 M	
April 2007			10 Bn	715.9 M	
May 2007			20 Bn	-1.720 Bn	
June 2007			30 Bn	-2.147 Bn	
during July 2007			<b>30 Bn</b>	-2.5 Bn	
Early August 2007			30 Bn		<b>500 M (a)</b>
September–October 2007	Dax and Eurostoxx Futures	Short	<b>30 Bn</b>	Unknown	
November–December 2007			30 Bn		<b>971 M (b)</b>
2–18 January 2008	Dax, Eurostoxx and	Long (upward)	<b>50 Bn</b>	-2.779 Bn	
21 & 24 January 2008	FTSE Futures		50 Bn		-6.3 Bn (c) Closed by SocGen's task force
24 January 2008		Gains generated to date by Kerviel (a) + (b)			1.471 Bn (d)
		Total losses (c) + (d)			<b>-4.9 Bn</b>

*Judicial sources: Decision by the Paris court of appeal (2012, p. 35-52)*

Only the amounts shown in bold are mentioned in the text of the article.

Periods: the taking and closing of positions do not happen in a single step, but in successive stages.

M: Million.

Bn: Billion.

Cumulative nominal value of positions: the total amount of Kerviel's commitments at the end of the period stated.

Unrealized gain/loss: the "theoretical" gain or loss, calculated by market value. This was monitored in real time by the trader. Here, it indicates the risk taken each time.

Actual gain/loss: the profit or loss actually made on the day of closing, which is visible in the cash accounts.

## Appendix A. Supplementary data

Supplementary data to this article can be found online at <https://doi.org/10.1016/j.cpa.2021.102414>.

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