

‘The good, the bad and the ugly’

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Introduction

The fight against financial crime in the United Kingdom (UK) has gone through numerous cycles, just like the economy, over the last thirty years. Grippled by the fear of fraud in the 1980s, the then Conservative government, as a result of the recommendations of the Roskill Committee, created the Serious Fraud Office (SFO) by virtue of the Criminal Justice Act 1987. Similarly, following the ‘regrettable’ decision of the House of Lords in *R v Cuthbertson*,¹ the Conservative government commissioned the Hodgson Committee to investigate how it could tackle the problems associated with confiscating the proceeds of crime. The recommendations of the Hodgson Committee were instrumental in the implementation of the Drug Trafficking Offence Act 1986 which introduced a broader set of confiscation measures, criminalised money laundering and also the first anti-money laundering reporting (AML) obligations. In the following decade, the Conservative government responded to the threat posed by money laundering and implemented the 1993 Money Laundering Regulations and the Criminal Justice Act 1993.² Following the General Election victory in the 1997 the Labour government introduced an AML and counter-terrorist financing strategy that was administered by HM Treasury. This was followed by the implementation of the recommendations of the Performance and Innovation Unit Report via the Proceeds of Crime Act 2002. This legislation sought to bolster the AML reporting obligations and the ability of the then Assets Recovery Agency to confiscate the proceeds of crime. Furthermore, following the publication of the Fraud Review the Labour government implemented the Fraud Act 2006 and updated the UK’s anti-bribery measures by introducing the Bribery Act 2010. Prior to the 2010 General Election, David Cameron MP, made his infamous ‘Day of Reckoning Speech’, in which he promised to bring the culprits of the financial crisis to justice. This was echoed in the 2010 Coalition agreement where the government stated it would “take white collar crime as seriously as other crime, so we will

¹ [1981] AC 470.

² SI 1993/1933.

create a single agency to take on the work of tackling serious economic crime”.³ This was followed by the Chancellor of the Exchequer, George Osborne declaring in his first Mansion House Speech that ‘we will tackle financial crime’.⁴ As a result, the Coalition government has introduced legislation to tackle the illegal conduct of those who contributed toward the financial crisis via the Financial Services (Banking Reform) Act 2013. However, this only applies where a bank becomes insolvent as a result of the conduct of its employees. The Coalition government have drastically reduced the budget of the SFO, at a time when we have seen a significant increase in financial crime and when it is a year away from the first LIBOR related prosecution. Therefore, despite the bold statements from the Coalition government since 2010, their response to financial crime can be best described as lacklustre, mismanaged and unstructured. However, the recent allegations of traders manipulating the foreign exchange rates have presented the Coalition government with the opportunity to possibly reclaim the political high ground to tackle financial crime.

LIBOR and FOREX Manipulation

One of the most recent types of manipulation associated with the financial crisis is the manipulation of LIBOR, which was described by the Financial Services Authority (FSA) as ‘benchmark reference rates fundamental to the operation of both UK and international financial markets, including markets in interest rate derivatives contracts’.⁵ The first evidence of wrongdoing regarding the LIBOR was witnessed in 2005 and it was alleged that Barclays Bank attempted to manipulate the dollar LIBOR and the EURIBOR rates of interest after being asked by derivative traders and other banking institutions. Further breaches took place between February 2006 and October 2007 when Barclays sought to further manipulate the EURIBOR and the US LIBOR. During this period, the FSA determined that Barclays continued to control LIBOR submissions to provide a misleading depiction of its credit quality so that it could continue to raise funds. This resulted in several media outlets questioning the reliability of these submissions.⁶ Further concerns about the submissions

³ HM Government *The Coalition: our programme for government* (HM Government: London, 2010) at 9.

⁴ HM Treasury ‘Speech by the Chancellor of the Exchequer, Rt Hon George Osborne MP, at Mansion House’, June 16 2010, available from <https://www.gov.uk/government/speeches/speech-by-the-chancellor-of-the-exchequer-rt-hon-george-osborne-mp-at-mansion-house>, accessed June 23 2014.

⁵ Financial Services Authority above, n 104, at 1.

⁶ See for example the excellent report by Gilbert, M. ‘Barclays takes a money-market beating’, 3 September 2012, available from <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8uEKKBY7As>, accessed 1 October 2012.

were voiced by the New York Federal Reserve, which stated that it had communications which implied that the LIBOR submissions were ‘being set unrealistically low’ by the banks.⁷ In 2008, the Wall Street Journal also queried the reliability of LIBOR and stated that ‘the concern: some banks don’t want to report the high rates they’re paying for short-term loans because they don’t want to tip off the market that they’re desperate for cash. The Libor system depends on banks to tell the truth about their borrowing rates.’⁸ Further concerns about the LIBOR were raised by the Bank of International Settlements, which stated that banks had several reasons for providing a misleading quote during a shortage of funding.⁹ The FSA imposed a then record financial sanction of £59.5m for breaches of its Handbook.¹⁰ The Commodities Futures Trading Commission ordered Barclays to pay a \$290m fine for attempted manipulation and false reporting concerning LIBOR and EURIBOR.¹¹ Additionally, Barclays entered into an agreement with the Department of Justice (DoJ) to pay a \$160m penalty.¹² Several other banks have been sanctioned by US and UK regulatory authorities for manipulating LIBOR. For example the FSA imposed a financial sanction of £87.5m on the Royal Bank of Scotland¹³ and the DoJ announced that RBS Securities Japan Limited, as part of a deferred prosecution agreement it has agreed to pay a \$50m fine. Additionally, it has agreed to pay a \$100m penalty to the Department of Justice.

More recently, a number of investigations have been launched by regulatory agencies and central banks into the alleged manipulation of the foreign exchange market, or ‘forex market’. The foreign exchange market involves daily transactions between financial

⁷ New York Federal Reserve ‘USD Libor’, 28 August 2008, available from http://www.newyorkfed.org/newsevents/news/markets/2012/libor/August_28_2007_mass_distribution_emails.pdf, accessed 1 October 2012.

⁸ Mollenkamp, C. ‘Bankers cast doubt on key rate amid crisis’, 16 April 2008, available from <http://online.wsj.com/article/SB120831164167818299.html>, accessed 1 October 2012.

⁹ Detrixhe, J. ‘Libor reported as rigged in ’08 proving 2012’s revelation’, 19 July 2012, available from <http://www.bloomberg.com/news/2012-07-18/libor-reported-as-rigged-in-08-crisis-proving-revelation-in-12.html>, accessed 3 October 2012.

¹⁰ Financial Services Authority ‘Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR’, 27 June 2012, available from <http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml>, accessed 1 October 2012.

¹¹ Commodity Futures Trading Commission ‘CFTC orders Barclays to pay \$200 million penalty for attempted manipulation of and false reporting concerning LIBOR and Euribor benchmark interest rates’, 27 June 2012, available from <http://www.cftc.gov/PressRoom/PressReleases/pr6289-12>, accessed 1 October 2012.

¹² 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’, 27 June 2012, available from <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>, accessed 1 October 2012.

¹³ Financial Services Authority ‘RBS fined £87.5m for significant failings in relation to LIBOR’, 6 February 2013, available from <http://www.fsa.gov.uk/library/communication/pr/2013/011.shtml>, accessed 8 February 2013.

institutions that exceed £3tn per day, 40% of which is via the City of London.¹⁴ The first investigation into the alleged manipulation was instigated by the Swiss regulatory agency FINMA, who announced that it was “conducting investigations into several Swiss financial institutions in connection with possible manipulation of foreign exchange markets”.¹⁵ This was followed by a statement by the Financial Conduct Authority (FCA) “we are conducting investigations alongside several other agencies into a number of firms relating to trading on the foreign exchange market”.¹⁶ Interestingly, the Bank of England has become involved in investigating the alleged manipulation of the forex market as part of its remit is to ensure the stability of the pound against other currencies. Further investigations have been launched in Germany and Singapore,¹⁷ and at the time of writing this note, traders at a large number of banks including RBS and Barclays are under investigation.

Mansion House Speech

On June 12 2014, George Osborne MP announced a number of measures to criminalise the conduct of traders and banks. In his speech the Chancellor stated that “people should know that when they trade in London, whether in commodities or currencies or fixed income instruments, that they are trading in markets that are fair and effective”.¹⁸ In relation to the forex scandal he stated that “I can announce that the Treasury, the Bank of England and the FCA will conduct a comprehensive review of standards in our fixed income, currency and commodity markets”. Additionally, the Chancellor stated that “we will extend the new powers we put in place to regulate LIBOR to cover further major benchmarks across foreign exchange, commodity and fixed income markets ... I can also announce that we will introduce tough new domestic criminal offences for market abuse”. The Chancellor concluded that “let me make this clear, so no one is in any doubt ... I am going to deal with abuses, tackle the unacceptable behaviour of the few, and ensure that markets are fair for the

¹⁴ BBC ‘Forex scandal: What is that all about?’, June 12 2014, available from <http://www.bbc.co.uk/news/business-26526905>, accessed June 20 2014.

¹⁵ FINMA ‘FINMA is investigating possible manipulation of foreign currency exchange rates’, October 4 2013, available from <http://www.finma.ch/e/aktuell/pages/mm-untersuchung-manipulation-fremdwahrungskurse-20131004.aspx>, accessed June 20 2014.

¹⁶ Financial Conduct Authority ‘Statement on foreign exchange market investigation’, October 16 2013, available from <http://www.fca.org.uk/news/forex-investigation-statement>, accessed June 20 2014.

¹⁷ Copley, C. and Graham, P. ‘Swiss, UK watchdogs step up scrutiny on forex traders’, March 31 2014, available from <http://www.reuters.com/article/2014/03/31/us-swiss-forex-investigation-idUSBREA2U0EN20140331>, accessed June 20 2014.

¹⁸ HM Treasury ‘Mansion House 2014: Speech by the Chancellor of the Exchequer’, June 12 2014, available from <https://www.gov.uk/government/speeches/mansion-house-2014-speech-by-the-chancellor-of-the-exchequer>, accessed June 6 2014.

many who depend on them ... we're not going to wait for more scandals to hit– instead we are going to act now, and get ahead”.

Conclusion

The City of London faces a plethora of lengthy investigations by domestic and international regulatory agencies that could see the imposition of even more financial sanctions. Nonetheless, the Coalition government finds itself in an identical set of circumstances it faced during the LIBOR scandal. Sadly, the response has been to commission *another* review that will no doubt result in the introduction of more legislation that seeks to cover the deep gaps in the UK regulatory regime.