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What Are the Merits of Taking a Hybrid Regulatory Approach Toward the Enforcement of Corporate Financial Crime in the United Kingdom and United States of America?

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Abstract

This article focuses on the hybrid regulatory approaches used in both the USA and the UK for the enforcement of corporate financial crime. In particular, the article analyses the use of Deferred Prosecution Agreements, which typically impose a financial penalty and behavioral commitments on a corporate entity for a defined period of time in exchange for the deferral of a criminal prosecution. The article will examine the merits of the use of DPAs instead of the imposition of criminal penalties on a company. The article will also consider whether a hybrid use of competition law as well as, or instead of, financial regulation could achieve better outcomes for regulators when enforcing financial crime.

Keywords

financial crime, competition law, benchmark manipulation, LIBOR crisis, deferred prosecution agreements

Introduction

This article examines the merits of adopting a hybrid regulatory approach in the United States of America (U.S.) and the United Kingdom (UK) toward the enforcement of corporate financial crime. The Cambridge Dictionary defines "hybrid" as "something that is a mixture of two very different things" (Cambridge Dictionary, 2020). In the case of the enforcement of corporate financial crime, this involves the use of two or more different laws to enforce the same financial crime, for instance using both financial crime law and competition law, or it could involve the use of different enforcement tools for the same crime, for instance by creating the option for UK financial regulators to use Deferred Prosecution Agreements (DPAs) against the offending companies as well as bringing criminal or civil charges against individual employees or directors involved in the corporate financial crime. This article will commence by investigating what enforcement tools the UK and United States used to deal with the corporate financial crime of market manipulation following the LIBOR and FX crises. It will then move on to consider the merits of these regulatory approaches and to propose improvements that can be made to the enforcement strategy of the U.S. and UK regulators for the enforcement of future corporate financial crime.

This article aims to demonstrate that a hybrid use of competition law as well as financial regulation could achieve better outcomes for regulators when enforcing financial crime rather than relying solely on financial regulation, as has been the case in the past in the UK. In the United States, there is a long history of using anti-trust, or competition, laws to penalize financial crimes such as the banking cartels seen in the FX benchmark rate fixing scandals (Department of Justice [DOJ], 2020). However, in the UK for the LIBOR and FX market manipulation offences the banks involved were sanctioned using civil financial regulations and individual traders were prosecuted using criminal law (the offense of conspiracy to defraud) rather than a competition law specifically designed for cartels, which may have been better suited to the crime (s.88 Enterprise Act, 2002). As a result, lower fines and limited criminal convictions have been achieved in the UK when compared to the US. The use of competition law to enforce financial crime is examined in order to draw conclusions and to formulate proposals for future enforcement approaches to financial corporate crime. The use of DPAs is examined as an enforcement tool in the UK for regulators to use in the enforcement of corporate financial crime. DPAs impose a financial penalty and behavioral commitments on a company

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for a defined period of time in exchange for deferring a criminal prosecution. DPAs have been used extensively in the United States for the enforcement of corporate financial crime and their use in the UK is growing for cases of fraud, bribery and other economic crime (Serious Fraud Office [SFO], 2021) This article will examine the merits of the use of DPAs as an alternative to the imposition of criminal penalties on a company and will explain the legislative changes needed to make this enforcement tool available to the UK financial and competition regulators. The level of deterrence that DPAs have compared to a corporate criminal penalty will be considered, as will the significance of the imposition of civil versus criminal penalties on a company for financial crime.

U.S. and UK Approaches to the LIBOR Crisis

Following the LIBOR and FX scandals, different enforcement approaches were adopted in the United States and UK. The United States uses a combination of competition (anti-trust) and non-antitrust law was used to prosecute and fine banks and brokers involved with the LIBOR manipulation. The Commodity Futures Trading Commission (CFTC) fined 13 banks and brokers over US$4 billion for non-anti-trust infringements of the Commodity Exchange Act 2006 in connection with the LIBOR and FX benchmark abuses (CFTC, 2015, April 23). The Anti-Trust Division of the Department of Justice charged both banks and traders involved in the LIBOR scandal, although it used the charge of conspiracy to commit wire fraud and bank fraud rather than the antitrust provisions of the Sherman Antitrust Act of 1890. The Department of Justice brought criminal proceedings against individual bank employees for LIBOR related offences. These proceedings involved jury trials and resulted in imprisonment for terms ranging between 12 and 24 months (*USA v Allen, Conti* et al., 2016). The Department of Justice entered into DPAs with five banks, the Royal Bank of Scotland, Deutsche Bank, UBS, Barclays and Rabobank. These DPAs were used to impose significant fines on these banks as well as behavioral commitments which given by the banks to the Department of Justice for the term of each DPA.

In the FX crisis, the Department of Justice used anti-trust law to levy high fines for breach of the cartel provisions in the Sherman Act 1890. To date, the highest fine levied against a company for a Sherman Act violation is US$925 million, which was imposed on CitiCorp in 2017 for its participation in the FOREX benchmark manipulation cartel (U.S. DoJ, 2020, May 18). The primary enforcer of the cartel provisions of the Sherman Act is the Anti-Trust division of the Department of Justice which is empowered to bring criminal charges against both individuals and companies who engage in cartel behavior (U.S. DoJ, 2020, May 22). For individuals, there is a maximum period of imprisonment for a breach of the Sherman Act of 10 years as well as, or instead of, a fine of up to US$1 million (Sherman Act, 1890). The maximum criminal fine for a company in breach of the Sherman Act is US$100 million, however the Alternative Fines Act (Alternative Fines Act, 18 USC) permits prosecutors to ignore this statutory maximum and fine defendants up to “twice the gross gain or twice the gross loss” for the offence (Green, 2020, May 21). This provision has enabled the Department of Justice to collect extremely high fines for breach of the cartel provisions in the Sherman Act.

There was a raft of civil cases in the United States, brought by customers of the banks involved in LIBOR who had suffered financial losses as a result of the benchmark manipulation. These actions have been brought using anti-trust law and the most recent judgment was given in October 2020 in the case of *In re: Libor-based Financial Instruments Antitrust Litigation* which was settled by Judge Naomi Buchwald of the Southern District of New York, providing final approval of a nearly US$22 million settlement between a class of indirect investors and five Wall Street banks accused by the plaintiff investors of manipulating LIBOR in violation of the Sherman Act. This case is one of many civil anti-trust cases brought after Barclays admitted in 2012 that it had manipulated LIBOR. Under the terms of the October 2020 settlement agreement, Citi must pay approximately US$7 million, HSBC must pay US$4.75 million, and JPMorgan and Bank of America must each pay approximately US$5 million (Slachetka, 2020). It can be seen that these anti-trust settlement amounts are not insignificant and, when combined with the fines from the regulators, increase substantially the financial sanctions against each bank.

In the UK, the banks and individuals involved with LIBOR and FX rate fixing fared better than they did when prosecuted under the combination of antitrust and non-antitrust law by U.S. regulators (Ball, 2018). Six banks, Barclays, UBS, Royal Bank of Scotland, Deutsche Bank, Rabobank, Lloyds Banking Group and two brokers, ICAP Brokers and Martin Brokers (UK), were fined by the Financial Conduct Authority’s (FCA) predecessor, the Financial Services Authority (FSA) and by the FCA between 2012 and 2015 for breaches to the FSA and FCA’s “Principles for Businesses” in relation to LIBOR benchmark manipulation (FSA, 2012 June 27, FSA, 2012 December 19, FSA, 2013, February 6, FCA, 2013 September 25, FCA, 2013 October 29, FCA, 2014 May 15, FCA, 2014 July 28, FCA, 2015). Fines ranged from £59 million for Barclays (FSA, 2012) to £227 million for Deutsche Bank (FCA, 2015), totaling £976 million for the six banks and two brokers (Jordanoska & Lord, 2020). However, these fines were significantly smaller than those imposed for the same misconduct in the US, where fines totaling US$2.519 billion were made (DoJ, 2017).

As an example of this discrepancy, the fine of £227 million imposed by the FCA on Deutsche Bank was the largest of any LIBOR related fines in the UK and was more than double than any other fines imposed by either the FSA or FCA for LIBOR manipulation (FCA, 2015). The size of the fine was due to the bank having misled the regulator, which could have hampered the investigation. In the US, the fines imposed on Deutsche bank for LIBOR manipulation totaled US$775 million (DoJ, 2017). Another example of significant discrepancies between UK and U.S. fines for LIBOR manipulation offences can be seen in the fines imposed on Barclays Bank Plc which was fined £59.5 million by the FSA in 2012, discounted by 30% from £85 million due to Barclays’ agreement to settle at an

early stage of the FSA's investigation (FSA, 2012). By comparison, Barclays was fined US$160 million by the U.S. Department of Justice (DoJ, 2012) and US$200 million by the CFTC (CFTC, 2012, June 27) in the USA in relation to its LIBOR fixing.

In the later FX crisis, the UK financial regulator again used financial regulation rather than competition law as the basis of its actions. It fined six banks for failing to take reasonable care to organize and control their affairs responsibly in relation to the FX market. Five banks were fined £1.1 billion in 2014 (FCA, 2014), followed by a fine for Barclays in 2015 (FCA, 2015) and then a further fine for the broker ICAP in 2020 (FCA, 2020). When the level of these fines are compared with those levied by U.S. regulators, it can be seen that the United States has a greater appetite to impose substantial financial penalties on banks, whereas the UK regulators do not appear to have the appetite for this approach. For instance, the fines imposed by the UK and United States for FX manipulation on Citigroup and CitiCorp, both part of the same group, were £225,575,000 (US$358 million; FCA, 2014) and US$925 million (U.S. DoJ, 2020, May 18), a difference of US$567 million in favor of U.S. regulators.

There are several possible reasons for the disparity between the fines imposed by UK and U.S. regulators for the same offences for LIBOR and FX manipulation. For example, the UK financial services regulator used financial regulation, rather than working with the competition regulator to use competition law to punish the banks for the market manipulation. Also the comparative size of the markets affected by the manipulation in each country could be a contributory factor to the disparity in the fines (Hillman, 2016). However, these factors do not entirely account for the extreme difference in the level of fines by the United States (over three and a half times that of the UK financial sanctions) for the same offence (Hillman, 2016). There were no criminal prosecutions of banks in the UK under any existing legislation, unlike in the United States (DoJ, 2015) because UK regulators used civil financial regulations to fine banks for the LIBOR manipulation, resulting in less reputational damage to the banks and the imposition of lower financial sanctions. Should the regulators in the UK have used the existing competition laws against individual traders and banks involved in the LIBOR or FX manipulation, a wider range of enforcement tools would have been available, such as fines of up to 10% of a bank's worldwide turnover, the acceptance of commitments given by the banks or the imposition of directions to regulate the banks' future conduct (ss. 31, 32 and 36 Competition Act 1998). If these competition law penalties had been used against the banks, in conjunction with the use of the criminal cartel offence against individual traders, this may have resulted in a greater deterrent effect than civil fines alone. However, it must be noted that at the time of the LIBOR and FX crises, the criminal cartel offence required the proof of dishonesty, which made it as hard for prosecutors to prove as the criminal offence of conspiracy to defraud, which also required proof of dishonesty and which was used by the SFO against individual traders (SFO, 2019). The requirement for dishonesty to be proved by prosecutors in the criminal cartel offence was abolished in 2014 (s.47 Enterprise and Regulatory Reform Act 2013).

In addition to the above, if the UK regulators had been able to use a corporate criminal offence against the banks, involved in the LIBOR or FX cartels, it would have provided UK authorities with the option of entering into a DPA with those banks in lieu of prosecution. Entry into a DPA with the offending banks would have allowed the regulators to impose a significant fine in conjunction with behavioral remedies, which could have been used to ensure that future instances of market manipulation did not happen again in the near future due to the threat of a future criminal trial hanging over the banks. As it was, further market manipulation scandals followed the LIBOR scandal (including the FX crisis), which demonstrates the lack of a deterrent effect the FSA's fines had on the banks involved (Ryder, 2018).

Although no criminal prosecutions were made in the UK against banks in relation to the LIBOR benchmark fixing accusations, criminal proceedings were taken against some of the individual traders involved. For example, on 6 July 2012 the SFO launched a criminal investigation into LIBOR manipulation (SFO, 2017). The investigation resulted in charges against 13 individuals, the highest profile of whom was Tom Hayes, a former derivatives trader at both UBS and Citigroup in Tokyo. Hayes was convicted on eight counts of conspiracy to defraud in relation to the manipulation of the Japanese Yen LIBOR between 2006 and 2010 (*R v Tom Alexander William Hayes*, 2015). He was sentenced to fourteen years imprisonment on 3 August 2015 (SFO, 2015), although this was reduced to eleven years upon appeal in December 2015 (*R v Hayes*, 2015). Hayes was released in January 2021, five and a half years after his original conviction in 2015 (McNulty, 2019). There were a further four convictions and eight acquittals of individuals relating to LIBOR manipulation in the UK (SFO, 2015). The high level of acquittals and low amount of convictions show that there was a failure in the UK to prosecute the LIBOR rate manipulation that caused so much harm in the UK and contributed to the global financial crisis.

It must be considered why competition laws were not used for the enforcement of the LIBOR or FX benchmark manipulation scandals in the UK. It could well be that competition law was not used because it would have involved a different regulator, the then Office of Fair Trading (OFT), which was not a specialist in the financial services sector. At that time the financial services regulator in the UK did not have any competition law powers and so would have had to hand the enforcement over to the OFT, or to share the enforcement with the OFT. This situation has changed due to new laws which came into force after the LIBOR crisis and these changes will be discussed below. Overall, the difference in U.S. and UK enforcement of the LIBOR and FX market manipulation—the same offence—demonstrates that using a mixture of laws for the same offences, as was done in the US, can result in wider and more effective powers for the regulators.

Legislative Changes in the UK Since LIBOR

Following the 2007–8 financial crisis and the LIBOR crisis, significant changes were made to legislation and regulation in the UK, including a change to the financial services regulator. In 2000, the Financial Services and Markets Act (FSMA) had changed the banking regulator from the Bank of England to the newly created Financial Services Authority. The financial services regulator was changed again in 2012 to two main agencies, each of whom is responsible for different regulatory objectives. The regulators are the FCA and the Prudential Regulation Agency (PRA), both created by the Financial Services Act 2012. The PRA's strategic objective is to contribute to the financial stability of the UK, with an operational objective of ensuring the safety and soundness of PRA authorized persons (FSMA, 2000). The FCA's strategic objective is to protect and enhance confidence in the UK's financial system and it has three operational objectives; consumer protection, protecting the integrity of the UK's financial markets and promoting competition in financial markets (FSMA, 2000).

The promotion of competition in financial markets is a new objective for the financial services regulator and reflects the increased emphasis on the use of competition law in the enforcement of financial crime following the 2007–2008 financial crisis. The FCA's new competition objective was supported by three Acts relating to the use of competition law in the financial services sector which were passed by the UK government immediately following the LIBOR crisis. The first, and most significant reform was the Financial Services (Banking Reform) Act 2013, which conferred competition powers on the newly created FCA. In particular, the Act inserted a new provision into the Financial Services and Markets Act 2000 (s.234K FSMA, 2000) which places an obligation on the FCA to consider, before using certain of its powers as financial regulator, whether its competition powers are more appropriate and, if so, to use them instead (Schedule 8, Part I, s.3 Financial Services [Banking Reform] Act 2013). This new competition objective given to the FCA is one of the FCA's three operational objectives and it makes the FCA one of the few financial regulators in the world with a core objective to promote competition (FCA, 2017, December 11).

This legislation marked a significant change of direction and policy, especially given that no competition law had been used in the enforcement of any of the LIBOR or FX perpetrators. The FCA's new competition powers can be used concurrently with those of the previously sole competition regulator in the UK; the Competition and Markets Authority (CMA; FCA, 2019, May 22). Where the FCA lacks specialized expertise or powers it will be able to work with the completion regulator (Ferran, 2012). This key change in UK law compels the FCA to consider the use of competition law in all future cases of financial crime and, if relevant, to justify its lack of use of competition law if it instead relies on prosecuting for breaches of financial regulations as it did in the aftermath of the LIBOR crisis (FCA Mission, 2018, October).

The second Act which promoted the use of competition law in the financial services sector was the Financial Services Act 2012 which created the FCA, as stated above, with its new competition objective. This Act also created a new criminal offence for individuals who knowingly or deliberately make false or misleading statements relating to benchmark-setting (s.91 Financial Services Act 2012). This criminal offence has not yet been used but is a significant addition to the armory the FCA will have available in any future benchmark rate-fixing situation. The introduction of this new criminal offence, in addition to the existing criminal cartel offence in the Enterprise Act 2002, gives the FCA two alternative options for criminal prosecutions of individuals and presumably will increase the regulator's chances of securing criminal convictions in any future benchmark rate-fixing cartel. UK regulators do not have the power to prosecute companies for participating in cartels such as those seen in the LIBOR and FX benchmark rate fixing crises, unlike the United States which has criminal corporate liability offences available to regulators.

A third UK legislative change affecting the UK competition law regime which came into force following the LIBOR crisis was the Enterprise and Regulatory Reform Act 2013. This Act amended the concurrency provisions found in the Competition Act 1998 and abolished the OFT and the Competition Commission, creating a single new UK regulator for competition (s.26 Enterprise and Regulatory Reform Act 2013). Pursuant to the concurrency provisions introduced by the Enterprise and Regulatory Reform Act 2013 and the Financial Services (Banking Reform) Act 2013 the CMA is jointly responsible with the FCA for competition law enforcement in the financial services sector (Schedule 8 Financial Services [Banking Reform] Act 2013 and s.51 Enterprise and Regulatory Reform Act 2013). Both of these relatively new regulators have had to learn how to work together in an effective manner over the last few years, in order to combat financial crime. This concurrency of regulation between the CMA and the various sector regulators now allows each sector regulator, including the FCA, to apply UK and EU competition law prohibitions on undertakings engaging in anticompetitive agreements or the abuse of a dominant market position and to conduct market studies in order to identify areas where the sector market is not working competitively for the benefit of consumers (s.51 Enterprise and Regulatory Reform Act 2013).

The above legislative changes in the UK which came into force following the LIBOR crisis provided the financial services' regulator with extensive competition law powers to use in the enforcement of financial crime. The legislative changes made by the Financial Services (Banking Reform) Act 2013 compel the FCA to consider the use of competition in all future enforcement actions, which is a strong step closer to the U.S. system, which uses a combination of competition law and other enforcement measures (s.234K Financial Services [Banking Reform] Act 2013).

Taking a Hybrid Approach to the Enforcement of Financial Crime

This article considers whether a hybrid use of competition law as well as, or instead of, financial regulation could achieve a better outcome for regulators when enforcing financial crime. In the US, there is a long history of using anti-trust, or competition, laws to penalize financial crimes such as the banking cartels seen in the LIBOR and FX benchmark rate fixing scandals. However, as noted above, in the UK these market manipulation offences the banks involved were sanctioned using civil financial regulations and individual traders were prosecuted using criminal law rather than a law specifically designed for the cartels they were involved in. As set out above, with the introduction of three new legislative Acts, all of which came into force following the LIBOR crisis, there appears to have been a recognition by UK authorities that competition law does have a part to play in the enforcement of financial crime. However, it remains to be seen whether these competition powers will be used by the FCA if/when a similar market manipulation crisis occurs in the future. This section of the article will look at what competition law brings to the enforcement of financial crime and at how a hybrid approach, using a combination of competition law, financial regulation and DPAs could have more of the deterrent effect that regulators would wish for.

The FCA, now has a clear operational objective to use competition law in future financial crime (FCA Handbook, 2021). It is considered below whether there is any evidence that competition law will be more effective than the previous use of financial regulation alone. As a starting point, it is relevant to note that competition law applies whenever competition in any market is harmed (Pinsent Masons, 2018, September 5). This includes any anti-competitive agreements, whether these are informal oral agreements between traders (as occurred\in the LIBOR crisis) or written agreements. This is the most relevant area of competition law for financial crime. Other areas covered by competition law include the abuse of substantial market power, mergers and public restrictions of competition, such as state aid (Whish & Bailey, 2018). Anti-competitive agreements are agreements that have as their object or effect the prevention, restriction or distortion of competition (s.2(1) Competition Act 1998). Such agreements will be unlawful and void, with the parties subject to penalties, unless they have some redeeming virtue such as the enhancement of economic efficiency or the sharing of benefits derived from the agreement with consumers (s.9 Competition Act 1998). In the LIBOR crisis, the manipulation of the LIBOR and EURIBOR benchmarks were carried out by traders acting in a coordinated way in what was deemed to be a cartel by the European Union's (EU) competition regulator, the European Commission (European Commission, 2015). The EU's competition law is virtually identical to that of the UK, the only difference being that the EU's competition rules (Articles 101 and 102, Treaty on the Functioning of the EU, 2007) refer to "Member States" and the Competition Act 1998 refers to the UK (Chapters I and II, Competition Act 1998), so it is not immediately clear why the UK did not use its competition law powers under Chapter I to fine to fine the banks involved in the LIBOR benchmark rate manipulation. Instead, the FSA used its Principles of Business to impose fines on the banks involved with the LIBOR manipulation (FSA, 2012, June 27).

Competition Law Sanctions for Financial Crime

Since 2002, the UK competition regulator has had the power to pursue custodial sentences of up to five years against individuals who have set up and maintained a hardcore cartel (s.190 Enterprise Act, 2002). A hardcore cartel would include the type of cartels used in the LIBOR and FX crisis to fix the prices of a benchmark rate. A hardcore cartel is an agreement between competitors to carry out the most harmful actions to competition, including such things as fixing prices, sharing markets or limiting production (Pinsent Masons, 2018, September 5). The regulator can also pursue financial penalties pursuant to the criminal cartel offence, although both criminal penalties have to be imposed by a court (s.190 Enterprise Act, 2002). Despite this criminal cartel power having existed for a number of years, there are very few examples of successful prosecutions, none of which have been in the financial services sector.

Other competition law powers which could be of use in the future to the UK financial services regulator include the power for the FCA to make competition disqualification orders or to take competition undertakings from directors (ss.9A, 9B and 9E(2)(h) Company Directors Disqualification Act 1986). This power can be used for any serious breach of competition law and will prohibit a director from being involved in the management of a company for up to 15 years (Pinsent Masons, 2018, September 5). This could be used against a culpable bank director if he or she was clearly involved in a competition crime such as benchmark or other market manipulation and would act as a significant deterrent to other bank directors if the regulator used the power for this purpose. Another competition law power that could be of use to the UK financial services regulator in future market manipulation instances is the power to accept commitments from the infringing banks (s.31A Competition Act 1998). Commitments are similar in some ways to DPAs, in that they may involve the bank being investigated making legally-binding commitments to the regulator as to their future behavior in order to end the investigation. However, if the bank was to breach its commitments the competition regulator may apply to the court for an order to enforce compliance (Whish & Bailey, 2018). This is a tool that could be used in the regulation of financial crime, as commitments can be used to enforce good behavior and to prevent further breaches of financial regulation, although it is worth noting that commitments are not, except in exceptional cases, used for hardcore competition breaches which would include cartels (Cardell, 2016).In the case of hardcore competition breaches, an additional competition law enforcement tool, directions, could be used (s.31 Competition Act 1998). Directions enable the competition regulator to give directions to bring a breach of

competition law to an end and directions can include provisions such as positive action and reporting obligations, similar to DPAs (Whish & Bailey, 2018). Under competition law, sectoral regulators such as the FCA also have the power to fine companies up to 10% of their worldwide turnover (s.36 Competition Act 1998). This is potentially a significant fine as it is based on the worldwide turnover, which will hit international companies harder than smaller, national companies. The fact that the fine is based on turnover, rather than profit, also increases the potential maximum amount that can be levied by a regulator, which has a corresponding effect on the deterrent effect of this penalty.

Deferred Prosecution Agreements

Much has been written about DPAs, with the primary theme being the consideration of whether DPAs are an effective enforcement tool or not (Grasso, 2016). Many authors ask whether reaching a deferred prosecution settlement with an offending corporate entity can provide the deterrent effect that a criminal prosecution would have (Palmer, 2020). There is little agreement on this debate, with some scholars arguing that DPAs are *"simply a prosecutorial tool used to avoid lengthy and costly trials with little hope of true remorse, accountability, reintegration and rehabilitation for participating stakeholders"* (McStravick, 2020). While other academics argue that, DPAs are a "safer, generous and more flexible option" (Ryder, 2018), as they minimize the impact of corporate death that a successful criminal prosecution may otherwise have on a company (Grasso, 2016). Advocates of the use of DPAs suggest that "it is only by imposing or by threatening to impose criminal liability on business entities, rather than by solely charging individuals, that the government can effectively stop and prevent corporate crime." (Sheyn, 2009, November 28). Other academics who support the increased use of DPAs feel that they "must be used in conjunction with criminal proceedings against employees and/or agents of corporations if they are to have a deterrent effect to reduce future misconduct" (Ryder, 2018).

This article will continue and add to this debate, examining in detail how DPAs have been used to regulate financial crime both immediately after the LIBOR crisis and in the years since then. This article will focus the debate about the efficacy of DPAs on a particular area, that of benchmark rate manipulation by banks and their employees, and will consider the use of DPAs as a settlement tool in a proposed criminal action against a banking cartel.

Settlement tools such as Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) were first used in the United States in the early 1990s following the 1994 *Prudential Securities* trial (*In re Prudential Securities Inc.*, 1994), which saw the first DPA involving a public company (Alexander & Cohen, 2015). DPAs, which are entered into between the company or companies under investigation and the relevant regulator, operate by allowing companies to escape criminal liability if they agree to pay a fine instead of facing criminal prosecution (Gibson Dunn, 2015, January 6). DPAs often also involve some form of behavior regulation to manage the offending behavior such as undertaking to cooperate in the future prosecution of individuals and the payment of compensation to victims (SFO, 2020). There has been a marked increase of use of DPAs in the United States since 2003 (Alexander & Cohen, 2015). They are a popular settlement option for companies under investigation who, by entering into a DPA, are able to avoid having to enter a guilty plea or to face the substantial costs of defending a criminal trial, with all the associated reputational damage that would cause. However, whether DPAs can be viewed as a useful tool from the regulator's point of view depends on whether their success is viewed in purely financial terms or whether the entry into a DPA instead of taking a company to trial is seen as a "soft option," allowing companies to absolve themselves of responsibility and avoid the risks of potential prosecution (Harris, 2013, June).

Since 2014 DPAs have been in use in the UK, enacted by the Crime and Courts Act 2013 (Crime and Courts Act, 2013), for offences set out in that Act, including conspiracy to defraud. The only regulators with power to issue DPAs in the UK are the SFO and the Crown Prosecution Service (paragraph 3(1), Schedule 17 Crime and Courts Act 2013). Their first use was in the case of Standard Bank in 2015, which was accused of failure to prevent bribery contrary to section 7 of the Bribery Act 2010 (SFO, 2015 November 30). The DPA was granted for a three year period which expired in November 2018, bringing to an end the criminal charges against the bank. In exchange for the dropping of criminal charges after the term of the DPA, Standard Bank had to pay multi-million dollar sums as fines and compensation to victims. In addition to the financial penalties, Standard Bank agreed to cooperate with the SFO and to be subject to a review of its anti-bribery and corruption controls. It was also required to implement recommendations made by Price Waterhouse Coopers LLP, who acted as an independent reviewer in the case (SFO, 2019, September 3). It has been argued that the use of DPAs are an illustration of restorative justice in action; participating offenders such as Standard Bank work with regulators to manage their offending behavior and are helped, as part of the DPA, to find both moral-based and financial based opportunities to repair the harm done by them to their victims (Mcstravick, 2020). This article argues that legislative changes should be made in order to allow UK regulators to be able to use DPAs to tackle the financial crime of benchmark rate manipulation. To date, nine DPAs have been used in the UK between 2015 and 2020, none of which relate to market manipulation (SFO, 2020).

It is likely that the use of criminal sanctions against banks combined with DPAs would deter banks from committing financial crime, however whether the use of DPAs, which the SFO states only apply to corporations (SFO, 2020), will deter individual traders from breaking the law, which they do in order to make huge personal and corporate profits, is more questionable. Often the profits made over a period of years until discovery by the authorities will dwarf any fine ultimately

imposed, so even for the bank itself, the risk of receiving just a fine is not considered to be prohibitive (Hillman, 2016). As Chiu and Wilson (2019) state, "bank misconduct is often driven by individuals and groups, but wrongdoers may lack a sense of personal responsibility as the bank is made the subject or enforcement." This highlights a key problem in financial crime—that there is no sense of individual culpability among employees of large international organizations. However, if the personal liberty of individual traders was at stake (i.e., a jail term), or if they could face being disbarred from working in the financial services sector for a period of years, that would be a more immediate deterrent to the traders. This again supports the argument for UK regulators to use the criminal cartel sanctions against individuals in future cases of market manipulation as well as taking strong enforcement action against the banks.

Proposals for Reform

With the legislative changes made since the LIBOR crisis, the UK financial services regulators now have a wider variety of enforcement powers at their disposal than they did at the time of the LIBOR crisis. As mentioned above, during the LIBOR crisis, the FCA's predecessor, the FSA, used primarily its civil enforcement powers to fine the banks involved with the benchmark rate fixing. Fines on individual banks imposed by the UK regulator ranged from £59.5 million (Barclays) to £160 m (UBS AG). In addition to the fines, the SFO attempted to prosecute traders identified as responsible for the manipulation. However, the majority of these prosecutions were not successful overall.

If the FCA had allowed the UK's competition regulator of the time, the OFT, to use its competition powers, the banks responsible could have been fined up to 10% of their worldwide turnover. For a bank such as Barclays that would have been up to £1.919 billion because in the year ending 31 December 2012 Barclays' worldwide turnover was £19.199 billion (Barclays Bank, 2012). When this is compared to the fine of £59.5 million that Barclays received from the FSA, there is a significant difference. In the US, the fine given to Barclays dwarfed the UK fine as Barclays was fined a total of US$360 million by U.S. regulators (CFTC, 2012, June 27), despite a reduction for cooperation with the authorities, which is six times as much as the UK fine. The criminal cartel powers were also available to the competition regulator and if these powers had been used then the individuals responsible for the market manipulation could have been subject to criminal penalties.

This article argues that a more effective method of enforcement of any future market manipulation such as the LIBOR or FX crisis would be for the FCA and CMA to use a hybrid of competition law powers, including the criminal cartel offence, alongside its financial regulatory powers in order to fine the banks, disqualify directors for competition law breaches, accept commitments from banks and prosecute the traders involved in the manipulation. If these existing powers were to be combined with a new corporate criminal offence which would enable regulators to prosecute any banks whose employees were involved in benchmark manipulation offences, such as the criminal competition law used by the United States to prosecute banks for FX manipulation or a new failure to prevent economic crime offence, similar to the s.7 Bribery Act 2010 failure to prevent bribery offence, then the option of entering into a DPA with those banks in lieu of prosecution would be available to UK regulators. This would have the advantage of combining a fine with regulation of the bank's future behavior and would have the effect of both penalizing and deterring future financial misconduct. The DPA could also be combined with civil prohibition orders made by the FCA against individual traders involved with market manipulation to bar them from carrying on regulated activities for a set period of time (s.56 FSMA, 2000).

Other competition law powers that could be used in future cases of benchmark manipulation by the financial services regulator (and which were available at the time of the LIBOR and FX crisis) are the acceptance of commitments from the infringing banks (s.31 Competition Act 1998). If competition law powers are used alongside financial regulation, it will broaden the reach of the regulators' powers. For instance the action of prohibiting individuals from working in the financial services industry referred to above (s.56 FSMA, 2000) would have a deterrent effect on individual traders who consider being involved in market manipulation or other financial crime. Should traders believe that there is a real chance they could be prohibited from working in their profession if they are caught, the stakes are raised and the deterrent effect of this punishment is likely to appear more immediate than a fine issued to their employer. This is particularly true if, as was the case in the LIBOR crisis, the fine issued to banks involved in market manipulation may not be larger than the profits made as a result of the financial crime. If this is combined with the criminal prosecution of the employer bank, perhaps settled with a DPA containing behavioral undertakings, or commitments containing behavioral or structural undertakings, it could have a significant deterrent effect in the regulation of financial markets.

The hybrid approach outlined above, combining criminal competition sanctions against the bank and individual traders with financial crime law, used to sanction individual traders, will give regulators of financial crime significantly improved enforcement powers in the fight against corporate financial crime. Some legislative changes, as well as an increased appetite by regulators to pursue banks under criminal charges, will be necessary to achieve this, but the results of such a hybrid approach would deliver more enforcement options to regulators and should result in a significantly increased deterrent effect for future market manipulation offences.

Conclusion

The merits of regulators taking a hybrid regulatory approach to financial crime can be seen by the use in the United States of a combination of criminal and civil enforcement powers for the same crime. The United States uses a wider variety of

enforcement measures, namely the imposition of fines and also the entry into DPAs with offending institutions, than the UK has done in the past for financial crime. In the last two global financial crisis involving benchmark manipulation, the UK relied on its financial regulatory powers alone to punish the banks involved in the benchmark manipulation cartels. However, it is argued in this article that the regulators would have been more effective had they used a combination of competition law and if they had had alternative enforcement tools such as DPAs available to them to use against the infringing banks. Use of competition law by the UK financial services regulator in the LIBOR and FX crisis would have opened up a raft of alternative enforcement tools, including those referred to below, the use of which are likely to act as more of a deterrent to a bank than a fine alone, which can be absorbed into its operating costs and/or set against the huge profits the illegal benchmark manipulation generated for the bank.

Some of the main advantages for a financial services regulator of using competition law in the enforcement of corporate financial crime are firstly, the maximum fines the regulator can impose are much larger than those imposed using financial regulation alone in the UK following the LIBOR and FX crises. Competition law authorizes regulators to impose fines of up to 10% of company's worldwide turnover (s.36 Competition Act 1998) which, for an international bank such as HSBC or Barclays, could result in a significant fine, far higher than those imposed by the FSA for banks' participation in the LIBOR and FX benchmark rate manipulation. Regulators will of course have to balance the size of the fine levied against a particular bank with the risk of the bank not being able to pay the fine, which could result in the corporate death penalty, as seen in the case of Arthur Anderson in 2002 (Groves, 2012). However, making banks aware of the potential for regulators to levy such a large fine should help to deter banks from illegal benchmark manipulation. Secondly, where there is a cartel operated between employees of different banks (as happened in the LIBOR and FX crisis), criminal sanctions are available to the UK competition regulator (s.188 Enterprise Act, 2002). Since the removal of the dishonesty element in 2014 (s.47 Enterprise and Regulatory Reform Act 2013), prosecutors may find it easier in the future to use this criminal offence than the one used against the traders involved with the LIBOR and FX manipulation or there is also now the option for regulators to use the new misleading statements in relation to benchmark criminal offence against individuals (s.91 Financial Services Act 2012). In the US, breach of competition law is a criminal offence (s.1 Sherman Antitrust Act 1890), enabling regulators to enter into a DPA with companies, including banks, who have breached competition law. If this option was open to UK regulators, they would have the option of either pursuing the case in a criminal court against one/more of the infringing banks, or to enter into a DPA with the bank(s) which would have the advantage of compelling those banks to comply with the law for the period of the DPA, as well as paying a substantial fine. This could then drive cultural change and increase compliance in the financial sector over time. Thirdly, another advantage of using competition law in the enforcement of corporate financial crime is that it provides access to a wider range of enforcement tools than a financial services regulator would otherwise have. Such alternative competition law enforcement tools include the use of commitments (s.31A Competition Act, 1998), whereby a regulator can require the infringing company to make structural changes, or the regulator could give directions to the infringing bank to bring the infringement to an end (ss. 32, 33 Competition Act, 1998). Also, director disqualification orders can be imposed for breaches of competition law (s.204 Enterprise Act, 2002) and these could be used against directors of banks who are found to have been involved with or to have had oversight or awareness of the infringing behavior of the cartel members.

Using a combination of different enforcement tools as well as drawing from different areas of law for appropriate offences to charge offending financial institutions with, would provide the UK financial services regulators with more effective powers which should in turn result in a more substantial deterrent effect than the use of a fine alone against a bank which has been involved in financial crime.

It appears however that legislators and regulators in UK seem more inclined to focus criminal penalties on individuals rather than companies (for instance the misleading statements in relation to benchmarks offence and the cartel offence are both aimed at individuals and do not apply to companies) but if there was a suitable criminal offence that could be used against banks who benefitted from employees market manipulation in the future, it would allow the use by UK regulators of DPAs, as has been done in the US. The risk of reputational damage for committing a criminal offence is likely to provide more of a deterrent effect for banks than just civil fines alone and a significant advantage of DPAs is that banks will be required to commit to increased compliance checks.

As has been said above, it can be seen that civil fines alone do not seem to deter banks from committing financial crime. Something else is needed for the UK regulators to use, perhaps corporate criminal offences which involve the risk of reputational damage as well as larger fines is the answer for the future regulation of corporate financial crime. However, there does appear to be a cultural difference between the United States and UK with U.S. regulators being happy to levy high fines and to cause reputational damage to companies, unlike UK regulators, who seem reluctant to use their civil powers to impose significant fines or other structural or behavioral sanctions on banks. UK regulators are keener to go after individuals, but this article has argued that a combination of imposing criminal and civil sanctions on companies as well as on individuals would provide a better deterrent effect, following the approach of the United States.

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