

‘Are the current laws and potential enforcement measures effective in achieving the accountability of bank directors for their actions, or the actions of the banks they manage? A comparison of UK and US approaches’

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Introduction

The recent banking crisis has highlighted deficiencies in the regulation of banks and in 2011 this gave rise to a full scale review of the banking sector and how it is regulated.¹ New regulation came in the form of the Financial Services Act² which received Royal Assent in December 2012. The aim of this chapter is to assess the accountability of bank directors, specifically their liability for the actions of their banks and whether current sanctions being imposed hold them to account. This is of particular relevance in the light of the LIBOR scandal in which involvement at a high level within banks was exposed; as well as the wrongdoing of former CEOs, who appear to have avoided accountability for their actions, such as Fred Goodwin.³ Despite recent charges against individuals;⁴ so far the punishments have been imposed on the banks as companies and not on individuals. The lack of individual liability raises questions over the effectiveness of bank sanctions.⁵ The financial sanctions imposed have been of record values⁶ but still arguably affordable when compared to the bank profits.⁷ Alternative sanctions; through either criminal or civil law, aimed at the individuals responsible might be a more effective approach, which this chapter seeks to demonstrate. The chapter uses real world examples and academic theory to assess the sanctions used by regulators with regard to the impact these sanctions have on the behaviour and mentality of bank directors. Comparisons are drawn between the United Kingdom (UK) and the United States of America (US) approaches to the issue, as well as other relevant jurisdictions and international initiatives. These two jurisdictions have been selected due to their similar legal systems and comparable global status in the banking sector, but the two are not entirely the same and differences are observed in their approaches to enforcement. Additionally, trends may be appearing in the

¹ Independent Commission on Banking, *Final Report: Recommendations* (Domarn Group 2011).

² Financial Services Act 2012 c.21.

³ Fred Goodwin's pension has been of keen media interest, having retired, it has been reduced significantly since he retired but it is still in the hundreds of thousands per year: BBC News, 'Former RBS Boss Fred Goodwin Stripped of Knighthood' <<http://www.bbc.co.uk/news/uk-politics-16821650>> accessed 12 November 2013.

⁴ Serious Fraud Office, 'Trader Charged in LIBOR Investigation' <<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/trader-charged-in-libor-investigation.aspx>> accessed 10 November 2013.

⁵ Demetra Arsalidou, 'The Banking Crisis: Rethinking and Refining the Accountability of Bank Directors' (2010) 4 284.

⁶ Fines have been imposed for non-compliance with money laundering regulations: The Guardian, 'HSBC Pays Record \$1.9bn Fine to settle US Money-Laundering Accusations' <<http://www.guardian.co.uk/business/2012/dec/11/hsbc-bank-us-money-laundering>> accessed 21 February 2013 as well as for high profile fraud: BBC News, 'UBS Fined £29.7m by FSA Over Kweku Adoboli Case' <<http://www.bbc.co.uk/news/business-20492017>> accessed 21 February 2013 and in relation to the LIBOR scandal: BBC News, 'UBS Fined \$1.5bn for LIBOR Rigging' <<http://www.bbc.co.uk/news/business-20767984>> accessed 21 February 2013.

⁷ Henry Hillman, 'The Carrot or the Stick: Finding a Balance in the Regulatory Conundrum' (2013) 16(4) FRI 3.

actions of bank directors in the wake of scandals and failures,⁸ an example would be Fred Goodwin, who was stripped of his knighthood,⁹ and James Crosby who voluntarily surrendered his.¹⁰ Enforcement measures are considered individually in each part of the chapter, such measures include: financial sanctions, director disqualification and prison sentences; then lesser used measures such as banking licence revocation and the personal liability of directors are considered. These sanctions have been selected as they demonstrate a variety of severity of punishment. The use of each enforcement measure is considered in the UK and in the US providing a running comparison between the two jurisdictions; this format will allow for the succinct comparison from within the two countries approaches at this level and allow for a more comprehensive comparison of their overall approaches. In light of this analysis future recommendations are made in the concluding comments. Bank directors warrant special attention because banks themselves have been described as special;¹¹ special in that they are “not like other companies.”¹² The unique position banks hold is evidenced by the treatment they receive when they fall into difficulty, few industries would be rescued in such a way. This special status arguably saves the directors of banks from the liability they would face under insolvency law, because a big enough bank will be prevented from entering insolvency, as identified by Arsalidou.¹³ The combination of high profile banking scandals and the apparent avoidance of liability must be analysed and then reforms should be proposed. The first measure assessed is financial sanctions in part 2; the analysis considers whether financial sanctions are appropriate punishments to impose on banks. The appropriateness of financial sanctions imposed on banks by both UK and US authorities is assessed in terms of the aims of a financial sanction which are to punish, to deter others and, or, to correct the losses caused. Part 2 also discusses the effect of financial sanctions on the directors of a bank; because the bank pays the sanction, not the directors, it is argued that the effect is minimal. Part 3 considers disqualifying individuals as a sanction for wrongdoing. This part of the chapter also assesses the requirements

⁸ Resignations and the removal of titles have been seen in recent years: BBC News, ‘Barclays Boss Bod Diamond Resigns Amid LIBOR Scandal’ <<http://www.bbc.co.uk/news/business-18685040>> accessed 10 November 2013, BBC News, ‘Former RBS Boss Fred Goodwin Stripped of Knighthood’ <<http://www.bbc.co.uk/news/uk-politics-16821650>> accessed 12 November 2013 and BBC News, ‘Ex-HBOS chief James Crosby stripped of knighthood’ <<http://www.bbc.co.uk/news/business-22865297>> accessed 12 November 2013.

⁹ BBC News, ‘Honours stripped: Who else has lost out?’ <<http://www.bbc.co.uk/news/uk-16823208>> accessed 10 April 2013.

¹⁰ The Telegraph, ‘Business is the Biggest Casualty as Sir James Crosby Surrenders his Knighthood’ <<http://www.telegraph.co.uk/finance/comment/telegraph-view/9982890/Business-is-the-biggest-casualty-as-Sir-James-Crosby-surrenders-his-knighthood.html>> accessed 10 April 2013.

¹¹ Treasury Committee, ‘The Run on the Rock’ HC (2007-08) 56-1 [169].

¹² *ibid* at [168].

¹³ Demetra Arsalidou, ‘The Banking Crisis: Rethinking and Refining the Accountability of Bank Directors’ (2010) 4 284.

a bank director must fulfil under the approved persons regime¹⁴ and subsequently when they should be removed. Additionally, disqualification is considered under the Company Directors Disqualification Act 1986 (CDDA).¹⁵ Comparisons are made with the approach in the US. Part 4 explores the use of prison sentences as sanctions for bank directors; this involves an assessment of what a criminal offence is and the applicability of the offences currently in force in the UK; further more proposals for a new criminal offence of reckless risk taking are considered.¹⁶ The use of prison sentences in the UK and the length of those sentences are compared to those imposed in the US. Part 5 considers some lesser used measures such as the revocation of banking licenses, as well as the potential for making directors liable for losses. The consideration of alternative measures leads on to the concluding remarks which consider the sanction regime as a whole, commenting upon the applicability of sanctions to directors and making future recommendations.

Financial Sanctions

The first enforcement measure to be analysed is the use of financial sanctions against the bank. Arguably a default sanction, banks may expect a financial sanction in response to a wide range of wrongdoing.¹⁷ Financial sanctions may be imposed as civil law sanctions, for breaches of regulations which are often written by the regulators enforcing them.¹⁸ Under this heading the effectiveness of these financial sanctions is assessed; in terms of their impact upon the banks and whether such penalties hold directors to account. This part of the chapter demonstrates the relative insignificance of the financial sanctions when compared to bank profits and questions whether financial sanctions achieve the objectives intended. When a bank receives a financial sanction, it is usually directly related to a specific wrongdoing, it is a punishment for a specific

¹⁴ For the FCA see: FCA, 'Controlled Functions' <<http://www.fca.org.uk/firms/being-regulated/approved/approved-persons/functions>> accessed 10 October 2013 and for the PRA: Bank of England, 'Approved Persons – Controlled Functions' <<http://www.bankofengland.co.uk/pr/Pages/authorisations/approvedpersons/controlledfunctions.aspx>> accessed 10 October 2013.

¹⁵ Company Directors Disqualification Act 1986.

¹⁶ Jonathan Fisher QC et al, 'The global financial crisis: the case for a stronger criminal response' (2013) 7(3) Law and Financial Markets Review 159.

¹⁷ Examples include false LIBOR submissions: FSA, 'Final Notice: Barclays PLC' <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013, failing to maintain risk management systems: FSA, 'Final Notice UBS AG' <<http://www.fsa.gov.uk/static/pubs/final/ubs-ag.pdf>> accessed 10 September 2013 and Failing to enforce adequate anti-money laundering procedures: BBC News, 'HSBC to Pay \$1.9bn in US Money Laundering Penalties' <<http://www.bbc.co.uk/news/business-20673466>> accessed 10 November 2013.

¹⁸ The FSA drafted the FSA Handbook by which it regulated, the FCA have since inherited and adapted this document: Financial Conduct Authority, 'Financial Conduct Authority Handbook' <<http://fshandbook.info/FS/html/FCA>> accessed 10 November 2013.

act. Jeremy Bentham defines a punishment as “an evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done or omitted”.¹⁹ An evil is “either a pain, or a loss of pleasure, or else of that ... which is the immediate cause of such pain or loss of pleasure”²⁰ Bentham suggests there are two aims of punishment; the first is to “obviate the danger of the like mischief in future”²¹ and the second is to “compensate the mischief that has already been done.”²² It may be viewed that Bentham actually identifies three aims of punishment; firstly to inflict an evil, causing pain or loss of pleasure, secondly to obviate, or deter future offending, and thirdly to compensate the mischief. Taking each of these in turn it must first be established whether a financial sanction is painful or causes a loss to a bank. Subsequently the deterrent nature of a financial sanction will be considered, and thirdly whether it compensates the mischief.

It can be seen that this is one of the aims of the regulators; the FCA argue the purpose of enforcement “is to help the FCA change behaviour by making it clear that there are real and meaningful consequences for those firms or individuals who don’t play by the rules.”²³ This is element of the FCA’s credible deterrence policy which will be considered later in this part of the chapter.²⁴ The FCA intends to achieve this by imposing “higher penalties against high-profile targets”²⁵ but it can be seen that the average financial sanction imposed by the FCA is no higher than that of its predecessor, the FSA. In 2012, the FSA’s last full year of existence, the average financial sanction imposed as a result of enforcement actions was £5,878,665.²⁶ Since the creation of the FCA in April it has imposed 30 financial sanctions, at an average of £5,823,885,²⁷ which would suggest no significant change in the severity of financial sanctions being imposed since the FCA has been the main regulator. The average financial sanction in 2102 imposed by the FSA may be distorted by the two exceptional penalties imposed on

¹⁹ Jeremy Bentham, *The Works of Jeremy Bentham* (published under the Superintendence of his Executor, John Bowring, Edinburgh, William Tait, 1838-1843) 11 vols. Vol. 1. Chapter: Principles Of Penal Law.

²⁰ Jeremy Bentham, *The Works of Jeremy Bentham* (published under the Superintendence of his Executor, John Bowring, Edinburgh, William Tait, 1838-1843) 11 vols. Vol. 1. Chapter: Principles Of Penal Law.

²¹ *ibid.*

²² *ibid.*

²³ FCA, ‘Enforcement’ <<http://www.fca.org.uk/firms/being-regulated/enforcement>> accessed 17 July 2013

²⁴ FCA, ‘FCA Approach: Advancing Objectives’ <<http://www.fca.org.uk/static/documents/fca-approach-advancing-objectives.pdf>> accessed 10 November 2013.

²⁵ Travers Smith Regulatory Investigations Group, ‘FSA Enforcement Action: Themes and Trends’ (2012) 96 (May) COB 1 at p.2.

²⁶ Based on a total fines of £311,569,256 imposed over 53 enforcement actions: FSA, ‘Fines Table 2012’ <<http://webarchive.nationalarchives.gov.uk/20130301170532/http://www.fsa.gov.uk/about/press/facts/fines/2012>> accessed 09 September 2013.

²⁷ Calculated on 09 September 2013 based on: FCA, ‘Fines Table 2013’ <<http://www.fca.org.uk/firms/being-regulated/enforcement/fines>> accessed 09 September 2013.

Barclays and UBS for the attempted manipulation of LIBOR, excluding those sanctions the average financial sanction in 2012 was £1,805,280.²⁸ This average is consistent with that of 2011 when the average financial sanction was £1,102,414,²⁹ and 2010 when the average financial sanction was £1,106,466.³⁰ When looked at in this way the FCA does appear to have taken the approach of imposing higher financial sanctions, but it is only in its first year of existence so full conclusions cannot be drawn. In comparison, much higher financial sanctions are imposed by the US authorities; over \$10 billion in 2012³¹ by agencies such as the Securities Exchange Commission (SEC)³² and the Office of the Comptroller of Currency (OCC);³³ both of which impose civil penalties;³⁴ as well as the US Department of Justice (DoJ)³⁵ which enforces criminal law.³⁶ The \$10 billion of financial sanctions dwarfs the £311,569,256 of penalties the FSA imposed in 2012; the contrast is most clearly seen when comparing the respective financial sanctions for the same offences. The most prominent example of UK and US authorities imposing financial sanctions for the same offence is in relation to the LIBOR scandal.³⁷ The LIBOR scandal warrants special attention as it provides a unique opportunity to directly compare the financial sanctions imposed by the UK and US authorities. This rare occurrence may be analysed over three instances as both UK and US authorities have fined three banks. Prior to assessing the financial sanctions, the LIBOR scandal must first be explained.

LIBOR is an acronym, it refers to the London Interbank Offered Rate, this in turn refers to a set of 150 interest rates, and these are broken down into 10 currencies each with rates for 15

²⁸ $\frac{£92,069,256}{51} = £1,805,280$ based on 2012 total financial sanctions of £311,569,256 – (£160,000,000+£59,500,000) = £92,069,256. FSA, ‘Fines Table 2012’ <<http://webarchive.nationalarchives.gov.uk/20130301170532/http://www.fsa.gov.uk/about/press/facts/fines/2012>> accessed 09 September 2013.

²⁹ $\frac{£66,144,839}{60} = £1,102,414$ based on 2011 total financial sanctions of £66,144,839: FSA, ‘Fines tables 2011’ <<http://webarchive.nationalarchives.gov.uk/20130301170532/http://www.fsa.gov.uk/about/press/facts/fines/2011>> accessed 19 November 2012 $\frac{£66,144,839}{60} = £1,102,414$.

³⁰ $\frac{£88,517,282}{80} = £1,106,466$ based on 2010 total financial sanctions of £88,517,282: FSA, ‘FSA Fines Tables 2010’ <<http://webarchive.nationalarchives.gov.uk/20130301170532/http://www.fsa.gov.uk/about/press/facts/fines/2010>> accessed 19 November 2013.

³¹ CNN Money, ‘Bank Fines Top \$10 Billion This Year’ <<http://money.cnn.com/2012/12/28/news/companies/bank-fines/>> accessed 12 November 2013.

³² SEC, ‘US Securities Exchange Commission’ <<http://www.sec.gov/>> accessed 10 November 2013.

³³ OCC, ‘The Office of the Comptroller of Currency’ <<http://occ.gov/>> accessed 12 November 2013.

³⁴ OCC, ‘About the OCC’ <<http://www.occ.gov/about/what-we-do/mission/index-about.html>> accessed 12 November 2013 and SEC, ‘The Laws that Govern the Securities Industry’ <<http://www.sec.gov/about/laws.shtml>> accessed 12 November 2013.

³⁵ DoJ, ‘United States Department of Justice’ <<http://www.justice.gov/>> accessed 10 November 2013.

³⁶ DoJ, ‘About the DoJ’ <<http://www.justice.gov/about/about.html>> accessed 12 November 2013.

³⁷ BBC News, ‘Timeline: LIBOR-Fixing Scandal’ <<http://www.bbc.co.uk/news/business-18671255>> accessed 12 November 2013.

maturities,³⁸ ranging from overnight to 12 month loans. The LIBOR rates are used by many in the global financial services industry to formulate interest rates on loans.³⁹ LIBOR is formulated based on submissions across the 15 maturities from a panel of banks. Taking the Sterling Panel as an example; it is made up of 16 banks, all of these banks will submit rates for all 15 maturities.⁴⁰ A trimmed mean is then calculated, for a panel of 16 this involves the 4 highest and the 4 lowest submissions being discarded and an average being calculated from the remaining 8 submissions.⁴¹ This process is completed for all of the rates, the size of the trimming is determined by the size of the panel; a panel of 6 will only involve trimming 2 submissions; the highest and the lowest. Each banks submitter gives a rate based on a question asked to them by the British Bankers Association (BBA), “at what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?”.⁴² This question allows the submitters to give a rate based on their knowledge of the markets and their bank’s previous rates. The manipulation of LIBOR can be divided into two categories; individual traders influencing submitters for personal gains, and higher level instructions to give the impression the bank is doing better than it is. While the first category is serious, the second is more worrying as it shows the collusion of bank officials. An even more worrying issue is that for any manipulation to be effective banks had to collude with each other. If only one bank was supplying false submissions they are unlikely to make any difference to the rate as their submission will likely be in the top or bottom 4 and thus be discarded when calculating the average.

Barclays was the first bank to be fined for its involvement in the LIBOR scandal.⁴³ In relation to the first category, it was found that from 2005 to 2008 derivatives traders at Barclays made requests to the bank’s LIBOR submitters.⁴⁴ This was with a very simple aim, to increase the money they made from their trades, if the rate was moved in their favour then they made a better profit from the deal, this could be up or down depending on the circumstances.

³⁸ A maturity refers to the length of time the money is loaned for.

³⁹ BBC News, ‘LIBOR – What is it and Why does it Matter?’ <<http://www.bbc.co.uk/news/business-19199683>> accessed 06 April 2013.

⁴⁰ bbalibor, ‘The Basics’ <<http://www.bbalibor.com/explained/the-basics>> accessed 12 November 2013.

⁴¹ bbalibor, ‘The Basics’ <<http://www.bbalibor.com/explained/the-basics>> accessed 12 November 2013.

⁴² *ibid.*

⁴³ FSA, ‘Final Notice: Barclays PLC’ <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013.

⁴⁴ *ibid* at para 8.

In relation to the second category it was found that between 2007 and 2009 Barclays gave submissions which took into account the negative media coverage they were receiving, the results were intended to portray the bank as in a stronger financial position than it was. Barclays was facing liquidity issues during the financial crisis and some used LIBOR submissions to measure a bank's ability to raise funds.⁴⁵ This attempted manipulation of LIBOR was identified to have come from "senior management's concerns"⁴⁶ which led to "instructions being given by less senior managers."⁴⁷ Barclays was subsequently fined £59.5m by the FSA⁴⁸ and a combined \$360 million by US authorities (\$200m imposed by CFTC⁴⁹ and \$160 imposed by the Department of Justice⁵⁰) equal to £231,192,000.⁵¹ The difference in strength of the financial sanctions is stark; the US financial sanction was over three and a half times that of the UK financial sanction. The contrast in the financial sanctions can be seen in all three of the LIBOR settlements so far.⁵² UBS was fined £160m by the FSA,⁵³ yet they were fined \$1.2 billion by US authorities (\$700 million by the CFTC⁵⁴ and \$500 million by the Department of Justice⁵⁵) equating to £923,100,000.⁵⁶ The RBS financial sanctions continue the trend; £87.5 million by the FSA⁵⁷ and \$375 million in the US (\$325 million by the CFTC⁵⁸ and \$50 million by the

⁴⁵ *ibid* at para 13.

⁴⁶ FSA, 'Final Notice: Barclays PLC' <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013 at para 14.

⁴⁷ *ibid* at para 14.

⁴⁸ *ibid*.

⁴⁹ Commodity Futures Trading Commission, 'CFTC Ordered Barclays to Pay \$200 Million Penalty for Attempted Manipulation of and False Reporting concerning LIBOR and Euribor Benchmark Interest Rates' <<http://www.cftc.gov/PressRoom/PressReleases/pr6289-12>> accessed 04 April 2013.

⁵⁰ The United States Department of Justice, 'Barclays Bank PLC Admits Misconduct Related to Submissions for the London interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty' <<http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>> accessed 04 April 2013.

⁵¹ Based on exchange rate of 1USD = 0.6442GBP at time of announcement: Exchange Rates, 'US Dollar to British Pound (USD GBP) for 27 June 2012 (27/06/2012)' <http://www.exchangerates.org.uk/USD-GBP-27_06_2012-exchange-rate-history.html> accessed 04 April 2013.

⁵² BBC News, 'Timeline: LIBOR-Fixing Scandal' <<http://www.bbc.co.uk/news/business-18671255>> accessed 12 November 2013.

⁵³ FSA, 'Final Notice: UBS' <<http://www.fsa.gov.uk/static/pubs/final/ubs.pdf>> accessed 09 September 2013.

⁵⁴ Commodity Futures Trading Commission, 'CFTC Orders UBS to Pay \$700 Million to Settle Charges of Manipulation, Attempted Manipulation and False Reporting of LIBOR and Other Benchmark Interest Rates' <<http://www.cftc.gov/PressRoom/PressReleases/pr6472-12>> accessed 04 April 2013.

⁵⁵ The United States Department of Justice, 'UBS Securities Japan Co Ltd to Plead Guilty to Felony Wire Fraud for Long-Running Manipulation of LIBOR Benchmark Interest Rates' <<http://www.justice.gov/opa/pr/2012/December/12-ag-1522.html>> accessed 04 April 2013.

⁵⁶ Based on exchange rate of 1USD = 0.6154GBP at time of announcement: Exchange Rates, 'US Dollar to British Pound (USD GBP) for 19 December 2012 (19/12/2012)' <http://www.exchangerates.org.uk/USD-GBP-19_12_2012-exchange-rate-history.html> accessed 04 April 2013.

⁵⁷ FSA, 'Final Notice: RBS' <<http://www.fsa.gov.uk/static/pubs/final/rbs.pdf>> accessed 09 September 2013.

⁵⁸ Commodity Futures Trading Commission, 'CFTC Orders The Royal Bank of Scotland PLC and RBS Securities Japan Limited to Pay \$325 Million Penalty to Settle Charges of Manipulation, Attempted Manipulation and False

Department of Justice⁵⁹) amounting to £239,437,500.⁶⁰ The US can also be seen to implement high value financial sanctions for other transgressions, such as \$453m against Barclays for market manipulation⁶¹ and a \$1.9bn financial sanction for HSBC over money laundering failures.⁶² Average financial sanctions from US agencies are not available but it is clear from the \$10 billion in financial sanctions that the policy in the US is to impose much higher financial sanctions than in the UK.⁶³

The size of the financial sanctions, as high as they are, does not automatically mean that they are considered a punishment; an evil causing pain on an organisation.⁶⁴ To establish this it is useful to look at the profits banks generate, money made is the clearest indicator of how a bank is performing, so negatively impacting upon this with a financial sanction should be an effective method of punishing such an organisation. It is hard to consider the financial sanctions imposed on Barclays as painful when they appear insignificant in relation to the profits the bank generates. To further put the financial sanctions in perspective; the combined financial sanctions equated to £290,692,000, based on the Barclays' 2012 profits this could be earned in just over 2 weeks.⁶⁵ It is difficult to argue that this hurts the bank in any significant way. An interesting comparison may be made to the size of the financial sanction imposed on RBS for attempted LIBOR manipulation. RBS made a loss of £5.165 billion in 2012;⁶⁶ it is well documented that the bank which is still largely owned by the taxpayer is struggling in its

Reporting of Yen and Swiss Franc LIBOR' <<http://www.cftc.gov/PressRoom/PressReleases/pr6510-13>> access 04 April 2013.

⁵⁹ United States Department of Justice, 'RBS Securities Japan Limited Agrees to Plead Guilty In Connection with Long-Running Manipulation of Libor Benchmark Interest Rates' <<http://www.justice.gov/opa/pr/2013/February/13-crm-161.html>> accessed 04 April 2013.

⁶⁰ Based on exchange rate of 1USD = 0.6385GBP at the time of announcement: Exchange Rates, 'US Dollar to British Pound (USD GBP) for 06 February 2013 (06/02/2013)' <http://www.exchangerates.org.uk/USD-GBP-06_02_2013-exchange-rate-history.html> accessed 04 April 2013.

⁶¹ FERC, 'FERC Orders \$453 Million in Penalties for Western Power Market Manipulation' <<https://www.ferc.gov/media/news-releases/2013/2013-3/07-16-13.asp#.UeelyNLVB8E>> accessed 17 July 2013.

⁶² BBC News, 'HSBC to Pay \$1.9bn in US Money Laundering Penalties' <<http://www.bbc.co.uk/news/business-20673466>> accessed 09 September 2013.

⁶³ CNN Money, 'Bank Fines Top \$10 Billion This Year' <<http://money.cnn.com/2012/12/28/news/companies/bank-fines/>> accessed 12 November 2013.

⁶⁴ Jeremy Bentham, *The Works of Jeremy Bentham* (published under the Superintendence of his Executor, John Bowring, Edinburgh, William Tait, 1838-1843) 11 vols. Vol. 1. Chapter: Principles Of Penal Law.

⁶⁵ Based on £290,692,000 ÷ (£7,048,000,000 ÷ 52) = 2.144.

⁶⁶ RBS, 'RBS Annual Report 2012' <http://www.investors.rbs.com/download/pdf/Annual_Report_2012.pdf> accessed 19 November 2013.

recovery from the financial crisis and has consistently reported losses.⁶⁷ The US financial sanctions imposed on RBS equated to \$375 million (\$325 million by the CFTC⁶⁸ and \$50 million by the Department of Justice⁶⁹) amounting to £239,437,500.⁷⁰ Adding this to the £87.5 million financial sanction imposed by the FSA,⁷¹ the totals sanctions against RBS equal £326,937,500. Despite this the LIBOR sanction may not impact them greatly; it only equates to 6.33%⁷² of their losses and would suggest that the bank more pressing issues than the LIBOR fine. Financial sanctions can also have indirect implications; the negative publicity will often cause a drop in the share price of a bank. This is potentially significant and the share price is an indication as to the value of a bank, taking the share price the overall value of the bank can be extrapolated.

The share price of Barclays dropped in the wake of the LIBOR financial sanctions, wiping millions off the value of the bank, but this is only a temporary effect.⁷³ Prior to the financial sanction Barclays highest share price in 2012 was 256.75p on March 2nd 2012; based on this share price the 12,867,570,000 shares in issue⁷⁴ amounted to the bank being valued at £33bn. This valuation dropped to £19.4bn as the share price hit a year low of 150.55p on July 25th⁷⁵ in the wake of the LIBOR financial sanctions.⁷⁶ The value of the bank was reduced by £13.6bn over the mid part of 2012; this could be seen as a painful stimulus upon the bank but the share

⁶⁷ BBC News, 'RBS Lost £5.2bn in 'Chastening' year' <<http://www.bbc.co.uk/news/business-21612261>> accessed 04 April 2013.

⁶⁸ Commodity Futures Trading Commission, 'CFTC Orders The Royal Bank of Scotland PLC and RBS Securities Japan Limited to Pay \$325 Million Penalty to Settle Charges of Manipulation, Attempted Manipulation and False Reporting of Yen and Swiss Franc LIBOR' <<http://www.cftc.gov/PressRoom/PressReleases/pr6510-13>> access 04 April 2013.

⁶⁹ United States Department of Justice, 'RBS Securities Japan Limited Agrees to Plead Guilty In Connection with Long-Running Manipulation of Libor Benchmark Interest Rates' <<http://www.justice.gov/opa/pr/2013/February/13-crm-161.html>> accessed 04 April 2013.

⁷⁰ Based on exchange rate of 1USD = 0.6385GBP at the time of announcement: Exchange Rates, 'US Dollar to British Pound (USD GBP) for 06 February 2013 (06/02/2013)' <http://www.exchangerates.org.uk/USD-GBP-06_02_2013-exchange-rate-history.html> accessed 04 April 2013.

⁷¹ FSA, 'Final Notice: RBS' <<http://www.fsa.gov.uk/static/pubs/final/rbs.pdf>> accessed 09 September 2013.

⁷² $(239437500+87500000) / (516500000/100) = 6.33$.

⁷³ *ibid.*

⁷⁴ Citywire Money, 'Barclays PLC' <<http://citywire.co.uk/money/share-prices-and-performance/share-factsheet.aspx?InstrumentID=313>> accessed 21 August 2013.

⁷⁵ *ibid.*

⁷⁶ Yahoo Finance, 'Barclays PLC' <<http://uk.finance.yahoo.com/echarts?s=BARC.L#symbol=barc.l;range=20111230,20121231;compare=;indicator=;charttype=area;crosshair=on;ohlcvvalues=0;logscale=off;source=undefined;>> accessed 21 August 2013

⁷⁵ Citywire Money, 'Barclays PLC' <<http://citywire.co.uk/money/share-prices-and-performance/share-factsheet.aspx?InstrumentID=313>> accessed 21 August 2013.

⁷⁶ FSA, 'Final Notice: Barclays PLC' <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013.

price recovered over the remainder of the year.⁷⁷ By 20th December the share price had reached 266.80p and the bank was worth £34.3bn, £1.3bn more than before the LIBOR financial sanction.⁷⁸ This demonstrates that although the financial sanctions do cause investors to desert a bank, the effects are short lived and the share price can quickly recover, nullifying the effects of the financial sanction within 5 months.⁷⁹ Therefore it is even possible to argue that financial sanctions do not impact on banks recording heavy losses either; the LIBOR financial sanction against RBS only counts for 6.33% of their £5.165 billion losses in 2012.⁸⁰ Considering this the bank may feel it has more pressing issues than such financial sanctions. The share price of RBS did not suffer in the same way as Barclays did; the RBS share price only dropped 9.2p on the announcement of the financial sanction⁸¹ and recovered the next day.⁸²

The failure of financial sanctions to implement significant pain on banks is arguably a factor in the financial sanctions appearing to fail in acting as a deterrent either.⁸³ The FCA state that creating a “credible deterrence will remain central to our enforcement approach.”⁸⁴ Credible deterrence was a policy of the now abolished FSA which the FCA has pledged to continue,⁸⁵ this policy includes “pursuing tough penalties for infringements of rules,”⁸⁶ and “taking more cases against individuals.”⁸⁷ The FCA does not make clear statements as to how this will prevent individuals committing offences, most likely because this is impossibly hard to

⁷⁷ Yahoo Finance, ‘Barclays PLC’ <<http://uk.finance.yahoo.com/echarts?s=BARC.L#symbol=barc.l;range=20111230,20121231;compare=;indicator=;charttype=area;crosshair=on;ohlcvvalues=0;logscale=off;source=undefined;>> accessed 21 August 2013.

⁷⁸ Based on share value of 266.80p: Yahoo Finance, ‘Barclays PLC’ <<http://uk.finance.yahoo.com/echarts?s=BARC.L#symbol=barc.l;range=20111230,20121231;compare=;indicator=;charttype=area;crosshair=on;ohlcvvalues=0;logscale=off;source=undefined;>> accessed 21 August 2013 and total number of shares being 12867570000: Citywire Money, ‘Barclays PLC’ <<http://citywire.co.uk/money/share-prices-and-performance/share-factsheet.aspx?InstrumentID=313>> accessed 21 August 2013.

⁷⁹ 256.75p on March 2nd 2012, 150.55p on July 25th and returned to 266.80p by December 20th: Yahoo Finance, ‘Barclays PLC’ <<http://uk.finance.yahoo.com/echarts?s=BARC.L#symbol=barc.l;range=20111230,20121231;compare=;indicator=;charttype=area;crosshair=on;ohlcvvalues=0;logscale=off;source=undefined;>> accessed 21 August 2013.

⁸⁰ $(239437500+87500000) / (516500000/100) = 6.33$: RBS Group, ‘Annual Report and Accounts 2012’ <http://www.investors.rbs.com/download/pdf/Annual_Report_2012.pdf> accessed 08 August 2013.

⁸¹ Yahoo Finance, ‘Royal Bank of Scotland PLC’ <<http://uk.finance.yahoo.com/echarts?s=RBS.L#symbol=rbs.l;range=20121001,20130617;compare=;indicator=;charttype=area;crosshair=on;ohlcvvalues=0;logscale=off;source=undefined;>> accessed 19 November 2013.

⁸² *ibid.*

⁸³ Hannah Laming, ‘FSA v UBS: Will Big Fines Change Banks’ Attitudes to Risk Management?’ (2013) 1 JIBFL 41.

⁸⁴ FCA, ‘Enforcement’ <<http://www.fca.org.uk/firms/being-regulated/enforcement>> accessed 17 July 2013.

⁸⁵ FCA, ‘Enforcement and Credible Deterrence in the FCA’ <<http://www.fca.org.uk/static/documents/enforcement-credible-deterrence-speech.pdf>> accessed 10 November 2013.

⁸⁶ FCA, ‘FCA Approach: Advancing Objectives’ <<http://www.fca.org.uk/static/documents/fca-approach-advancing-objectives.pdf>> accessed 10 November 2013 at page 19.

⁸⁷ *ibid.*

measure;⁸⁸ it is not possible to determine who has been deterred from transgressing and who would not transgress even without the deterrence.⁸⁹ The number of offences committed can be an indicator but the infinite number of factors which impact the cause of transgression means cause and effect cannot be established. The only identifiable evidence tends to be offences committed, and these indicate that financial sanctions are not serving as an effective deterrence. An example of this can be shown in the recent rogue trader case concerning UBS in which Kweku Adoboli was sentenced to seven years for fraud⁹⁰ and UBS was fined £29.7m.⁹¹ UBS received this financial sanction for breaching the FSA's Principles for Business; breaching "Principle 3 by failing to take responsible care to organise and control its affairs responsibility and effectively with adequate risk management systems."⁹² UBS also breached "Principle 2 by failing to conduct its business from the London Branch with due skill, care and diligence".⁹³

This incident occurred only three years after the same branch of UBS was fined £8million for breaching the same principles as unauthorised trading took place.⁹⁴ UBS were found to have inadequate safeguards and the Kweku Adoboli case suggests the £8million financial sanction failed to deter UBS from further non-compliance. Lamming questions whether big financial sanctions will really stop banks transgressing.⁹⁵ The concept of using punishments as a deterrent is criticised by many commentators; Ayres and Braithwaite argue such an approach creates a cat and mouse game between regulators and those they regulate.⁹⁶ Lansky observes that pursuing strong deterrent orientated punishments can create resentment and cause the regulated to resist the regulators; Lansky argues this is "basic to human psychology."⁹⁷ It may never be clear whether punishment serves as an effective deterrence, but it is important for the regulated party to know how they will be dealt with should they offend; there must be certainty which comes from consistency This is perhaps not present in recent financial sanctions, for

⁸⁸ J M Morris, 'The Structure of Criminal Law and Deterrence' [1986] Aug Crim LR 524.

⁸⁹ *ibid.*

⁹⁰ BBC News, 'Kweku Adoboli jailed for fraud over £1.4bn UBS loss' <<http://www.bbc.co.uk/news/uk-20338042>> accessed 10 September 2013.

⁹¹ FSA, 'Final Notice UBS AG' <<http://www.fsa.gov.uk/static/pubs/final/ubs-ag.pdf>> accessed 10 September 2013.

⁹² FSA, 'Final Notice UBS AG' <<http://www.fsa.gov.uk/static/pubs/final/ubs-ag.pdf>> accessed 10 September 2013 at para 3.

⁹³ *ibid.*

⁹⁴ FSA, Final Notice UBS AG' <http://webarchive.nationalarchives.gov.uk/20130301170532/http://www.fsa.gov.uk/pubs/final/ubs_ag.pdf> accessed 10 September 2013.

⁹⁵ Hannah Laming, 'FSA v UBS: Will Big Fines Change Banks' Attitudes to Risk Management?' (2013) 1 JIBFL 41.

⁹⁶ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Social-Legal Studies, OUP, 1992) at p.20.

⁹⁷ Melvin R. Lansky, 'Violence, Shame and the Family' (1984) 5 International Journal of Family Psychiatry 21.

example it is not clear how the FSA arrived at the three different amounts for the financial sanctions of Barclays, UBS and RBS,⁹⁸ which makes it difficult to predict the size of future LIBOR sanctions.⁹⁹

A third factor to consider when assessing a financial sanction is whether there are any aggrieved parties and whether the ill-gotten gains of the offending bank are paid back.¹⁰⁰ In some cases this is impossible to calculate with any accuracy; as demonstrated by the LIBOR scandal.¹⁰¹ LIBOR rates impact on an indeterminable number of transactions, as such it is impossible to calculate the losses through manipulation. Estimates suggest LIBOR sets the rate for \$300,000,000,000,000 worth of financial transactions;¹⁰² based on this if LIBOR was moved 0.01% up or down it could cause \$30,000,000,000 of loss or gain. So far US financial sanctions amount to \$2,135,000,000.00 which equates to just 0.071% of the potential cost of the alleged manipulation.¹⁰³ It is obvious that financial sanctions correcting such a wrong is unrealistic, especially in the case of LIBOR where the extent of the wrongdoing is unknown. It is also not known if manipulation was successfully achieved;¹⁰⁴ the financial sanctions were for attempted manipulation as this is all that can be proved;¹⁰⁵ the false values submitted may have been eliminated during the calculation of the rate using the trimmed mean method detailed above.

In other cases the exact gains and losses from an offence can be calculated,¹⁰⁶ the payment protections insurance (PPI) scandal is a good example of this. The scandal concerned the miss-

⁹⁸ FSA, 'Final Notice: Barclays PLC' <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013, FSA, 'Final Notice: RBS' <<http://www.fsa.gov.uk/static/pubs/final/rbs.pdf>> accessed 09 September 2013, and FSA, 'Final Notice: UBS' <<http://www.fsa.gov.uk/static/pubs/final/ubs.pdf>> accessed 09 September 2013.

⁹⁹It cannot be predicted how high a sanction the next Rabobank will receive, the next bank understood to settle with regulators: Reuters, 'Rabobank faces second-biggest fine in Libor scandal' <<http://uk.reuters.com/article/2013/10/23/uk-rabobank-libor-idUKBRE99M0Q920131023>> accessed 21 November 2012.

¹⁰⁰ Jeremy Bentham, *The Works of Jeremy Bentham* (published under the Superintendence of his Executor, John Bowring, Edinburgh, William Tait, 1838-1843) 11 vols. Vol. 1. Chapter: Principles Of Penal Law.

¹⁰¹ BBC News, 'Libor – what is it and why does it matter?' <<http://www.bbc.co.uk/news/business-19199683>> accessed 10 November 2013.

¹⁰² *ibid.*

¹⁰³ Full explanation of LIBOR scandal may be seen previously in this part of the chapter.

¹⁰⁴ FSA, 'Final Notice: Barclays PLC' <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013, FSA, 'Final Notice: RBS' <<http://www.fsa.gov.uk/static/pubs/final/rbs.pdf>> accessed 09 September 2013.

¹⁰⁵ FSA, 'Final Notice: Barclays PLC' <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013, FSA, 'Final Notice: RBS' <<http://www.fsa.gov.uk/static/pubs/final/rbs.pdf>> accessed 09 September 2013.

¹⁰⁶ BBC, 'Payment Protection Insurance (PPI)' <<http://www.bbc.co.uk/programmes/b006mg74/features/ppi-information>> accessed 13 November 2013.

selling of PPI to customers on their loans, without their knowledge or consent, or to customers who were not eligible for the insurance.¹⁰⁷ Since the initial financial sanctions for the banks and insurance brokers customers have been able to claim back the money they paid for PPI, reaching over £8.5 billion in January 2013.¹⁰⁸ Where it is possible to impose a financial sanction directly linked to the wrongdoing, a punishment can potentially be the most effective sanction; the transgression is addressed and a pain is inflicted.¹⁰⁹ Unfortunately not all transgressions have finite consequences and as such correcting the perceived wrong is not always possible. In the US disgorgement orders are imposed on those found guilty of financial crimes, these used to order offenders to repay the money they illegally obtained.¹¹⁰ These are not used in the UK but should be considered as mechanism to separate the punishment element of the financial sanction from the ‘compensating the mischief’¹¹¹ element.

Comparing the UK and US

The clearest difference between the US and the UK in relation to financial sanctions is the size of the financial sanctions imposed,¹¹² this can be seen through the LIBOR financial sanctions and the trend can be observed when more recent enforcement actions are also compared. In August 2013 the Commodity Futures Trading Commission (CFTC) imposed 5 financial sanctions,¹¹³ the highest was \$7.5million and the average financial sanction was \$2.22million (£1,398,378),¹¹⁴ in the same period the FCA imposed 2 financial sanctions which averaged

¹⁰⁷ FSA, ‘What is Payment Protection Insurance?’ <http://www.fsa.gov.uk/consumerinformation/product_news/insurance/payment_protection_insurance/_what-is-ppi> accessed 10 September 2013.

¹⁰⁸ FSA, ‘PPI Graph’ <<http://www.fsa.gov.uk/static/pubs/consumer-research/ppi-graph-jan13.pdf>> accessed 11 September 2013.

¹⁰⁹ Jeremy Bentham, *The Works of Jeremy Bentham* (published under the Superintendence of his Executor, John Bowring, Edinburgh, William Tait, 1838-1843) 11 vols. Vol. 1. Chapter: Principles Of Penal Law.

¹¹⁰ Securities Exchange Commission, ‘Disgorgement and Penalty Payments’ <<http://www.sec.gov/about/offices/oig/reports/audits/2006/403fin.pdf>> accessed 21 November 2013.

¹¹¹ Jeremy Bentham, *The Works of Jeremy Bentham* (published under the Superintendence of his Executor, John Bowring, Edinburgh, William Tait, 1838-1843) 11 vols. Vol. 1. Chapter: Principles Of Penal Law.

¹¹² Ryder assesses these in detail: Nicholas Ryder, *The Financial Crisis and White Collar Crime – The Perfect Storm?* (Edward Elgar: Cheltenham, 2014).

¹¹³ CFTC, ‘Enforcement Actions’ <<http://www.cftc.gov/LawRegulation/Enforcement/EnforcementActions/index.htm>> accessed 15 September 2013.

¹¹⁴ Based on exchange rate of 1USD = 0.62990GBP correct as of 12:40 15/09/2012: BBC News, Market Data: USA \$’ <http://www.bbc.co.uk/news/business/market_data/currency/12/13/default.stm> accessed 15 September 2013.

£148,837.¹¹⁵ In July the FCA did not impose any financial sanctions,¹¹⁶ the CFTC handed out 4 punishments,¹¹⁷ the average financial sanction was \$2.095million (£1,319,641).¹¹⁸ In June 2013 the CFTC imposed 8 financial sanctions,¹¹⁹ an average of \$3.154million (1,986,468)¹²⁰ compared to 1 financial sanction of £45,673 by the FCA.¹²¹ Over this three month period the average financial sanction from the FCA was £114,449 and the CFTC imposed an average financial sanction of \$2,629,941 (£1,656,600);¹²² making the CFTC's average financial sanction over 14 times that of the FCA which clearly demonstrates that a stronger punishment policy is in place in the US. The question remains whether this policy is effective? The analysis of the LIBOR financial sanctions show that in relation to banks even the US financial sanctions are far outweighed by the bank profits, or in the case of RBS outweighed by other losses. Financial sanctions do not appear to inflict a pain on banks, they clearly cause them some loss but the loss is insignificant and so cannot be considered painful.

The obvious response to this would be to suggest the authorities in the UK and the US impose higher financial sanctions, but this would risk two things; removing proportionality and causing further resentment against the regulators, reducing compliance. In relation to proportionality, the financial sanctions must be related to the wrongdoing; it would be unjust to impose a £1billion financial sanction for a transgression valued at £1,000 in the pursuit of inflicting pain on a bank. The issue of resentment is discussed by Lansky¹²³ and Ayres and Braithwaite,¹²⁴

¹¹⁵ FCA, 'Fines Table' <<http://www.fca.org.uk/firms/being-regulated/enforcement/fines>> accessed 15 September 2013.

¹¹⁶ *ibid.*

¹¹⁷ CFTC, 'Enforcement Actions' <<http://www.cftc.gov/LawRegulation/Enforcement/EnforcementActions/index.htm>> accessed 15 September 2013.

¹¹⁸ Based on exchange rate of 1USD = 0.62990GBP correct as of 12:40 15/09/2012: BBC News, Market Data: USA \$' <http://www.bbc.co.uk/news/business/market_data/currency/12/13/default.stm> accessed 15 September 2013.

¹¹⁹ CFTC, 'Enforcement Actions' <<http://www.cftc.gov/LawRegulation/Enforcement/EnforcementActions/index.htm>> accessed 15 September 2013.

¹²⁰ Based on exchange rate of 1USD = 0.62990GBP correct as of 12:40 15/09/2012: BBC News, Market Data: USA \$' <http://www.bbc.co.uk/news/business/market_data/currency/12/13/default.stm> accessed 15 September 2013.

¹²¹ FCA, 'Fines Table' <<http://www.fca.org.uk/firms/being-regulated/enforcement/fines>> accessed 15 September 2013.

¹²² Based on exchange rate of 1USD = 0.62990GBP correct as of 12:40 15/09/2012: BBC News, Market Data: USA \$' <http://www.bbc.co.uk/news/business/market_data/currency/12/13/default.stm> accessed 15 September 2013.

¹²³ Melvin R. Lansky, 'Violence, Shame and the Family' (1984) 5 *International Journal of Family Psychiatry* 21.

¹²⁴ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Social-Legal Studies, OUP, 1992).

these commentators argue the aggressive use of punishments creates a culture whereby the regulated parties are combative rather than co-operative. One policy the UK could consider adopting from the US is the use of disgorgement orders where possible; this clearly separates the punishment element of the financial sanction from the ‘compensating the mischief’¹²⁵ element.

It is clear that bigger financial sanctions are stronger punishments than smaller ones but the effectiveness of financial sanctions as a regulatory tool are questionable, and many commentators recognise the limitations of financial sanctions.¹²⁶ Financial sanctions do appear, as demonstrated the above, to be the most appropriate measure where the damage is quantifiable, and though not strictly financial sanctions, the compensation orders in the wake of the PPI scandal represent a good example of using financial sanctions to correct improper advantages. It is however difficult to assess the deterrent financial sanctions pose to potential offenders; the UBS example may have a third instalment should the most recent enforcement action fail to deter re-offending.

Financial sanctions are paid by the bank, not the individual offenders or parts of a bank, should the £160 million financial sanction against UBS have been applied to the desk responsible it would have accounted for 15% of that desk’s profits.¹²⁷ Further to this should the regulators seek to punish those accountable rather than the bank as a whole? As a bank absorbs a financial sanction as a company it will pass this on to shareholders through reduced dividends, yet the directors in control of the bank remain unaffected. The potential for punishments aimed at increasing accountability need to be explored; a sanction directly impacting upon the directors would be the disqualification of individuals.

¹²⁵ Jeremy Bentham, *The Works of Jeremy Bentham* (published under the Superintendence of his Executor, John Bowring, Edinburgh, William Tait, 1838-1843) 11 vols. Vol. 1. Chapter: Principles Of Penal Law.

¹²⁶ Karen Harrison in Nicholas Ryder, *Financial Crime in the 21st Century* (Edward Elgar 2011), Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Social-Legal Studies, OUP, 1992) and Hannah Laming, ‘FSA v UBS: Will Big Fines Change Banks’ Attitudes to Risk Management?’ (2013) 1 JIBFL 41.

¹²⁷ Hannah Laming, ‘FSA v UBS: Will Big Fines Change Banks’ Attitudes to Risk Management?’ (2013) 1 JIBFL 41.

Director Disqualification

This part of the chapter considers the use of disqualification as an enforcement measure, removing those responsible from a bank in order to prevent future wrongdoing. This is potentially more effective as it prevents re-offending and targets those who are responsible for the actions of the bank, rather than punishing the entire bank, with the financial sanction being paid out of the bank's profits, which impacts on shareholders dividends. Disqualification must be considered as a tool to hold bank directors accountable for the banks they control. Qualifying as a director of a company is not controlled by law,¹²⁸ the only statutory limitation on an individual becoming a director of a company is a minimum age requirement; “[a] person may not be appointed a director of a company unless he has attained the age of 16 years.”¹²⁹ There are however, legal requirements for a bank director, as this is a regulated position by both the Prudential Regulation Authority (PRA) and the FCA; as stated under s.59 of the Financial Services and Markets Act 2000.¹³⁰ Both agencies are given the power to specify which functions require a person to be authorised and both agencies list ‘director’ as a function requiring authorisation.¹³¹ Bank directors will only have to apply to the PRA in an effort by regulators to minimise the need for dual approval.¹³²

The PRA states that it is “the responsibility of a firm’s board of directors to ensure that the individuals appointed to senior positions are competent to fill such roles.”¹³³ Despite this, the risk poor management poses means that the PRA will also “[s]atisfy itself that such approved person are ‘fit and proper’ to carry out their roles.”¹³⁴ The PRA assess all potential directors’ “probity, reputation and financial soundness, including criminal record and credit checks”¹³⁵ as well as “assessment of an individual’s competence and capability to carry out the role.”¹³⁶

¹²⁸ David Milman, ‘Disqualification of Directors: An Evaluation of the Current Law, Policy and Practice in the UK’ [2013] (331) CoLN 1.

¹²⁹ Companies Act 2006, s.157(1).

¹³⁰ Financial Services and Markets Act (FSMA) 2000, s.59.

¹³¹ For the FCA see: FCA, ‘Controlled Functions’ <<http://www.fca.org.uk/firms/being-regulated/approved/approved-persons/functions>> accessed 10 October 2013 and for the PRA: Bank of England, ‘Approved Persons – Controlled Functions’ <<http://www.bankofengland.co.uk/pr/Pages/authorisations/approvedpersons/controlledfunctions.aspx>> accessed 10 October 2013.

¹³² Bank of England, ‘Approved Persons – Controlled Functions’ <<http://www.bankofengland.co.uk/pr/Pages/authorisations/approvedpersons/controlledfunctions.aspx>> accessed 10 October 2013.

¹³³ Bank of England, ‘Approved Persons – approved Persons’ <<http://www.bankofengland.co.uk/pr/Pages/authorisations/approvedpersons/default.aspx>> accessed 14 October 2013.

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ *ibid.*

The process of approval is “necessary to reduce the risk of behaviour intentionally misaligned with the PRA’s objectives,”¹³⁷ the aim is to prevent unsuitable individuals from occupying controlling positions in banks. It follows that disqualification is a tool “specifically aimed at the removal of unfit directors from the market and the protection of the public from individuals whose past record showed them to be a danger.”¹³⁸ The FSA undertook this role prior to 2013. Their processes may be the subject of investigation in the wake of Paul Flowers resignation following a national paper publishing pictures of him purchasing Class A drugs.¹³⁹ Questions are raised over how he was appointed,¹⁴⁰ and the current Chief Secretary to the Treasury, Danny Alexander said Flowers was “clearly not an appropriate person.”¹⁴¹

Okoye proposes further checks should be undertaken before an individual becomes a member of a board of directors; and believes personality profiling should be explored.¹⁴² Okoye argues “[p]sychological research and literature indicates that personality has a significant impact on the behaviour of individuals, and that there are personality dimensions which are better suited to corporate governance than others.”¹⁴³ While it would be difficult to disagree with the concept behind this proposition, currently our collective knowledge is insufficient; McCrae and Costa argue “personality traits are abstractions that cannot be directly measured and must instead be inferred from complex patterns of overt and covert behaviour.”¹⁴⁴ Restricting an individual’s career prospects would be unjustifiable based on inferences and tantamount to discrimination. The approved persons regime, and the powers of the regulators to remove approval, means there are effectively two ways in which a bank director may be removed from his or her position; either by withdrawing their approved person status and issuing a prohibition order, or under the Company Directors Disqualification Act 1986 (CDDA).¹⁴⁵ A third route to

¹³⁷ *ibid.*

¹³⁸ Demetra Arsalidou, ‘The Banking Crisis: Rethinking and Refining the Accountability of Bank Directors’ (2010) 4 284.

¹³⁹ BBC News, ‘Co-op Bank Ex-Boss Paul Flowers ‘Filmed Buying Drugs’ <<http://www.bbc.co.uk/news/uk-24978293>> accessed 21 November 2013.

¹⁴⁰ BBC News, ‘How did Flowers Bloom at Co-op Bank?’ <<http://www.bbc.co.uk/news/business-24984680>> accessed 21 November 2013.

¹⁴¹ Danny Alexander, Interview with the BBC News Channel 10:40am 21 November 2013.

¹⁴² Ngozi Okoye, ‘Managing Personality Risks in Corporate Governance: The Role of the State’ (Virtual Banking, Financial Services and Financial Crime Conference, Innovation Island, Second Life, UWE Bristol, September 2013).

¹⁴³ *ibid.*

¹⁴⁴ R. McCrae & P.T. Costa Jr., ‘Personality Trait Structure as a Human Universal’ (1997) 52(5) *American Psychologist* 509-516.

¹⁴⁵ Company Directors Disqualification Act 1986.

disqualification does exist but has limited scope; automatic disqualification arises when an individual becomes bankrupt. In this situation disqualification is automatic and will last as long as he or she is bankrupt. All other instances of disqualification will involve intervention by the courts or a regulator.

Powers of UK Regulators to Disqualify

The FCA and the PRA have the power to make a prohibition order, “if it appears... that an individual is not a fit and proper person,”¹⁴⁶ to perform functions carried out by an authorised person. The length of this prohibition order may be permanent, but can also be varied or revoked by the regulator if they are satisfied the individual is not fit and proper.¹⁴⁷ Both regulators also have a similar power in withdrawing approval, stipulated in s.63 of FSMA 2000.¹⁴⁸ The FCA and PRA must consult each other before this power is exercised, it is not stated whether an individual may reapply, but it is likely that they will be at a disadvantage in passing the relevant checks to become an approved person in the future, as the individual and the company will be obliged to disclose the withdrawal.¹⁴⁹ Statistics detailing the use of this power by the FSA and FCA are unavailable; a freedom of information request was made but the FCA advised that there would be a fee required for this information.¹⁵⁰ The CDDA 86 applies to any company director and so should be considered as a potential tool in holding bank directors accountable. Some sections of the 1986 Act are dependent on the bank being insolvent, which for many banks was avoided due to government bail outs.¹⁵¹ The term ‘unfit’ will be assessed in relation the CDDA 86, exploring when a director is deemed to be unfit, as this may prove a useful mechanism to hold directors to account. Additionally the potential for the Secretary of State to investigate a bank will be considered as a path to eventually declaring a bank director unfit. Section 8 states;

“(1) If it appears to the Secretary of State to investigative material that is expedient in the public interest that a disqualification order should be made against a

¹⁴⁶ Financial Services and Markets Act 2000, s.56 (1) and (2).

¹⁴⁷ *ibid*, s.56 (7).

¹⁴⁸ *ibid*, s.63.

¹⁴⁹ Bank of England, ‘Approved Persons – approved Persons’ <<http://www.bankofengland.co.uk/pr/Pages/authorisations/approvedpersons/default.aspx>> accessed 14 October 2013.

¹⁵⁰ Email from Stephanie Winson, Customer Contact Centre, Financial Conduct Authority to the Author (25 October 2013).

¹⁵¹ BBC News, ‘Rescue Plan for UK Banks Unveiled’ <<http://news.bbc.co.uk/1/hi/business/7658277.stm>> accessed 21 November 2013.

person who is, or has been, a director or shadow director of a company, he may apply to the court for such an order.”¹⁵²

The “investigative material” includes the reports under s.167 of the Financial Services and Markets Act 2000; s.167 gives an investigating authority to appoint investigators if “there is good reason for doing so.”¹⁵³ This is quite a vague justification, however it is arguable many of the recent scandals could be seen as “good reason for doing so;”¹⁵⁴ the banking crisis leading to the bailouts could justify investigation into those in difficulty. The PPI and LIBOR scandals could similarly warrant investigation. The investigation may be into the whole business,¹⁵⁵ a particular aspect of the business,¹⁵⁶ or an authorised person.¹⁵⁷ Using the subsequent report from such an investigation, the court may disqualify a person “if it is satisfied that his conduct in relation to the company makes him unfit to be concerned in the management of a company.”¹⁵⁸ This chapter considers the potential for establishing unfitness because the majority of the CDDA 86 requires the company to be insolvent, or have been convicted of a crime before triggering disqualification proceedings.¹⁵⁹ Determining whether a person is ‘unfit’ is addressed in section 9 of the CDDA 86; guidance for all companies can be found in Part I of Schedule 1,¹⁶⁰ and where the company is insolvent Part II of Schedule 1 gives additional guidance.¹⁶¹

Part I provides 5 situations where an individual will be deemed unfit to be a director;

- 1- Breaching a fiduciary duty.¹⁶²
- 2- Retention of company money.¹⁶³

¹⁵² Company Directors Disqualification Act 1986, s.8(1).

¹⁵³ Financial Services and Markets Act 2000, s.167(1).

¹⁵⁴ *ibid.*

¹⁵⁵ Financial Services and Markets Act 2000, s.167(1)(a).

¹⁵⁶ *ibid.*, s.167(1)(b).

¹⁵⁷ *ibid.*, s.167(1)(c).

¹⁵⁸ Company Directors Disqualification Act 1986, s.8(2).

¹⁵⁹ ss.2-5 concern general misconduct including criminal offences and fraud, ss9A-9E consider competition infringements, s.10 concerns wrongful trading and s.11 covers undischarged bankruptcies: Company Directors Disqualification Act 1986, ss2-11.

¹⁶⁰ Company Directors Disqualification Act 1986, Schedule 1 Part I.

¹⁶¹ *ibid.*, Schedule 1 Part II.

¹⁶² *ibid.*, Schedule 1 Part I Para 1.

¹⁶³ *ibid.*, Schedule 1 Part I Para 2.

- 3- Debt avoidance.¹⁶⁴
- 4- Non-compliance with administrative duties.¹⁶⁵
- 5- Non-Compliance with accounting duties.¹⁶⁶

Para 1 is the only Para of Part I that bank directors may satisfy, if they are found to have breached their duties; found within ss.170-177 of the Companies Act 2006. Of those sections s.172 and 174 are the most applicable; duty to promote the success of the company¹⁶⁷ and duty to take reasonable care.¹⁶⁸ A director's duty to promote the success of the company is a relatively vague duty; the director must consider the long term consequences of a decision,¹⁶⁹ the company's employees,¹⁷⁰ customers,¹⁷¹ the environment,¹⁷² reputation,¹⁷³ and fairness.¹⁷⁴ This set of duties is drafted so widely that a director is likely to breach one duty when fulfilling another; as a result it could be argued any director may be disqualified for breaching these duties if the law was applied strictly. A slightly narrower duty is found in the s.174 duty to exercise reasonable care, skill and diligence; here the requirement upon a director to reasonably exercise his or her;

- “(a) general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and,
- (b) the general knowledge, skill and experience that the director has.”¹⁷⁵

¹⁶⁴ Company Directors Disqualification Act 1986, Schedule 1 Part I Para 3.

¹⁶⁵ *ibid*, Schedule 1 Part I Para 4.

¹⁶⁶ *ibid*, Schedule 1 Part I Para 5.

¹⁶⁷ Companies Act 2006, s.172.

¹⁶⁸ *ibid*, s.174.

¹⁶⁹ *ibid*, s.172(1)(a).

¹⁷⁰ *ibid*, s.172(1)(b).

¹⁷¹ *ibid*, s.172(1)(c).

¹⁷² *ibid*, s.172(1)(d).

¹⁷³ *ibid*, s.172(1)(e).

¹⁷⁴ *ibid*, s.172(1)(f).

¹⁷⁵ Companies Act 2006, s.174 (2).

The standard here is both objective and subjective which is unhelpful; this makes it difficult to secure a disqualification based on this test as if an individual does not meet one standard, they may rely upon the other.

During the banking crisis that came to a head in 2007, banks were largely saved from insolvency due to government bailouts; as a result many bank directors have been protected from the likelihood of disqualification because the most applicable sections of the CDDA 86 require the company to be insolvent. Schedule 1, Part I, Para 6 states that a director may be declared unfit based on the “extent of the director’s responsibility for the causes of the company becoming insolvent.”¹⁷⁶ Were major UK banks to have entered insolvency then their directors would potentially be disqualified for their involvement; for example Fred Goodwin reportedly oversaw the acquisition of ABN Amro¹⁷⁷ which caused the bank to suffer £16bn in losses.¹⁷⁸ Had Fred Goodwin remained CEO and the bank was not bailed out, it would have been likely that a £16bn loss, contributing to the £40bn lost that year,¹⁷⁹ would have led to the bank failing and entering insolvency; and Para 6 would most likely be used to secure disqualifications. Para 6 and the bailouts of the banks provide a frustrating limitation to the CDDA 86; it lacks the flexibility to disqualify directors of companies who have satisfied conditions for disqualification but through the acts of a third party the company has been saved.

The limited use of the CDDA 86 may be explained by the aims of the legislation; which judges have attempted to define. Hoffmann LJ (as he was then) saw it as a “question of mixed fact and law [for the judge] in that he is applying the standard laid down by the courts... to the facts of the case.”¹⁸⁰ Disqualification is not deemed appropriate in the case of ordinary commercial misjudgement, as held by Browne-Wilkinson V.C. in *Re Lo-Line Electric Motors Ltd*.¹⁸¹ Despite this, disqualification may be justifiable where the “conduct, viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards”¹⁸² appropriate for directors of companies; and notwithstanding the restrictive use of

¹⁷⁶ Company Directors Disqualification Act 1986, Schedule 1 Part I Para 6.

¹⁷⁷ BBC News, ‘Former RBS Boss Fred Goodwin Stripped of Knighthood’ <<http://www.bbc.co.uk/news/uk-politics-16821650>> accessed 12 November 2013.

¹⁷⁸ The Telegraph, ‘RBS Posts Record £40bn Pre-Tax Loss’ <<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/4836849/RBS-posts-record-40bn-pre-tax-loss.html>> accessed 12 November 2013.

¹⁷⁹ *ibid.*

¹⁸⁰ *Re Grayan Building Services Ltd* [1995] Ch 241 at 245.

¹⁸¹ *Re Lo-Line Electric Motors Ltd* [1988] Ch 477.

¹⁸² *Re Grayan Building Services Ltd* [1995] Ch 241 per Hoffman LJ at 253.

disqualification, directors of banks should be investigated. The issue of banning bank directors has been pertinent in the media in the years since the 2007 financial crisis, particularly comments from politicians,¹⁸³ yet those with the power to change the law have yet to act.¹⁸⁴ Changing the guidelines for disqualification for unfitness is a power held by the Secretary of State; he or she may “modify any of the provisions of Schedule 1”¹⁸⁵ of the CDDA 86. This action would be unlikely to apply to the directors involved in the 2007 crisis; but it would demonstrate intent to utilise the law to hold directors to account. The intentions of the UK authorities to use disqualification as a regulatory tool may be seen through the number of directors who have been disqualified. The financial crisis had no impact on the number of directors being disqualified; it is also noteworthy that the majority of disqualifications occur once a company is insolvent, using s.6 of the CDDA 86.¹⁸⁶ If disqualification were to have been used as a tool to hold bank directors to account, a marked increase in disqualification since 2007 might have been expected.

It appears that disqualification is not seen as an appropriate tool; except in the case of bank collapsing, such as Barings Bank where nine former executives were banned.¹⁸⁷ It was reported in May 2013 that the business secretary Vince Cable was seeking to disqualify three former HBOS directors; James Crosby, Andy Hornby and Lord Stevenson.¹⁸⁸ However, no charges have been brought at the time of writing, some seven months after the reports. Arsalidou considers the use of disqualification in relation to the banking crisis and refers to the judgment of Parker J in *Re Barings Bank (No.5)*; “[I]t is a truism that if a manager does not properly understand the business which he is seeking to manage, he will be unable to take informed management decisions in relation to it.”¹⁸⁹ While accepting that banking is a complex

¹⁸³ BBC News, ‘Vince Cable ‘Examines Ban for Former HBOS Directors’ <<http://www.bbc.co.uk/news/business-22056275>> accessed 10 October 2013 and Mail Online, ‘We WILL jail reckless bankers’: Cameron vows to criminalise irresponsible behaviour and ban bonuses at bailed out banks’ <<http://www.dailymail.co.uk/news/article-2344511/David-Cameron-We-WILL-jail-reckless-bankers.html>> accessed 10 October 2013.

¹⁸⁴ Legislators are still only voicing their support of proposals: The Telegraph, ‘Cable to Push for Disqualification of Disgraced Bankers’ <<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/10178287/Cable-to-push-for-disqualification-of-disgraced-bankers.html>> accessed 19 November 2013.

¹⁸⁵ Company Directors Disqualification Act 1986, s.9(4).

¹⁸⁶ Frances Wilks & Jones LLP, ‘Directors Disqualification Recent Statistics’ <http://www.franciswilksandjones.co.uk/site/business/director_disqualification_london/statistics_dd/> accessed 20 October 2013.

¹⁸⁷ *Re Barings plc and others (No 5)* (1999) 1 B.C.L.C 433.

¹⁸⁸ BBC News, ‘Vince Cable ‘Examines Ban for Former HBOS Directors’ <<http://www.bbc.co.uk/news/business-22056275>> accessed 12 November 2013.

¹⁸⁹ *Re Barings plc and others (No 5)* (1999) 1 B.C.L.C 433 per Parker J at 527.

business, Arsalidou suggests that “banks such as Northern Rock, RSB and Bradford and Bingley have suffered massive losses because executives failed to understand [the financial products] consisting of sub-prime mortgages;”¹⁹⁰ this argument would lead to many bank directors being considered unfit, akin to the unfitness described by Parker J.

In the wake of the financial crisis the outgoing Labour government enacted the Banking Act 2009,¹⁹¹ which does legislate for the disqualification of bank directors, but this is only applicable where the bank is insolvent.¹⁹² However, the explanatory notes state “a wide range of matters may be considered in determining whether a director’s conduct has been such that action should be taken to bar him or her.”¹⁹³ This language, rather than being explanatory, is no more specific than the term ‘unfit’. In most cases it is difficult to assess the authenticity of statements from high profile politicians, yet many have been vocal on the subject of bank directors. David Cameron and Nick Clegg, current Prime Minister and Deputy Prime Minister respectively, have called for disqualifications,¹⁹⁴ and the Business Secretary Vince Cable is reportedly pushing for disqualifications.¹⁹⁵ Despite this, even after recommendations from the Parliamentary Commission on Banking Standards to disqualify the former directors of HBOS,¹⁹⁶ no bank directors have been disqualified.

United States

In the United States numerous agencies have the power to disqualify bank directors, two such agencies are the Office of the Comptroller of Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC). The OCC is the main regulator of national banks, charged with the regulation, supervision and issuance of charters. It has extensive powers to assess banks, make changes to their practices and staffing at high levels and penalise banks with financial sanctions. It has four objectives; to ensure the safe and soundness of the national banking

¹⁹⁰ Demetra Arsalidou, ‘The Banking Crisis: Rethinking and Refining the Accountability of Bank Directors’ (2010) 4 284.

¹⁹¹ Banking Act 2009, c.1.

¹⁹² *ibid*, s.121.

¹⁹³ Banking Act 2009, Explanatory Notes, Para 297.

¹⁹⁴ The Independent, ‘Cameron Pledges to Punish Bankers’ <<http://www.independent.co.uk/news/uk/politics/cameron-pledges-to-punish-bankers-1128207.html>> accessed October 12 2013 and Liberal Democrat Voice, ‘Bank Chiefs Should be Disqualified – Clegg’ <<http://www.libdemvoice.org/bank-chiefs-should-be-disqualified-clegg-12143.html>> accessed 12 October 2013.

¹⁹⁵ The Telegraph, ‘Cable to push for disqualification of disgraced bankers’ <<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/10178287/Cable-to-push-for-disqualification-of-disgraced-bankers.html>> accessed 22 October 2013.

¹⁹⁶ Parliamentary Commission on Banking Standards, ‘*An Accident Waiting to Happen: The Failure of HBOS*’ (2012-2013 HL 144, HC 705).

system,¹⁹⁷ aid competition in allowing banks to offer new services and products,¹⁹⁸ increasing efficiency and effectiveness to reduce the regulatory burden to banks in complying with OCC supervision,¹⁹⁹ and to ensure equal access to financial services for all Americans.²⁰⁰ The FDIC was created by the Glass-Steagall Act 1933,²⁰¹ and insures the deposits of all member banks. Membership with this institution safeguards a bank's deposits, but members are subject to FDIC supervision intended to safeguard the deposit fund. The regulation of the FDIC is seen to overlap with the aims of the OCC identified above, doubling up regulation.²⁰² Statistics for the enforcement actions concerning the removal of individuals imposed by the two agencies suggest that director removal has not been utilised as a punishment in the wake of the banking crisis. More disqualification orders were issued by the OCC in 2006 than any following years, this not consistent with what might be expected if the use of disqualification was to punish directors for bank failings.²⁰³ These statistics represent actions against all individuals, so the number of these imposed against bank directors is not known. Assessing the 12 disqualifications in 2013,²⁰⁴ 3 were against former board members of banks. Of the 15 disqualifications in 2012,²⁰⁵ only 2 were against board members; despite the low numbers, this still demonstrates a stronger willingness than UK authorities to disqualify directors.

Similarly numbers of 'Removal and Prohibition' orders by the FDIC are available on the FDIC website,²⁰⁶ but the numbers are the total number of orders, so the orders against bank directors cannot be quantified. Unlike the enforcement notices issued by the OCC, it is not possible to analyse the positions held by those being removed. All respondents were charged with having engaged in "unsafe or unsound banking practices, and/or breaches of fiduciary duty, as an

¹⁹⁷ The OCC 'About the OCC <<http://www.occ.treas.gov/about/index-about.html>> Accessed 20 March 2011.

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ Banking Act 1933, Public Law 73-66 at section 12B.

²⁰² General Accountability Office, 'Financial Regulation: Recent Crisis Reaffirms the Need to Overhaul the U.S. Regulatory System' <<http://www.gao.gov/new.items/d091049t.pdf>> Accessed 12 February 2011.

²⁰³ Obtained through searches of the OCC Enforcement Actions Search Tool: The Office of the Comptroller of Currency, 'Enforcement Action Search Tool' <<http://apps.occ.gov/EnforcementActions/>> accessed 16 October 2013.

²⁰⁴ Correct as of 24 October 2013: The Office of the Comptroller of Currency, 'Search Results' <http://apps.occ.gov/EnforcementActions/EnforcementActions_search.aspx> accessed 24 October 2013.

²⁰⁵ Obtained through searches of the OCC Enforcement Actions Search Tool: The Office of the Comptroller of Currency, 'Enforcement Action Search Tool' <<http://apps.occ.gov/EnforcementActions/>> accessed 16 October 2013.

²⁰⁶ FDIC, 'FDIC Enforcement Decisions and Orders' <<http://www.fdic.gov/news/news/press/2013/pr13094a.html>> accessed 13 November 2013.

institution-affiliated party.”²⁰⁷ It is observed that there is no comparable pattern to the two agencies use of disqualification and no conclusive link to the 2007 crisis is apparent. Both agencies disqualified more people in 2005 and 2006 than in 2007 and 2008, suggesting that the crisis has not had an impact on the use of this power. It is notable that the FDIC may disqualify for “unsafe or unsound banking practices”²⁰⁸ as this sets the requirements on the US authorities at a lower standard than in the UK, where disqualification is not deemed appropriate in the case of ordinary commercial misjudgement.²⁰⁹ The use of disqualification appears limited; to a modest proportion in the US and to the most serious cases in the UK; usually where the bank has entered liquidation.²¹⁰ The emphasis in the UK seems to be placed on the state of the company; while it is a going concern, even if only because of a government bailout, the directors are largely assumed to be fit and proper. The majority of disqualification orders are issued only when the company becomes insolvent.²¹¹ This trend is protecting the majority of bank directors from facing disqualification, as their banks have been saved from insolvency through government bailouts. Strangely the bailouts appear to be an intervening act, preventing the directors from having caused the required damages.

It is not clear whether the UK rules regarding disqualification will be amended to utilise this tool and hold those responsible to account. Where directors are saved from the impact of financial sanctions by the companies they preside over, they have been saved from disqualification by a government too afraid to allow those companies to fail. Disqualification is still a civil law measure and appears to be underused; the next consideration is the role criminal law may have to play in holding directors to account.

²⁰⁷ Federal Deposit Insurance Corporation, ‘John J Lannan – First Bank of Beverly Hills’ <<https://www5.fdic.gov/EDOBlob/Mediator.aspx?UniqueID=be30655e-6a1e-48c9-8e26-4df8bc50ff6e>> accessed 24 October 2013.

²⁰⁸ Federal Deposit Insurance Corporation, ‘John J Lannan – First Bank of Beverly Hills’ <<https://www5.fdic.gov/EDOBlob/Mediator.aspx?UniqueID=be30655e-6a1e-48c9-8e26-4df8bc50ff6e>> accessed 24 October 2013.

²⁰⁹ *Re Lo-Line Electric Motors Ltd* [1988] Ch 477.

²¹⁰ *Re Barings plc and others (No 5)* (1999) 1 B.C.L.C 433.

²¹¹ Frances Wilks & Jones LLP, ‘Directors Disqualification Recent Statistics’ <http://www.franciswilksandjones.co.uk/site/business/director_disqualification_london/statistics_dd/> accessed 20 October 2013.

Prison Sentences

“Despite the financial crisis and the spate of miss-selling scandals, we still have not seen anybody sent to jail. Is that because nobody ought to go to jail, or because there is a fundamental failure in the sanctions regime or the legal system in the UK?”²¹²

This question was posed by Andrew Tyrie MP, as Chairman of the Parliamentary Commission on Banking Standards; both the answers he offers to his question are worth considering in relation to bank directors; do bank directors deserve to go to prison? And if they do, has the UK legal system failed because it has failed to obtain criminal convictions? The first question will be considered in conjunction with an analysis of the components of a criminal offence; such as the actus reus, mens rea and causation. It will be seen that obtaining a criminal conviction against a bank director is hindered by the components of a criminal offence being incompatible with corporate structures. Subsequently the hypothetical offence of “reckless risk-taking”²¹³ as proposed by Fisher, will be applied to bank directors. The Financial Services (Banking Reform) Act 2013²¹⁴ does contain a new offence which may hold directors to account; a person commits an offence if while a senior manager he takes a decision, or fails to take a decision, which changes the way the business is carried on, and subsequently the bank fails.²¹⁵ This offence may be too vague and it may still be too difficult to obtain a conviction, it is unlikely that one decision will be identified which can be attributed to the failure of a bank. The second question may then be answered by comparing the convictions and subsequent prison sentences imposed in the UK and the US. As Andrew Tyrie surmises; there have been no convictions relating to the financial crisis, but other convictions will be used to identify the policy in the UK.²¹⁶ The US sentencing policy will also be considered and finally the concluding remarks will highlight the impacts on bank directors.

²¹² Corrected Transcript of Oral Evidence taken before the Parliamentary Commission on Banking Standards on Thursday 17 January 2013, Q2626. Available at: United Kingdom Parliament, ‘Oral Evidence taken before the Parliamentary Commission on Banking Standards on Thursday 17 January 2013’ <www.publications.parliament.uk/pa/jt201213/jtselect/jtpebs/c606-xxiv/c606xxiv.pdf> accessed 31 October 2013.

²¹³ Jonathan Fisher QC et al, ‘The global financial crisis: the case for a stronger criminal response’ (2013) 7(3) Law and Financial Markets Review 159.

²¹⁴ Financial Services (Banking Reform) Act 2013 c.33

²¹⁵ Financial Services (Banking Reform) Bill, HL Bill 2012-2013 to 2013-2014 [54], s.27.

²¹⁶ The case of Kweku Adoboli for example: BBC News, ‘Rogue trader Kweku Adoboli Sentenced for £1.4bn Loss’ <<http://www.bbc.co.uk/news/business-20416866>> accessed 10 December 2012.

Should Bank Directors go to Jail?

Criminal law is the strongest tool a state possesses in relation to controlling and punishing members of society.²¹⁷ Criminal law takes the form of the state against the individual cases and permits the strongest sanctions available to the courts; in the majority of the developed world this is incarceration, but a declining number of countries still impose capital punishment;²¹⁸ some of which use it to punish white collar crime.²¹⁹ Using the LIBOR scandal²²⁰ as an example, it can be seen that obtaining convictions of directors is difficult.²²¹ In relation to the attempted manipulation in the LIBOR scandal, s.2 of the Fraud Act 2006²²² appears to be the most likely offence committed; fraud by false representation. Allen argues this is applicable because “[t]he Fraud Act doesn’t require proof of a consequent loss or gain, provided one was intended by the wrongdoer”²²³ which is consistent with the attempted manipulation as it cannot be ascertained whether loss or gain was actually made, but from the communications between submitters and traders it is clear it was intended. A potential problem here is the requirement for the misrepresentation to be of fact. This is because LIBOR submissions are not facts per se but s.2(3) states that;

“Representation” means any representation as to fact or law, including a representation as to the state of mind of—

- (a) the person making the representation, or
- (b) any other person.”²²⁴

As such Allen argues “[b]y submitting a Libor figure of 4.5, it could be said the submitter was representing that his professional judgment (that is, his state of mind) was that this was the

²¹⁷ Alon Harel, ‘Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions’ (2008) 14(2) LT 113.

²¹⁸ In depth analysis into the use of the death penalty is carried out by Amnesty International: Amnesty International, ‘Death Sentences and Executions in 2012’ <<http://www.amnesty.org/en/library/asset/ACT50/001/2013/en/bbfea0d6-39b2-4e5f-a1ad-885a8eb5c607/act500012013en.pdf>> accessed 21 April 2013.

²¹⁹ Reuters, ‘China Sentences Woman to Death for \$16 million Fund Scam’ <<http://www.reuters.com/article/2012/04/06/us-china-economy-death-idUSBRE83508920120406>> accessed 11 December 2012.

²²⁰ See part 2 for detailed discussion of the LIBOR scandal.

²²¹ Jonathan Fisher QC et al, ‘The global financial crisis: the case for a stronger criminal response’ (2013) 7(3) Law and Financial Markets Review 159.

²²² Fraud Act 2006, s.2.

²²³ D Allen ‘Barclays LIBOR Scandal – What Charges May be Brought?’ (2012) Criminal Law and Justice Weekly, 14 July 2012.

²²⁴ Fraud Act 2006, s.2(3).

correct figure.”²²⁵ The Serious Fraud Office (SFO) is pursuing individuals in relation to the attempted manipulation of LIBOR,²²⁶ charging three people with conspiracy to defraud.²²⁷ There are no prosecutions which are likely to be brought against any directors of the banks involved. This is an issue as between 2007 and 2009 Barclays gave submissions that took into account the negative media coverage they were receiving; the results were intended to portray the bank as in a stronger financial position than it was.²²⁸ Barclays was facing liquidity issues during the financial crisis and senior management believed that the bank’s LIBOR submissions were suggesting the bank was having problems raising funds.²²⁹ This attempted manipulation of LIBOR was suspected as early as 2005,²³⁰ and the subsequent investigation by the FSA concluded the “senior management’s concerns”²³¹ led to “instructions being given by less senior managers”²³² This chain of command within a company arguably renders criminal law incompatibly with corporate structures, and protects the bank directors from liability as there is no identifiable link between the director and the wrongdoing. Fisher et al observe that “in large corporations it is often difficult to prove that directors, or equivalent persons, had a direct hand in the day-to-day running of the company”²³³ as such it is “difficult for the prosecution to establish that any one person carried out all of the elements of the actus reus with the necessary mens rea.”²³⁴ This is especially true in the case of LIBOR; high level management did not directly instruct the lower level management to instruct the submitters to alter their submissions. Senior management merely voiced concern and the rest was implied, this is not a strong enough link to secure a criminal conviction. Fisher et al argues a change of approach is needed in gaining convictions for financial crimes; they propose the creation of a “reckless risk-taking”²³⁵ offence.

²²⁵ D Allen ‘Barclays LIBOR Scandal – What Charges May be Brought?’ (2012) Criminal Law and Justice Weekly, 14 July 2012.

²²⁶ Financial Times, ‘SFO narrows Libor charges’ <<http://www.ft.com/cms/s/0/b5ae82ae-3a73-11e3-b234-00144feab7de.html#axzz2jJqP40r3>> accessed 31 October 2013.

²²⁷ SFO, ‘Brokers Charged In LIBOR Investigation’ <<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/brokers-charged-in-libor-investigation.aspx>> accessed 14 November 2013.

²²⁸ FSA, ‘Final Notice: Barclays PLC’ <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013.

²²⁹ *ibid* at para 13.

²³⁰ BBC News, ‘Timeline: LIBOR-Fixing Scandal’ <<http://www.bbc.co.uk/news/business-18671255>> accessed 12 November 2013.

²³¹ FSA, ‘Final Notice: Barclays PLC’ <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013 at para 14.

²³² *ibid*.

²³³ Jonathan Fisher QC et al, ‘The global financial crisis: the case for a stronger criminal response’ (2013) 7(3) Law and Financial Markets Review 159.

²³⁴ *ibid*.

²³⁵ *ibid*.

Reckless Risk-Taking

In the wake of the financial crisis it has been claimed that bank directors did not understand the risks they were taking, which Fisher et al, argue is clearly reckless. Using RBS as an example; Johnny Cameron, former RBS director, admitted he did not fully understand the risks of derivative trading.²³⁶ Johnny Cameron was Chairman of the Global Banking and Markets Division of RBS, a person in this position should understand the business which their bank undertakes. In light of a situation such as this Fisher et al, argue that a “substantive criminal offence of reckless risk-taking”²³⁷ should exist. It is not possible to prove whether the directors of banks actually knew the risks but a widely drafted offence would mean such knowledge would be irrelevant; if they knew the risks it was reckless, if they did not know the risks it was also reckless. Fisher et al propose this offence should be based upon the principles set out in *R v Sinclair*²³⁸ where the Court of Appeal upheld the trial judge’s jury direction; “It is fraud if it is proved that there was the taking of a risk which there was no right to take which would cause detriment or prejudice to another.”²³⁹ The reckless risk-taking offence would follow that an offence is committed if there was insufficient knowledge to take the risk; it would also be apply where the risk was known. The introduction of such a new offence would suffer from a similar issue to that of the LIBOR offence, it cannot be applied retrospectively. As a result those who have no doubt committed reckless risk-taking cannot be convicted, because it was not an offence at the time they committed it. Additionally the offence suggested, will still potentially only affect low level staff, as the proposed Fisher et al would apply, “where a person recklessly bought or sold a financial instrument on a recognised financial exchange,” and they did not understand that product. This may still be too closely linked to the actions carried out bank staff other than directors; board members rarely purchase the financial instruments, traders will do this instead. The offence is not without merit though; it could be reworded so that directors should understand the liabilities involved in the products they buy. This may provide a realistic threat of criminal liability for bank directors. Such a rewording may be;

Where a person recklessly purchased or sold, or oversaw the purchase or sale of, a financial instrument on a recognised financial exchange and did not understand the product, or understood but still took the risk.

²³⁶ Jonathan Fisher QC et al, ‘The global financial crisis: the case for a stronger criminal response’ (2013) 7(3) Law and Financial Markets Review 159.

²³⁷ *ibid.*

²³⁸ *R v Sinclair* [1968] 1 WLR 1246.

²³⁹ *ibid* per Widgery LJ at 1251 quoting *R. Kilner Brown Q.C.* from the case at the Central Criminal Court.

This working would expand the offence to be applicable to directors. Not all commentators agree that bankers should go to prison for their wrongdoing; Goplan argues the individuals should face prohibition orders and non-custodial sentences, subsequently they can then contribute to society in other industries;²⁴⁰ enabling them to pay back their debts to society which they cannot do from jail. While this argument may have value to it, banned bankers may be able to repay their social debt through working in other industries, it is difficult to quantify this debt and such measures do not serve as punishment. Additionally it is difficult to see how it is 'just' for one class of criminal to avoid prison while another does not, save the existing scale where sentences are linked to the severity of the crime. Goplan's ideas come from earlier work by Becker on the pros and cons of prison against the purposes and benefits of criminal law.²⁴¹ Becker and Goplan argue that different individuals are affected more by prison sentences; for example an unemployed man convicted of theft will lose his freedom, whereas a banker convicted of theft will lose his job, his freedom and the likelihood of obtaining a future job to the level he previously had. Goplan thus argues that merely the criminal conviction will serve as punishment to the banker as he will lose his job and damage his future employability, the unemployed man has no job to lose so can only be punished with a prison sentence. This argument may split opinion; while it may be accepted by some, others will argue that all people should be treated equally under the law and thus face the same punishments. In the case of bank directors it is difficult to view losing their position as adequate punishment as they may still retire on sizable pensions²⁴² and assets already acquired.²⁴³

Has the UK Legal System Failed?

As stated above, no bank director has been put in prison for their role in 2007 financial crisis; this chapter argues that this is not evidence in itself that the UK legal system has failed. Andrew Tyrie's question is clearly phrased so as to provoke a reaction and is evidence of an anti-bank sentiment arising as a popular political stance, with all the main party leaders backing stronger

²⁴⁰ Sandeep Goplan, 'Should Corporate Fiduciaries who Commit White Collar Crimes be Jailed?' (Fighting Financial Crime in the Global Economic Crisis: Policy, Trends and Sanctions, Bristol, November 2012).

²⁴¹ Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 J Pol Econ 169.

²⁴² Fred Goodwin's pension has been of keen media interest, having retired, it has been reduced significantly since he retired but it is still in the hundreds of thousands per year: BBC News, 'Former RBS Boss Fred Goodwin Stripped of Knighthood' <<http://www.bbc.co.uk/news/uk-politics-16821650>> accessed 12 November 2013.

²⁴³ Forbes, 'Barclays' Diamond IS Worth \$42 Million' <http://www.forbes.com/2008/03/28/diamond-barclays-capital-face-markets-cx_vr_0327autofacescan01.html> accessed 15 November 2013.

regulation.²⁴⁴ To assess the claimed failure of the UK legal system it is of use to assess some examples of successful convictions for financial crime, comparing these to that of the US and the subsequent prison sentences given. The fraudulent rogue trader Kweku Adoboli is the most prominent financial crime case to come to court in the UK in recent times, sentenced to 7 years in prison after causing £1.4bn in losses.²⁴⁵ Prior to this, in May 2012 the Travers Smith Regulatory Investigations Group had described 2012 as a “quieter few months”²⁴⁶ in relation to criminal cases, however they did point out that 20 individuals were facing trial at the time.²⁴⁷ Some of these can be seen to have yielded convictions; a four and a half year sentence for money laundering in April,²⁴⁸ three convictions for insider dealing received a total of nine years and ten months in June,²⁴⁹ and six more insider dealing convictions resulting in total sentences of sixteen years in July.²⁵⁰ Adoboli was given the maximum sentence available for fraud,²⁵¹ but this sentence is much shorter than those enforced in the US, as will be seen below. Azil Nadir was sentenced to 10 years in prison in 2012 for theft from Polly Peck, after returning to the UK to face charges.²⁵² While this is a longer sentence to that of Adoboli it was for a total of 10 offences; UK sentences tend to run concurrently rather than consecutively. Nadir could have expected his sentences to run consecutively in the US instead.²⁵³ Harrison discusses the aims of sentencing,²⁵⁴ outlining punishment, deterrence, rehabilitation, incapacitation and reparation as the aims of sentencing in the UK; codified in s.142 of the Criminal Justice Act.²⁵⁵

²⁴⁴ ED Miliband: BBC News, ‘Ed Miliband Seeks Banker Disciplinary Code’ <<http://www.bbc.co.uk/news/uk-politics-14869650>> accessed 17 November 2013 Nick Clegg: Financial Times, ‘Clegg Raises Banker-Bashing Rhetoric’ <<http://www.ft.com/cms/s/0/37b4f414-4c1e-11e0-82df-00144feab49a.html#axzz2kwb90YKQ>> accessed 17 November 2012 and Cameron: Financial Times, ‘David Cameron Backs Criminal Sanctions for ‘Reckless’ Bankers’ <<http://www.ft.com/cms/s/0/3a711c1c-d8b4-11e2-a6cf-00144feab7de.html#axzz2kwb90YKQ>> accessed 17 November 2013.

²⁴⁵ BBC News, ‘Rogue trader Kweku Adoboli Sentenced for £1.4bn Loss’ <<http://www.bbc.co.uk/news/business-20416866>> accessed 10 December 2012.

²⁴⁶ Travers Smith Regulatory Investigations Group, ‘FSA Enforcement Action: Themes and Trends’ (2012) 96 (May) C.O.B 1 at p.4.

²⁴⁷ *ibid.*

²⁴⁸ FSA, ‘FSA Secures Four and a Half Year Jail Sentence for Man Convicted of Laundering Boiler Room Funds’ <<http://www.fsa.gov.uk/library/communication/pr/2012/045.shtml>> accessed 10 December 2012.

²⁴⁹ FSA, ‘Three Sentenced for Insider Dealing’ <<http://www.fsa.gov.uk/library/communication/pr/2012/067.shtml>> accessed 10 December 2012.

²⁵⁰ FSA, ‘Six Sentenced for Insider Dealing’ <<http://www.fsa.gov.uk/library/communication/pr/2012/080.shtml>> accessed 10 December 2012.

²⁵¹ CPS, ‘Fraud, False Accounting, Fraudulent Evasion of VAT, False Statement for Vat Purposes, Conduct Amounting to an Offence’ <http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/fraud> accessed 20 December 2012.

²⁵² BBC News, ‘Asil Nadir Jailed for 10 Years for Polly Peck Thefts’ <<http://www.bbc.co.uk/news/uk-19352531>> accessed 17 November 2013.

²⁵³ The Guardian, ‘Why do US judges give such long prison sentences?’ <<http://www.theguardian.com/law/shortcuts/2012/mar/07/us-judges-long-prison-sentences>> accessed 20 November 2013.

²⁵⁴ Karen Harrison in Nicholas Ryder, *Financial Crime in the 21st Century* (Edward Elgar 2011) at p.253.

²⁵⁵ Criminal Justice Act 2003, s.142.

Harrison notes that the sentencing policy in relation to financial crime has become predominately aimed at punishment and deterring others from committing offences.²⁵⁶ In light of this, it still may be said that the UK legal system has failed, no banker has been jailed, only lower level cases of financial crime have been prosecuted, as no offences are applicable to those responsible for the recent crises. In assessing the sentencing aims, the actions of the US provide a comparison with a country facing similar issues to the UK.

US Approach

The US has much higher maximum sentences for financial crime than the UK and has had a fraud offence since 1872;²⁵⁷ China is even stricter, it uses the death penalty for some white-collar crimes.²⁵⁸ The US has a maximum prison sentence of 30 years for fraud and money laundering;²⁵⁹ it criminalises a wide range of fraudulent activities, and often sets sentences to run consecutively.²⁶⁰ Offences attracting prison sentences include; mail fraud,²⁶¹ bank fraud²⁶² and securities and commodities fraud.²⁶³ The record prison sentence for fraud was given to Shalom Weiss in 2000; he received a total of 845 years; his accomplice was sentenced to 740 years.²⁶⁴ In an even more high profile conviction Bernard Madoff was sentenced to 150-year imprisonment in 2009 for fraud amounting to \$50bn;²⁶⁵ and Alex Stanford received a 110 years sentence for operating a \$7bn Ponzi²⁶⁶ scheme.²⁶⁷ These are extreme examples but cases are frequent, for example a sentence from as recent as 11 December 2012, a 6 and a half year

²⁵⁶ Karen Harrison in Nicholas Ryder, *Financial Crime in the 21st Century* (Edward Elgar 2011) at p.253.

²⁵⁷ Mail Fraud Statute 1872 now found in the Criminal Code: 18 U.S.C §1341.

²⁵⁸ Reuters, 'China Sentences Woman to Death for \$16 million Fund Scam' <<http://www.reuters.com/article/2012/04/06/us-china-economy-death-idUSBRE83508920120406>> accessed 11 December 2012.

²⁵⁹ Nicholas Ryder, *Financial Crime in the 21st Century: Law and Policy* (Edwin Elgar 2011) at p266.

²⁶⁰ The Guardian, 'Why do US Judges Give Such Long Prison Sentences?' <<http://www.guardian.co.uk/law/shortcuts/2012/mar/07/us-judges-long-prison-sentences>> accessed 13 December 2012.

²⁶¹ 18 U.S.C §1341.

²⁶² *ibid* §1344.

²⁶³ *ibid* §1348.

²⁶⁴ Nicholas Ryder, *Financial Crime in the 21st Century: Law and Policy* (Edwin Elgar 2011) at p280.

²⁶⁵ BBC News, 'Fraudster Madoff gets 150 years' <<http://news.bbc.co.uk/1/hi/business/8124838.stm>> accessed 11 December 2012.

²⁶⁶ "This is a common form of investment fraud. The manager creates the appearance of success through impressively large and/or regular payments to early supporters, but the money actually comes from funds gathered from new investors." Financial Times, 'Lexicon: Ponzi Scheme' <<http://lexicon.ft.com/Term?term=Ponzi-scheme>> accessed 18 November 2013.

²⁶⁷ BBC News, 'Allen Stanford jailed for 110 years for \$7bn Ponzi' <<http://www.bbc.co.uk/news/world-us-canada-18450893>> accessed 18 November 2013.

sentence for a \$1.3 million phishing scheme;²⁶⁸ only half a year less than Adoboli for the loss of less than 10% that of Adoboli. Cases such as this show the willingness of the US to criminalise and imprison financial criminals for long periods of time, much longer than in the UK. Despite this the US authorities are in a similar situation to the UK when considering the criminal liability of bank directors. While the US have recently imprisoned a former Goldman Sachs board member jailed for 11 years,²⁶⁹ this was for insider trading; a specific offence, not directly linked to the financial crisis or recent banking scandals. The anti-banker sentiment which is observable in the UK, is also present in the US,²⁷⁰ commentators have argued more bankers should be in jail,²⁷¹ but those likely to be convicted will be lower level staff; not those in control. The reason behind this, as identified by Fisher et al, is that the components of a criminal offence are incompatible with corporate structures; as such those who are in control of the company are rarely close enough to the actual actions of the business to be able to commit criminal offences.²⁷² It can be seen that the US approach to sentencing is a scaled up version of the UK approach; this is a similar observation to that of US and UK approaches to financial sanctions against banks. This still does not provide a clear indication as to which jurisdiction holds directors to account more effectively; the only successful convictions have been against low level employees or for specific offences not linked to the recent crisis or scandals. To ascertain where there is “a fundamental failure in the sanctions regime or the legal system in the UK” the exact nature of the question must be clarified. If it asks whether the authorities using the legal system have failed, then it would be unfair to say this based on convictions of bank directors. Regulators cannot obtain convictions without offences to prosecute them for. Alternatively if the laws the UK legal system uses in its sanctions regime are to be considered, then it could be argued that there has been a fundamental failure. At present there have been no convictions of bank directors, because there are no applicable offences to by which to hold

²⁶⁸ FBI, ‘Georgia Man Sentenced to 75 Months in Prison for Role in \$1.3 Million Phishing Fraud Scheme’ <<http://www.fbi.gov/newark/press-releases/2012/georgia-man-sentenced-to-75-months-in-prison-for-role-in-1.3-million-phishing-fraud-scheme>> accessed 12 December 2012.

²⁶⁹ BBC News, ‘Former Goldman Sachs Board Member Jailed for Two Years’ <<http://www.bbc.co.uk/news/business-20075612>> accessed 15 April 2013.

²⁷⁰ New York Times, ‘Obama Presses for Action on Bank Rules’ <http://www.nytimes.com/2013/08/20/business/obama-presses-for-action-on-bank-rules.html?_r=0> accessed 17 November 2013, Bloomberg, ‘Warren Joins McCain to Push New Glass-Steagall Law for Banks’ <<http://www.bloomberg.com/news/2013-07-11/warren-joins-mccain-to-push-new-glass-steagall-bill-for-banks.html>> accessed 17 November 2013 and The Street, ‘Bill Clinton's Solution for 'Too Big to Jail' Banks’ <<http://www.thestreet.com/story/12105874/1/bill-clintons-solution-for-too-big-to-jail-banks.html>> accessed 17 November 2013.

²⁷¹ David D Hale, ‘Jail the Bankers: The Great Mystery of Why More US Bankers aren’t being Prosecuted’ (2010) 24(1) International Economy 46.

²⁷² Jonathan Fisher QC et al, ‘The global financial crisis: the case for a stronger criminal response’ (2013) 7(3) Law and Financial Markets Review 159.

them accountable. The corporate structure seen in banks and other companies is not a new phenomenon and the law should have adapted prior to the recent crises.

Alternative measures

It has been seen in the previous parts of this chapter that the sanctions currently preferred by regulators have little impact upon bank directors, such as with financial sanctions, or are not directly applicable to their wrongdoing, such as criminal charges and prison sentences. With this in mind, this part of the chapter highlights some alternative punishments, aimed at directly impacting on bank directors by holding them to account for their actions. Revoking a bank's licence to undertake regulated activities has been raised as a potential punishment for wrongdoing;²⁷³ this would essentially force the closure of a bank as it would be unable to continue to operate. As with financial sanctions, this is a punishment on the entire bank, not just the directors, but it will have a direct impact on them as it will most likely cause the bank to cease operations. This step arguably punishes a lot of innocent individuals, who will lose their jobs as a result; not only those employed by the bank will suffer, millions of deposits would be affected and any individual or firm contractually linked with the bank may be exposed.²⁷⁴ Considering the ramifications of such action, it may not be viable sanction in order to punish individuals. While licence revocations remain unlikely, media reports suggested it was used as a threat by the FSA in an attempt to force banks to comply with bonus caps.²⁷⁵ The threat of such action can have damaging consequences on banks, as can be seen in the wake of Standard Chartered being accused of aiding Iran in a money laundering scheme by the New York State Department of Financial Services (NYDFS).²⁷⁶ The combination of a \$340million financial sanction and the threat of losing its New York banking licence caused a 16.7% drop in the share price of Standard Chartered. However, as seen with Barclay's share price in relation

²⁷³ The Telegraph, 'Banks told to Comply on Bon uses or Lose UK Licences in Shock FSA Ultimatum' <<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/7141221/Banks-told-to-comply-on-bonuses-or-lose-UK-banking-licences-in-shock-FSA-ultimatum.html>> accessed 30 October 2013.

²⁷⁴ See the Enron Scandal: John Armour and Joseph A. McCahery, 'After Enron: Improving Corporate Law and Modernizing Securities Regulation in Europe and the US' (2006) 57(1) ICLQ 244, Ana Hajduka, 'The Enron Collapse: Justice and Fairness as a Theoretical Background for Ultimate Market Efficiency' (2002) 9 UCL Juris Rev 30, and BBC News, 'Anderson Guilty in Enron Case' <<http://news.bbc.co.uk/1/hi/business/2047122.stm>> accessed 17 November 2013.

²⁷⁵ The Telegraph, 'Banks told to Comply on Bon uses or Lose UK Licences in Shock FSA Ultimatum' <<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/7141221/Banks-told-to-comply-on-bonuses-or-lose-UK-banking-licences-in-shock-FSA-ultimatum.html>> accessed 30 October 2013.

²⁷⁶ BBC News, 'Standard Chartered Shares Plunge on Laundering Charges' <<http://www.bbc.co.uk/news/business-19159286>> accessed 11 November 2013.

to the LIBOR financial sanctions, the Standard Chartered share price soon recovered and eventually surpassed its pre-financial sanction value.

Comparable to Barclays recovery, the Standard Chartered share price fully recovered within six to 8 months and have gone on to surpass the share value held before the licence threat was made. This may be because it was unlikely that the bank would really lose its licence; it would be an unprecedented action in the circumstances and Standard Chartered is considered a 'Global Systemically Important Bank'²⁷⁷ by the Financial Stability Board.²⁷⁸ Global systemic importance suggests Standard Chartered would be considered 'too big to fail'²⁷⁹ which makes it very unlikely it would be forced to fail. It is not possible to distinguish the effect of the financial sanction on the share price to that of the licence revocation threat. However, it is possible to determine that the effect was temporary, and as such serves as little real punishment to the bank and no direct punishment on the directors. An example of regulators carrying out licence revocation can be seen in Sweden; here 'HQ Bank' had its licence revoked due to deficiencies in trading operations.²⁸⁰ Here the size of the bank is relevant as HQ Bank was described as a niche bank, it was not a major bank²⁸¹ and it was not considered too big to fail. Secondly the bank's licence was revoked because it was in financial difficulty; it was not used as a punishment.

The issue with licence revocation is that it is potentially the strongest measure a regulator can take against an institution; it is difficult to justify such a measure. The issue of sanctions imposed fitting the offences committed is explored by Ayres and Braithwaite,²⁸² they argue that the severity of an offence determines the range of sanctions which are politically acceptable to impose. Taking licence revocation as Z, it is only applicable in instances where offences are as serious as E, as a result it will only be applicable in a very small number of

²⁷⁷ Financial Stability Board, '2013 update of group of global systemically important banks (G-SIBs)' <http://www.financialstabilityboard.org/publications/r_131111.pdf> accessed 17 November 2013.

²⁷⁸ Financial Stability Board, 'Financial Stability Board' <<http://www.financialstabilityboard.org/>> accessed 17 November 2013.

²⁷⁹ Treasury Committee, 'Too Important to Fail - Too Important to Ignore' HC (2009-10) 261-1.

²⁸⁰ The Financial Times, 'Swedish Regulator Revokes KQ Bank's Licence' <<http://www.ft.com/cms/s/0/39c5ef50-b296-11df-b5ab-00144feabdc0.html#axzz2kH3RgQWQ>> accessed 11 November 2013.

²⁸¹ *ibid.*

²⁸² Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Social-Legal Studies, OUP, 1992).

cases. The issue highlighted by Ayres and Braithwaite's theory is that there may be gaps in the sanction regime; it may be that no sanctions are politically acceptable to impose for an offence. As a result a sanction may either be too weak or unjustifiably strong. Ayres and Braithwaite suggest that a sanctions regime may have not measures applicable for certain offences as a lesser sanction may be too weak but the next sanction available may be too strong. Some sanctions have variable severity; financial sanctions for example may be of greater or lesser severity depending on the size of the financial sanction; but as has been explored above, the effectiveness of this punishment is questionable. Prison sentences may also be considered as a sanction as severe as possible, this may too only be applied in the most serious cases.

Licence revocation is an unlikely punishment for large banks; the size of these companies, and the share of the market they hold, has made them 'too big to fail', or too big to be allowed to fail for fear of the impact it would have.²⁸³ 'Too big to fail' status is subjective, dependent on the institution's size, the size of the economy it is in, or country it is based, and its market share.²⁸⁴ The label 'too big to fail' is not publically given to a company and arguably is only explicitly clear when the institution is bailed out by the government. It can often be gauged beforehand, and this is seen to increase the risk such firms will take in the knowledge they will be saved by the government should they get into trouble.²⁸⁵ It is very unlikely that a bank which is considered 'too big to fail' is going to have its licence revoked and essentially be made to fail; it would also appear unjust to punish so many individuals for the actions of a few. The concept of limited liability protects the members of a company from liability for the debts of a company; the company is considered a legal person and may acquire its own assets and be liable for its own debts.²⁸⁶ This principle stretches to the employees of that company, they are not personally liable for the debts of the company; the company is liable as a legal person.²⁸⁷ There are exceptions to this principle, in certain circumstances, under the Insolvency Act 1986,²⁸⁸ directors of companies may be personally liable for the debts of their companies; however, this only becomes applicable where the company has gone into liquidation. This is of relevance when discussing bank directors as, save for the bailouts, it is highly likely numerous banks would have become insolvent, and many directors may have become

²⁸³ Treasury Committee, 'Too Important to Fail - Too Important to Ignore' HC (2009-10) 261-1.

²⁸⁴ Northern Rock being an example of a relatively small firm being in position of systemic importance.

²⁸⁵ See Arthur E. Wilmarth, Jr., 'The Transformation of the U.S. Financial Services Industry, 1975-2000: Competition, Consolidation, and Increased Risks' (2002) U ILL L REV 215.

²⁸⁶ Palmer's Company Law, Volume 1 Part 2 Chapter 2.0.

²⁸⁷ Palmer's Company Law, Volume 1 Part 2 Chapter 2.0.

²⁸⁸ Insolvency Act 1986.

personally liable under s.214 of the Insolvency Act,²⁸⁹ for wrongful trading. Section 214 “applies in relation to a person if-

- (a) the company has gone into insolvent liquidation,
- (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and
- (c) that person was a director of the company at the time²⁹⁰

Clearly this cannot apply to bank directors where government intervention has prevented insolvency; but without the bailouts the directors may satisfy the s.214(2) criteria. If s.214 is satisfied the court may order the director(s) to make a contribution to the company’s liabilities. While such a punishment is currently unobtainable through the Insolvency Act, Business Secretary, Vince Cable has expressed his intentions to make directors personally liable,²⁹¹ and is reported to support the proposal that directors should be liable for the failure of companies.²⁹² Cable’s language is typically broad; strong words such as “tough measures to beef up the system”²⁹³ appear well in the press but give no detail of the wording of legislation, so are largely irrelevant. Proposing personal liability for directors provokes contrasting responses; some suggest it will “focus bank directors’ minds;”²⁹⁴ while, perhaps unsurprisingly, the Institute of Directors argue the personal liability would be counter-productive, impeding the work of company directors.²⁹⁵ The proposals may still be inapplicable to many bank directors, as they will only be liable upon the failure of the company, which is unlikely in the case of a large enough bank, considered ‘too big to fail’. The US have sought to impose liability upon banks directors through the Dodd Frank Act,²⁹⁶ worryingly, there appears to already be advice for

²⁸⁹ *ibid.*, s.214.

²⁹⁰ *ibid.*, s.214(2).

²⁹¹ BBC News, ‘Vince Cable: Make Directors Liable for Failure’ <<http://www.bbc.co.uk/news/business-23306086>> accessed 01 November 2013.

²⁹² BBC News, ‘Vince Cable: Make Directors Liable for Failure’ <<http://www.bbc.co.uk/news/business-23306086>> accessed 01 November 2013.

²⁹³ *ibid.*

²⁹⁴ Money Marketing, ‘E&Y: Personal Liability Would Focus Bank Directors’ Minds’ <<http://www.moneymarketing.co.uk/1054166.article>> accessed 05 November 2013.

²⁹⁵ Institute of Directors, ‘Press Release: Banking Commission’s Personal Liability move could be Counter-Productive’ <<http://www.iod.com/influencing/press-office/press-releases/banking-commissions-personal-liability-move-could-be-counter-productive-says-iod>> accessed 06 November 2013.

²⁹⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act Public Law 111-203 Enacted 21 July 2010

avoiding such liability.²⁹⁷ Regulators will pursue individuals for wrongdoing whilst working for the bank, including the directors; such enforcement actions may result in personal financial sanctions. In 2009 the FSA imposed a £100,000 financial sanction on UBS CEO John Pottage²⁹⁸ for his failings in overseeing regulated activity. During his tenure traders at UBS engaged in unauthorised trading to cover up losses.²⁹⁹ This had demonstrated the power of bank regulators to punish those who were supposed to supervise, however this punishment was overturned on appeal to the Upper Tribunal.³⁰⁰ The Upper Tribunal were not satisfied that the FSA had proven the steps Pottage took were not reasonable, although the court did agree the risk management systems were deficient. McCluskey suggests the Tribunal will continue to “take a sympathetic view of the conduct of those holding senior positions in regulated entities.”³⁰¹ Personal financial sanctions are much more likely to be imposed on the lower level members of staff, actively carrying out the wrongdoing. An example of this can be seen in the same event for which John Pottage was fined for; the wrongful trading at UBS in 2006 resulted in individual financial sanctions for the traders, who committed the offences.³⁰² The use of personal personal financial sanctions by the FSA in the whole of 2012 may be compared to those imposed in just December of 2012 by the SEC in the US.³⁰³ The SEC imposed financial sanctions in December 2012 which equated to over 3 times the total value of financial sanctions imposed by the FSA during the whole year, and on average the SEC will fine an individual over 5 and a half times the amount the FSA would. This situation is similar to the comparison of company financial sanctions between the two countries; a clear difference in approach can be seen, the US regulators will regularly impose much higher penalties than the UK. What is not known from these statistics is the impact this has upon the directors. It can be surmised that a director will face a much higher financial sanction if he or she were in the US than the UK;

²⁹⁷ Pillsbury Law, ‘How Bank Directors Avoid Personal Liability in the post Dodd-Frank Era’ <<http://www.pillsburylaw.com/publications/how-bank-directors-avoid-personal-liability-in-the-post-dodd-frank-era>> accessed 08 November 2013.

²⁹⁸ David McCluskey, ‘The Buck Stops Where? Regulatory Action Against Senior Managers Post FSA v John Pottage’ (2012) 8 JIBFL 490.

²⁹⁹ *ibid.*

³⁰⁰ *John Pottage v The Financial Services Authority* [2013] Lloyd’s Rep FC 16.

³⁰¹ David McCluskey, ‘The Buck Stops Where? Regulatory Action Against Senior Managers Post FSA v John Pottage’ (2012) 8 JIBFL 490 at 491.

³⁰² Hannah Laming, ‘FSA v UBS: Will Big Fines Change Banks’ Attitudes to Risk Management?’ (2013) 1 JIBFL 41.

³⁰³ Complied using FSA, ‘Fines Tables 2012’ <<http://webarchive.nationalarchives.gov.uk/20130301170532/http://www.fsa.gov.uk/about/press/facts/fines/2012>> accessed 06 November 2012 and SEC, ‘Litigation Releases Archive 2012’ <<http://www.sec.gov/litigation/litreleases/litrelarchive/litarchive2012.shtml>> accessed 06 November 2013. Based on Exchange rate of 1GBP=1.625924USD correct on 31/12/2012: XE, ‘Current and Historical Rate Tables: GBP’ <<http://www.xe.com/currencytables/?from=GBP&date=2012-12-31>> accessed 06 November 2013.

but the financial sanction statistics do not distinguish what position the individual held. Based on these statistics, it is arguable that the UK may be advised to consider increasing its use of personal financial sanctions to come into line with the US; counter wise it may be argued that the UK is much smaller than the US and will impose fewer financial sanctions. In 2012 UK GDP was £2,435,173,775,671,³⁰⁴ US GDP in 2012 was \$15,684,800,000,000;³⁰⁵ 6 times that of the UK. Perhaps the UK should be expected to impose fewer financial sanctions and to a lesser value, as the punishment should be relative to the economy it is imposed within.

Conclusion

This chapter has explored a number of sanctions and their applicability to bank directors. Financial sanctions appear to be the most appropriate measure where the damage is quantifiable, as demonstrated by the PPI scandal, where financial sanctions are used to correct improper advantages. Financial sanctions are limited though, and do not necessarily hold the directors of a bank to account, the penalties being paid by the banks. The financial sanctions are arguably not a punishment for the banks either, as shown when comparing the sanctions to the profits of banks; the combined financial sanctions imposed by UK and US authorities on Barclays for attempted LIBOR manipulation equated to less than 5% of the banks 2012 profits.³⁰⁶ The insignificance of the financial sanctions in relation to bank profits support the suggestion that they do not serve as a credible deterrence; an argument which is further supported by the repeated offences of UBS in relation to their inadequate risk management systems.³⁰⁷ It would perhaps be more appropriate to impose the sanction on the part of the bank which offends. Should the £160 million financial sanction against UBS have been applied to the desk responsible, it would have accounted for 15% of that desk's profits.³⁰⁸ UK and US approaches to financial sanctions show a clear difference in policy; the US imposes much

³⁰⁴ World Bank, 'GDP (current US\$)' <<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>> accessed 12 November 2013.

³⁰⁵ *ibid.*

³⁰⁶ Based on profits of £7,048 million: Barclays, 'Annual Report 2012' <<http://reports.barclays.com/ar12/servicepages/welcome.html>> accessed 20 August 2013 and combined fines of £296.7 million: FSA, 'Final Notice: Barclays PLC' <<http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>> accessed 03 April 2013, Commodity Futures Trading Commission, 'CFTC Ordered Barclays to Pay \$200 Million Penalty for Attempted Manipulation of and False Reporting concerning LIBOR and Euribor Benchmark Interest Rates' <<http://www.cftc.gov/PressRoom/PressReleases/pr6289-12>> accessed 04 April 2013 and The United States Department of Justice, 'Barclays Bank PLC Admits Misconduct Related to Submissions for the London interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty' <<http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>> accessed 04 April 2013.

³⁰⁷ Hannah Laming, 'FSA v UBS: Will Big Fines Change Banks' Attitudes to Risk Management?' (2013) 1 JIBFL 41.

³⁰⁸ *ibid.*

higher sanctions on a regular basis. While this shows a stronger approach, the effectiveness of financial sanctions still appears limited. Banks can still absorb these financial sanctions, and the continual stream of settlements suggests they are not serving as a deterrence, and only in limited circumstances may they correct the damage caused. The comparison between the US and the UK suggests increasing the financial sanctions is not the answer; the US imposes higher fines but faces the same persisting issues. It is suggested that the UK adopts the US policy of imposing clear disgorgement orders to clearly indicate the functions each part of the financial sanction is intended to achieve. As financial sanctions do not appear to hold directors to account, disqualification may do, but unfortunately this tool appears to be underused. This underuse could be caused by a number of factors, one of which is the legislation available. The Company Directors Disqualification Act 1986 places emphasis on the company being insolvent before the director is disqualified. This prevents bank directors from facing such measures as banks have not been allowed to go insolvent; instead they have been saved by government bailouts. Reports in the media suggest an imminent increase in the use of disqualification,³⁰⁹ but no action has been taken. Another factor is the limited actions of the regulators; it has been seen that the financial crisis of 2007 has had no identifiable impact on the number of directors being disqualified. This may be due to the legislation, however, the FCA has the power to remove directors with prohibition orders or by removing the authorised required to hold such a position. Numbers of prohibition orders issued remain unknown and the use of this sanction requires greater analysis. The previous regulator, the FSA, was abolished because of its failure to act,³¹⁰ its successor, the FCA should be seen to use its powers where the FSA did not. Patterns in the use of disqualification are also difficult to see in the US, as no relationship between the crisis and disqualification statistics can be seen, but a stronger willingness to disqualify bank directors can be seen; bank directors have been disqualified in the US,³¹¹ unlike in the UK. The use of disqualification appears limited but even more limited is the use of

³⁰⁹ The Independent, 'Cameron Pledges to Punish Bankers' <<http://www.independent.co.uk/news/uk/politics/cameron-pledges-to-punish-bankers-1128207.html>> accessed October 12 2013 and Liberal Democrat Voice, 'Bank Chiefs Should be Disqualified – Clegg' <<http://www.libdemvoice.org/bank-chiefs-should-be-disqualified-clegg-12143.html>> accessed 12 October 2013, The Telegraph, 'Cable to push for disqualification of disgraced bankers' <<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/10178287/Cable-to-push-for-disqualification-of-disgraced-bankers.html>> accessed 22 October 2013, and Parliamentary Commission on Banking Standards, '*An Accident Waiting to Happen*': *The Failure of HBOS* (2012-2013 HL 144, HC 705).

³¹⁰ Treasury Committee, 'The Run on the Rock' HC (2007-08) 56-1.

³¹¹ Assessing the 12 disqualifications in 2013, 3 were against former board members of banks. Of the 15 disqualifications in 2012, only 2 were against board members; despite the low numbers, this still demonstrates a stronger willingness than UK authorities to disqualify directors: Obtained through searches of the OCC Enforcement Actions Search Tool: The Office of the Comptroller of Currency, 'Enforcement Action Search Tool' <<http://apps.occ.gov/EnforcementActions/>> accessed 16 October 2013.

criminal convictions and prison sentences; no bank director has been convicted of criminal offences for their part in the 2007 financial crisis and the recent scandals, and no bank director has gone to jail. This failure is not because of inaction by the appropriate authorities, this is because it is “difficult for the prosecution to establish that any one person carried out all of the elements of the actus reus with the necessary mens rea”³¹² Bank directors are too removed from any criminal acts to be held accountable, subsequently Fisher et al propose a new offence of “reckless risk-taking”³¹³ which would apply to bank directors. This chapter suggests such an offence may be applicable where:

A person recklessly purchased or sold, or oversaw the purchase or sale of, a financial instrument on a recognised financial exchange and did not understand the product, or understood but still took the risk.

The lack of such an offence is a common issue between the UK and the US; although the UK is in the process of passing legislation which may create a new offence relating to bank directors decisions.³¹⁴ A difference between the jurisdictions is shown by the contrasting approach to sentencing demonstrated in this chapter; the US clearly impose much longer sentences, both in terms of maximum sentences for an offence and through imposing consecutive sentences rather than concurrent sentences. This comparison is clear through analysis of the Kweku Adoboli and Azil Nadir cases in the UK to the cases of Bernard Madoff and Alex Stanford in the US. As with financial sanctions it is impossible to ascertain whether the higher sentences serve as a stronger deterrence, offences continue to be committed. Given the issues with the previous three sanctions; financial sanctions, disqualification and prison sentences, an analysis of some alternative measures was undertaken. This proved largely inconclusive; licence revocation can be largely dismissed due to the extreme nature of this sanction and subsequent ramifications, personal liability also remains unlikely. The threat of licence revocation had a marked impact on the share price of Standard Chartered in 2012, shown in Figure 8 in part 6, but this was temporary, much like the impact of the LIBOR sanctions on Barclays shown in Figure 4 in part 2. Threats of licence revocation are largely seen as empty when the systemic importance of

³¹² Jonathan Fisher QC et al, ‘The global financial crisis: the case for a stronger criminal response’ (2013) 7(3) Law and Financial Markets Review 159.

³¹³ *ibid.*

³¹⁴ Financial Services (Banking Reform) Bill, HL Bill 2012-2013 to 2013-2014 [54], s.27.

bank is considered, thus reducing the effectiveness of making such a threat. The issue of ‘too big to fail’ is still pertinent, and has now effectively been made public on a global scale by the Financial Stability Board’s list of ‘Global Systemically Important Banks’.³¹⁵ Personal financial sanctions and personal liability are also considered unlikely despite their merits as considered within part 5. Personal liability of directors was seen to apply in a similar fashion to the laws relating to director disqualification, relying upon the bank to be insolvent.³¹⁶ Proposals for the circumstances leading to personal liability to be widened received support from various sources,³¹⁷ but were opposed by the Institute of Directors who argued that personal liability would be counter-productive.³¹⁸ The proposals did not go far enough; failure of the company was still required, which is unlikely in the case of a large enough bank, considered ‘too big to fail’. Personal financial sanctions are found to be underused in the UK, especially in comparison to the US; the comparison shows a similar pattern to that seen when assessing financial sanctions on the whole bank. US fines are much higher than those in the UK. It can also be seen that the US authorities use this sanction more frequently than the UK.

Comparing the UK to the approach of the US, a clear theme is present. The UK imposes far smaller financial sanctions, far shorter prison sentences and it also appears to be less varied in the sanctions it imposes. In the defence of the UK, it could be argued that the UK is much smaller than the US, so will impose fewer sanctions. While this is true the size of the sanctions should be comparable, especially when they are imposed for the same offence, such as in the LIBOR cases. The variety in sanctions is important as it increases the deterrence effect of the sanctions, “[T]he bigger and more various are the sticks, the greater the success regulators will achieve by speaking softly.”³¹⁹ The UK authorities have arguably become too predictable, so the effect of the deterrence is diminished. Banks may expect a financial sanction and can accept that sanction; as shown through the analysis in part 2. The UK regime lacks the variety to cover

³¹⁵ Financial Stability Board, ‘2013 update of group of global systemically important banks (G-SIBs)’ <http://www.financialstabilityboard.org/publications/r_131111.pdf> accessed 17 November 2013.

³¹⁶ Insolvency Act 1986, s.214.

³¹⁷ See BBC News, ‘Vince Cable: Make Directors Liable for Failure’ <<http://www.bbc.co.uk/news/business-23306086>> accessed 01 November 2013 and Money Marketing, ‘E&Y: Personal Liability Would Focus Bank Directors’ Minds’ <<http://www.moneymarketing.co.uk/1054166.article>> accessed 05 November 2013.

³¹⁸ Institute of Directors, ‘Press Release: Banking Commission’s Personal Liability move could be Counter-Productive’ <<http://www.iod.com/influencing/press-office/press-releases/banking-commissions-personal-liability-move-could-be-counter-productive-says-iod>> accessed 06 November 2013.

³¹⁹ Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Social-Legal Studies, OUP, 1992) p.19.

offences of all severity. It should utilise director disqualification and personal financial sanctions in order to fill in the gaps in the regime. Financial sanctions may be appropriate for offence B but do not address the other offences, in cases where offence D has been committed the director should be held accountable and disqualification would be appropriate.

The issue of bank director accountability is arguably exacerbated by the issue of ‘too big to fail’, as directors know their banks will not fail, they will not face personal liability and they will not be disqualified. This is the precedent shown in the major banks in the wake of the financial crisis; Fred Goodwin was not held accountable after leaving RBS when their losses became apparent, and although James Crosby has lost his knighthood, he has not been disqualified, nor has Andy Hornby or Lord Stevenson, former HBOS directors.³²⁰ While lessons are learnt from the US, they too have not held bank directors criminally liable, or disqualified any high profile directors. It appears that directors are not held accountable for their banks, while the shareholders bare the cost of fines and the lower level members of staff face criminal liability.

³²⁰ BBC News, ‘Vince Cable ‘Examines Ban for Former HBOS Directors’ <<http://www.bbc.co.uk/news/business-22056275>> accessed 12 November 2013.