

‘The Financial Crisis and Financial Crime in the United Kingdom: a critical analysis of the response by Financial Regulatory Agencies’.

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The Financial Crisis and Financial crime: An Introduction

A previously unattributed factor that contributed towards the most recent financial crisis is financial crime.¹ However, it is important to note and accept that financial crime was *not* the sole and *only* cause of the financial crisis. For example, it has been asserted by economists,² the International Monetary Fund,³ the United States Department of Treasury,⁴ HM Treasury,⁵ official enquiries⁶ and academic commentators⁷ that the foundations of the financial crisis were laid as a result of the collapse of the United States subprime mortgage market.⁸ Others have argued that the foundations of the financial crisis were placed by the continued use of low interest rates by the Federal Reserve.⁹ Additional factors, which are beyond the scope of the article, include high levels of consumer debt,¹⁰ toxic debts,¹¹ securitisation,¹² deregulation

¹ An increasing amount of literature has suggested that financial crime was an important factor that contributed towards the most recent financial crisis. See for example Ryderyn N. *The Financial Crisis and White Collar Crime: The Perfect Storm?* (Edward Elgar, 2014), Ryder, N., Turksen, U. and Hassler, S. (eds), *Fighting Financial Crime in the Global Economic Crisis: Policy, Trends and Sanctions* (Routledge, 2014), Huisman, W. 'White-collar crime and the economic crisis' (2012/2013) Newsletter of the European Society on Criminology 11, Deflem, M. (ed), *Economic crisis and crime* (Bingley, 2011), Osoka, O., Trakkidi, A., Fisher, J., Blottiaux, M., Daniel, D., Oliveira, H. and Green, D. 'The global financial crisis: the case for a stronger criminal response' (2013) 7(3) *Law & Financial Markets Review* 159, Herlin-Karnell, E. 'White-collar crime and European financial crises: getting tough on EU market abuse' (2012) 37(4) *European Law Review* 481, Hardouin, P. 'The aftermath of the financial crisis' (2011) 18(2) *Journal of Financial Crime* 148, Creseney, A., Eng, G. and Nuttall, S. 'Regulatory investigations and the credit crisis: the search for villains'" (2009) 46 *American Criminal Law Review* 225, and Posner, E. and Vermeule, A. 'Crisis governance in the administrative state: 9/11 and the financial meltdown of 2008' (2009) 76 *University of Chicago Law Review* 1613.

² Reinhart, C. and Rogoff, K. *This time is different – eight centuries of financial folly* (Princeton University Press: New Jersey, 2009).

³ See International Monetary Fund *Global Financial Stability Report: Containing Systemic Risks and Restoring Financial Soundness* (International Monetary Fund, 2008).

⁴ Department of Treasury *Financial regulatory reform – A new foundation: Rebuilding financial supervision and regulation* (Department of Treasury: London, 2009).

⁵ For an interesting commentary on the UK response to the financial crisis see Arora, A. *Banking Law* (Pearson: Harlow: 2014) at 123-167 and HM Government *Review of HM Treasury's management response to the financial crisis* (HM Government: London, 2012).

⁶ Financial Crisis Inquiry Commission *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (Financial Crisis Inquiry Commission: Washington DC, 2011).

⁷ For an interesting discussion of the subprime model see McDonald, O. 'The American mortgage market' (2012) *Company Lawyer*, 33(6), 183–184 and Yeoh, P. 'Hedge funds: from privileged child to locust and now bogeyman?' (2012) *Company Lawyer*, 33(2), 42–49.

⁸ Hereinafter 'US'.

⁹ Taylor, J. *The financial crisis and the policy responses: an empirical analysis of what went wrong* (National Bureau of Economic Research: Cambridge, 2009).

¹⁰ See generally Dickerson, M. 'Over-indebtedness, the subprime mortgage crisis, and the effect on US cities' (2009) *Fordham Urban Law Journal*, 36, 395-425.

of banking legislation,¹³ ineffective macroeconomic policies,¹⁴ weak credit regulation,¹⁵ deregulation of consumer credit legislation,¹⁶ the self-regulation of credit rating agencies,¹⁷ the culture of some banking practices¹⁸ and weak banking regulation.¹⁹ Initially, the link between the financial crisis and financial crime was difficult to quantify. There is no ‘super villain’ that has become the face of financial crime during the financial crisis. However, research has concluded that several different types of financial crime have interacted with the traditional variables, as outlined above, that contributed towards the financial crisis. It is my contention that this includes the relationship between subprime mortgages and mortgage fraud, predatory lending, Ponzi fraud schemes, market misconduct and market manipulation.²⁰ It is not the purpose of this article to review each of these in detail, but to critically consider the response in the United Kingdom by the financial regulator towards financial crime during and after the financial crisis.²¹

¹¹ Arsalidou, D. ‘The banking crisis: rethinking and refining the accountability of bank directors’ (2010) *Journal of Business Law*, 4, 284-310 at 292.

¹² For a critical discussion of securitisation see Nwogugu, M. ‘Securitisation is illegal: racketeer influenced and corrupt organisations, usury, antitrust and tax issues’ (2008) *Journal of International Banking Law and Regulation*, 23(6), 316-332.

¹³ See Levitin, A. ‘The crisis without a face: emerging narratives of the financial crisis’ (2009) *University of Miami Law Review*, 63, 999-1010.

¹⁴ Gevurtz, G. ‘The role of corporate law in preventing a financial crisis: reflections on in re Citigroup Inc shareholder derivative litigation’ (2010) *Pacific McGeorge Global Business & Development Law Journal*, 23, 113, at 3.

¹⁵ Choi, J. and Papaioannou, M. ‘Financial crisis and risk management: reassessing the Asian financial crisis in light of the American financial crisis’ (2010) *East Asia Law Review*, Summer, 5, 442–466, at 443

¹⁶ See for example the impact of the decision in *Marquette National Bank of Minneapolis v. First Omaha Service Corp* 439 U.S. at 299. For a more detailed discussion of the impact of this case on the deregulation of the consumer credit market in the US see Schaefer, E. ‘The Credit Card Act of 2009 was not enough: a national usury rate would provide consumers with the protection they need’ (2012) *University of Baltimore Law Review*, Summer, 41, 741-767.

¹⁷ European Commission *Report of the High-Level Group on Financial Supervision in the EU* (European Commission: Brussels, 2009).

¹⁸ See generally Tomasic, R. ‘The financial crisis and the haphazard pursuit of financial crime’ (2011) *Journal of Financial Crime*, 18(1), 7–31.

¹⁹ Hutchins, A. ‘Flip That Prosecution Strategy: An Argument for Using RICO to Prosecute Large-Scale Mortgage Fraud’ (2011) *Buffalo Law Review* 59(1), 293 at 306.

²⁰ See Ryder above, n 1.

²¹ For the purpose of this article the FSA and FCA will be referred to as the ‘regulator’. Hereinafter ‘UK’.

Financial Regulatory Agencies and Financial Crime

The Financial Services Act 1986 was heralded by the then Conservative government as providing the Securities and Investment Board with new prosecutorial and enforcement powers to tackle some aspects of financial crime.²² This is a view supported by Grey who took the view that “in order to ensure efficacious enforcement of the FSA [1986], the SIB has an impressive range of ... powers”.²³ For example, under the Financial Services Act 1986 the SIB could apply for either an injunction or a restitution order against unauthorised investment businesses,²⁴ it could bar financial practitioners from operating in the financial services industry²⁵ and it could apply to the court to wind up either an authorised person or an appointed representative.²⁶ However, the prosecutorial role of the SIB was *limited* to the breaches relating to the authorisation to conduct investment business and insider dealing.²⁷ The enforcement performance of the SIB was hampered by their *unwillingness* to have a larger prosecutorial role²⁸ and the agency did little to tackle or even prevent commercial fraud.²⁹ In addition, the Conservative government created the Serious Fraud Office³⁰ by virtue of the Criminal Justice Act 1987³¹ following the recommendations of the Roskill

²² Hereinafter ‘SIB’. See Fishman, J. ‘A comparison of enforcement of securities law violations in the UK and US’ (1993) *Company Lawyer* 14(9) 163-172, at 163.

²³ For a more detailed commentary on these provisions of the FSA 1986 see Grey, J. ‘Financial Services Act 1986 Reforms: Part 2’ (1991) *International Banking Law* 9(9) 412-416, at 415.

²⁴ Financial Services Act 1986, s. 6.

²⁵ Financial Services Act 1986, s. 59.

²⁶ Financial Services Act 1986, s. 71 and 72.

²⁷ For a more detailed discussion of the enforcement of the insider dealing provisions of the FSA 1986 see Lomnicka, E. ‘Curtailed section 62 accountability’ (1991) *Journal of Business Law* July 353-360 and Alcock, A. ‘Insider dealing – how die we get here’ (1994) *Company Lawyer* 15(3) 67-72.

²⁸ It must be noted that the FSA 1986 did provide the SIB with fraud enforcement powers under section 47. For a more detailed analysis see Barnett, W. ‘Fraud enforcement in the Financial Services Act 1986: an analysis and discussion of section 47’ (1996) *The Company Lawyer* 17(7) 203.

²⁹ See Rider, B. ‘Policing the city – combating fraud and other abuses in the corporate securities industry’ (1988) *Current Legal Problems* 41 47-68 and Long, J. ‘Policing the markets – SIB’s role’ (1994) 15(3) 83-85.

³⁰ Hereinafter ‘SFO’. See generally Wright, R. ‘Fraud after Roskill: A view from the Serious Fraud Office’, (2003) *Journal of Financial Crime*, 11(1), 10-16.

³¹ Criminal Justice Act 1987, s. 1.

Committee.³² The initial remit of the SFO was to tackle serious and complex fraud, yet this has been extended to include bribery and corruption following the enactment of the Bribery Act 2010.³³ The SFO was established following the era of financial deregulation in the 1980s, which resulted in the city of London being perceived as an epicentre for financial criminals.³⁴ However, the effectiveness of the SFO has been questioned on many occasions.³⁵ For example, its reputation was tarnished by a several notorious prosecutorial failures including Guinness,³⁶ Blue Arrow,³⁷ Maxwell³⁸ and Levitt.³⁹ Furthermore, the SFO has been in the headlines for its handling of the bribery allegations against BAE Systems and its abandonment of the investigation into arms sales in Saudi Arabia.⁴⁰ In 2012, the SFO was

³² The Committee was asked to ‘consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved and to consider what changes in existing law and procedure would be desirable to secure the just, expeditious and economical disposal of such proceedings’. See Fraud Trials Committee Report (1986) HMSO.

³³ For a more detailed discussion see Ryder, N. ‘The Legal Mechanisms to control Bribery and Corruption’. In: Rider, B. (eds) *Research Handbook on International Financial Crimes*, Edward Elgar: Cheltenham, 2015, 381-393.

³⁴ Bosworth-Davies, R. ‘Investigating financial crime: the continuing evolution of the public fraud investigation role – a personal perspective’, (2009) *Company Lawyer*, 30(7), 195-199, at 196.

³⁵ See for example de Grazia, J. *Review of the Serious Fraud Office – Final Report* (Serious Fraud Office 2008), HM Crown Prosecution Service, Inspectorate *Review of the Fraud Prosecution Service* (HM Crown Prosecution Service Inspectorate: London, 2008), and HM Crown Prosecution Service Inspectorate *Report of the Attorney General on the inspection of the Serious Fraud Office* (HM Crown Prosecution Service Inspectorate: London, 2012).

³⁶ For a more detailed discussion see Sarker, R. ‘The trials and errors of the Guinness four’ (1995) *Journal of Financial Crime*, 3(1), 86-.

³⁷ For a more detailed discussion of this case see Cohen, H. ‘What place does the criminal law have in the regulation of securities markets after the Blue Arrow trials?’ (1992) *Journal of International Banking Law*, 7(10), 420-.

³⁸ For a more detailed discussion see Sarker, R. ‘Maxwell: fraud trial of the century (Case Comment)’ (1996) *Company Lawyer*, 17(4), 116-117 and Honess, T. ‘Juror competence in processing complex information: implications from a simulation of the Maxwell trial’ (1998) *Criminal Law Review*, November 763-773.

³⁹ For a more detailed discussion see Sarker, R. ‘The Serious Fraud Office - quo vadis?’ (1995) *Company Lawyer*, 16(2), 56-61.

⁴⁰ For a more detailed discussion see Williams, S. ‘The BAE/Saudi Al-Yamamah contracts: implications in law and public procurement’ (2008) *International & Comparative Law Quarterly*, 57(1), 200-209 and Rose, C. ‘Legislative Comment The UK Bribery Act 2010 and accompanying guidance: belated implementation of the OECD Anti-Bribery Convention’ (2012) *International & Comparative Law Quarterly*, 2012, 61(2), 484-499. The decision by the SFO to terminate its investigation into sale of arms in Saudi Arabia was subject to a judicial review and the Queen’s Bench Divisional Court determined that the decision was unlawful. See *The Queen on the application of (1) Corner House Research (2) Campaign Against Arms Trade v The Director of the Serious Fraud Office (Defendant) and BAE Systems Plc (Interested Party)*, Claim No CO/1567/2007, High Court of Justice, Queen's Bench Division, Administrative Court, 18 April 2007. However, this decision was overturned on appeal by House of Lords. See *R (on the application of Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60, 30 July 2008, para 11. For a more detailed discussion of this case and the related legal issues see Yihdego, Z. ‘Arms trade and public controls: the right to information perspective’ (2008) *Northern Ireland Legal Quarterly*, 59(4), 379-394; Spencer, J. ‘Fiat justitia, ruatque

severely criticized over its poor handling of the Tchenguiz brother's investigation.⁴¹ However, it is important to emphasize that the SFO *has* increased the frequency of its investigations and prosecutions, against a political background of severe financial restrictions imposed by the Coalition government.⁴² For example, between 2001 and 2006, the SFO reported a conviction rate of 61%.⁴³ This increased to 71% in 2007.⁴⁴ By 2008, the conviction rate had fallen slightly to 68%.⁴⁵ In 2009, the SFO achieved a conviction rate of 91%,⁴⁶ 84% in 2010, 73% in 2011,⁴⁷ 70% in 2012,⁴⁸ 85% in 2013⁴⁹ and 78% in 2014.⁵⁰

The need to review and reform the relationship between financial regulation and financial crime legislation was hastened following the catastrophic collapse of Bank of Credit Commerce International⁵¹ and the failure of Barings Bank.⁵² As a result, the then newly elected Labour Government announced in May 1997 that it intended to create a single super regulator for the UK's financial services sector, the Financial Services Authority.⁵³ The reduction of financial crime became one of the Regulator's then four statutory objectives, and

concordia cum Arabe?' (2008) Cambridge Law Journal, 67(3), 456-458 and Roberts, A. 'Prosecution: Director of SFO - lawfulness of decision to discontinue prosecution' (2009) Criminal Law Review, 1, 46-49.

⁴¹ See for example Neate, R. 'Tchenguiz brothers seek millions from Serious Fraud Office', December 3 2012, available from <http://m.guardian.co.uk/business/2012/dec/03/tchenguiz-brothers-millions-damages-sfo>, accessed 18 March 2015, Russel, J. 'Tchenguiz brothers launch damages case against SFO', 2 December 2012, available from <http://www.telegraph.co.uk/finance/financial-crime/9717240/Tchenguiz-brothers-launch-damages-case-against-SFO.html>, accessed 18 March 2015,

⁴² See generally Ryder, N. 'White collar crime and the global financial crisis; how long will we have to wait for the day of reckoning?' (2013) The Criminal Lawyer, 57(Jul), 5-14.

⁴³ Serious Fraud Office *Annual Report 2006/2007* (Serious Fraud Office: London, 2007) at 4.

⁴⁴ *Ibid.*

⁴⁵ Serious Fraud Office *Annual Report 2007/2008* (Serious Fraud Office: London, 2008) at 5.

⁴⁶ Serious Fraud Office *Annual Report 2009/2010* (Serious Fraud Office: London, 2010) at 2.

⁴⁷ Serious Fraud Office *Annual Report and Accounts 2011/2012* (Serious Fraud Office: London, 2012) at 6.

⁴⁸ Serious Fraud Office *Annual Report and Accounts 2012/2013* (Serious Fraud Office: London, 2013) at 4.

⁴⁹ Serious Fraud Office *Annual Report and Accounts 2013/2014* (Serious Fraud Office: London, 2014) at 1.

⁵⁰ Serious Fraud Office *Annual Report and Accounts 2014/2015* (Serious Fraud Office: London, 2015) at 1.

⁵¹ For an excellent discussion of the collapse of BCCI see Arora, A. 'The statutory system of the bank supervision and the failure of BCCI' (2006) Journal of Business Law, August, 487-510.

⁵² For a more detailed and analytical account of the collapse of Barings see Proctor, L. 'The Barings collapse: a regulatory failure, or a failure of supervision' (1997) Brooklyn Journal of International Law, 22, 735

⁵³ Lomnicka, E. 'Reforming U.K. financial services regulation: the creation of a single regulator' (1999) Journal of Business Law, September, 480-489, at 482. Hereinafter 'FSA'.

it has been regarded by this author as one of the most innovative aspects of FSMA 2000.⁵⁴ In order to achieve this statutory objective the regulator was given a plethora of investigative and enforcement powers. For example, the regulator has become a prosecuting authority for money laundering, a limited number of fraud related offences and insider dealing. It also has the power to impose financial sanctions where it establishes that there has been a contravention by an authorised person of any of its requirements.⁵⁵ Furthermore, the FSA had the power to ban authorized persons and firms from undertaking any regulated activity.⁵⁶ By virtue of the Financial Services Act 2012, the FSA was replaced by the Financial Conduct Authority and the financial crime statutory objective was removed and it is now associated with the FCA's consumer protection and market integrity objectives.⁵⁷ The FCA stated that “one of our objectives is to ensure the integrity of the markets ... a key part of that is ensuring that our markets operate honestly and that the firms we regulate understand, and manage, the financial crime risks that they face”.⁵⁸ Hill stated that “the FCA must also have regard to taking action in relation to financial crime. This will be a freestanding duty to take action in relation to any fraud, dishonesty, misconduct and handling the proceeds of crime”.⁵⁹ The regulator will continue to concentrate its resources towards maintaining “standards of conduct in the financial services industry”.⁶⁰ This means that the FCA will adopt a very similar approach towards the reduction of financial crime as that adopted by the FSA, namely that regulated firms must have appropriate systems and controls. Another legacy left by the

⁵⁴ Financial Services and Markets Act 2000, s. 6. See generally Ryder, N. ‘The Financial Services Authority, the Reduction of Financial Crime and the Money Launderer – A Game of Cat and Mouse’, (2008) Cambridge Law Journal, 67(3), 635-653.

⁵⁵ Financial Services and Markets Act 2000, s. 206 (1). For a general discussion see Travers Smith Regulatory Investigations Group ‘FSA enforcement action: themes and trends’ (2011) Compliance Officer Bulletin, 87, June, 1-35.

⁵⁶ Financial Services and Markets Act 2000, s. 56.

⁵⁷ Financial Conduct Authority ‘Fighting financial crime’, March 31 2013, available from <http://www.fca.org.uk/about/what/protecting/financial-crime> accessed July 8 2013. Hereinafter ‘FCA’.

⁵⁸ *Ibid.*

⁵⁹ Hill, C. ‘Fund management update’ (2013) Compliance Officer Bulletin, 104(Mar), 1-36, at 30.

⁶⁰ Srivastava, A., Mason, I., Simpson, M. and Litt, M. ‘Financial Crime’ (2011) Compliance Officer Bulletin, 86(May), 1-23, at 9.

FSA are the “the tools that are currently available to the FSA. It will be able to impose penalties for market abuse, instigate criminal proceedings for insider dealing and market manipulation and it will act as a ‘competent authority’ in relation to money laundering”.⁶¹ Furthermore, the FCA will be expected to follow and further develop the FSA’s credible deterrence strategy.⁶² This would involve the FCA continuing to “taking tough, targeted, effective and public action against misconduct perpetrated by firms and individuals”.⁶³ However, it is important to note that there is an expectation that the FCA will be more *proactive* than its predecessor by initiating more cases and imposing stronger penalties.⁶⁴ Therefore, in light of this the article now turns to critically review the use of civil and criminal mechanisms since the onset of the most recent financial crisis.

Civil sanctions and credible deterrence

One of the most commonly utilised powers by the regulator has been its ability to impose financial sanctions where it establishes that there has been a contravention by an authorised person of any requirement under FSMA 2000.⁶⁵ The highest profile financial sanctions imposed since the financial crisis has been over the manipulation of the London Interbank Borrowed Rate and the Foreign Exchange Currency Market.⁶⁶ For example, in 2012 the regulator concluded that Barclays Bank had manipulated the both the dollar LIBOR and the EURIBOR rates of interest after being asked by derivative traders and other banking

⁶¹ Hill above, n 59 at 30.

⁶² Srivastava *et al* above, n 62 at 10.

⁶³ Hill above, n 59 at 30.

⁶⁴ Marshall, H., Leonard, C. and Siriwardhane, A. ‘The regulation of short selling in the UK’ (2009) Compliance Officer Bulletin, 63(Feb), 1-29, at 9.

⁶⁵ Financial Services and Markets Act 2000, s. 206 (1).

⁶⁶ Hereinafter ‘LIBOR’ and ‘FORX’. It is important to also state that the regulator has also imposed financial penalties for other types of financial crime including money laundering, fraud and bribery.

institutions.⁶⁷ The regulator noted that Barclays had acted inappropriately by “making LIBOR submissions which took into account concerns over the negative media perception of Barclays’ LIBOR submissions”.⁶⁸ This is of particular relevance to link between the financial crisis and the illegal activities of Barclays. This was a point raised by the regulator who reported:

“Liquidity issues were a particular focus for Barclays and other banks during the financial crisis and banks’ LIBOR submissions were seen by some commentators as a measure of their ability to raise funds. Barclays was identified in the media as having higher LIBOR submissions than other contributing banks at the outset of the financial crisis. Barclays believed that other banks were making LIBOR submissions that were too low and did not reflect market conditions. The media questioned whether Barclays’ submissions indicated that it had a liquidity problem. Senior management at high levels within Barclays expressed concerns over this negative publicity”.⁶⁹

The regulator added that the concerns raised by members of senior management of Barclays resulted in “instructions being given by less senior managers at Barclays to reduce LIBOR submissions in order to avoid negative media comment”.⁷⁰ The regulator concluded that this conduct breached several of its Principles of Business and stated that Barclays had “fail[ed] to conduct its business with due skill, care and diligence when considering issues rose internally in relation to its LIBOR submissions”.⁷¹ Barclays Bank Plc was fined £59.5m by

⁶⁷ Financial Services Authority ‘Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR’, June 27 2012, available from <http://www.fca.org.uk/news/press-releases/barclays-fined-595-million-libor-euribor>, accessed February 8 2016.

⁶⁸ Financial Services Authority *Final notice to Barclays Bank Plc* (Financial Services Authority: London, 2012) at 3.

⁶⁹ *Ibid.*

⁷⁰ Financial Services Authority above, n 68 at 3.

⁷¹ *Ibid.*

the regulator and their conduct was strongly condemned by the HM Treasury Select Committee.⁷² The second bank to be fined (£160m) due to its manipulation of LIBOR was UBS in December 2012.⁷³ The regulator concluded that between January 2005 and December 2010, UBS breached Regulations 3 and 5 of the Principles of Business when the bank engaged in illegal behaviour regarding the calculation of LIBOR and EURIBOR.⁷⁴ The Royal Bank of Scotland (RBS) became the third bank to be fined in February 2013 following the revelations of LIBOR rigging. The regulator fined RBS £87.5m for its conduct between January 2006 and November 2010.⁷⁵ The overall fine would have been £125m had it not been for a 30% discount granted by the regulator. The conduct of the banks employees was not limited to the UK, it occurred in Japan, Singapore and the US. According to the regulator, the illegal conduct was extensive and “219 requests for inappropriate submissions were documented – an unquantifiable number of oral requests, which by their nature would not be documented, were also made. At least 21 individuals including derivatives and money market traders and at least one manager were involved in the inappropriate conduct”.⁷⁶ The regulator added that “the failures at RBS were all the more serious because of the attempts not only to influence the submissions of RBS but also of other panel banks and the use of interdealer brokers to do this ... the extent and nature of the misconduct relating to LIBOR has cast a shadow on the reputation of this industry and we expect firms to take steps to ensure that this can never happen again”.⁷⁷ The regulator imposed another financial penalty of £14m on ICAP European Limited in September 2013 for an embarrassing amount of

⁷² HM Treasury Select Committee *Fixing LIBOR: some preliminary findings* (HM Treasury: London, 2012) at 21.

⁷³ Financial Services Authority ‘UBS fined £160 million for significant failings in relation to LIBOR and EURIBOR’, December 19 2012, available from <http://www.fsa.gov.uk/library/communication/pr/2012/116.shtml>, accessed February 5 2016.

⁷⁴ *Ibid.*

⁷⁵ 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 8th February 2013.

⁷⁶ *Ibid.*

⁷⁷ Financial Services Authority above, n 75.

misconduct that involved the firm's traders colluding the UBS traders to manipulate the (Japanese Yen) JPY LIBOR rates and one trader receiving bonus or corrupt payments for assisting in the manipulation.⁷⁸ In October 2013, Rabobank was fined by the regulator £105m for "poor internal controls encouraged collusion between traders and LIBOR submitters and allowed systematic attempts at benchmark manipulation".⁷⁹ The regulator added that "The FCA found over 500 instances of attempted LIBOR manipulation, directly or indirectly involving at least 9 managers and 19 other individuals based across the world. At least one manager was actively involved in attempted manipulation and facilitated a culture where this practice appeared to be accepted, or even endorsed by the bank".⁸⁰ In July 2014, Lloyds TSB was fined £104m by the regulator for breaches of the LIBOR and other benchmarks.⁸¹ Additionally, Martin Brokers (UK) Limited was fined £630,000 for significant failings in relation to LIBOR.⁸² The key question that must be addressed here is whether the financial penalties will deter future misconduct in the financial services sector? Evidence suggests that the impact of these fines on the financial services sector is extremely limited and that the financial services sector continues to be troubled by misconduct. This was soon illustrated the imposition of these record breaking financial penalties following the manipulation of FOREX. For example, in November 2014 the regulator fined five banks a total of £1.1bn for "failing to control business practices ... in their foreign exchange trading

⁷⁸ Financial Conduct Authority 'ICAP Europe Limited fined £14 million for significant failings in relation to LIBOR', September 25 2013, available from <http://www.fca.org.uk/news/icap-europe-limited-fined>, accessed February 6 2016.

⁷⁹ Financial Conduct Authority 'The FCA fines Rabobank £105 million for serious LIBOR-related misconduct', October 29 2013, available from <http://www.fca.org.uk/news/the-fca-fines-rabobank-105-million-for-serious-libor-related-misconduct>, accessed February 6 2016.

⁸⁰ *Ibid.*

⁸¹ Financial Conduct Authority 'Lloyds Banking Group fined £105m for serious LIBOR and other benchmark failings', 28 September 2015, available from <https://www.fca.org.uk/news/lloyds-banking-group-fined-105m-libor-benchmark-failings>, accessed February 2 2016.

⁸² Financial Conduct Authority 'Martin Brokers (UK) Limited fined £630,000 for significant failings in relation to LIBOR', May 15 2014, available from <http://www.fca.org.uk/news/press-releases/martin-brokers-uk-limited-fined-630000-for-significant-failings-in-relation-to-libor>, accessed February 6 2016.

operations”.⁸³ In this instance, the regulator fined Citibank £225m, HSBC Bank Plc £216.3m, JP Morgan Chase Bank £222.1m, RBS £217m and UBS AG £233m. Martin Wheatley, the then head of the regulator *boldly* claimed:

“The FCA does not tolerate conduct which imperils market integrity or the wider UK financial system. Today’s record fines mark the gravity of the failings we found and firms need to take responsibility for putting it right. They must make sure their traders do not game the system to boost profits or leave the ethics of their conduct to compliance to worry about. Senior management commitments to change need to become a reality in every area of their business”.⁸⁴

In May 2015, Barclays was fined by the regulator £284.4m for “failing to control business practices in its foreign exchange business in London”.⁸⁵ The regulator condemned the actions of Barclays and stated that “this is *another* [author’s emphasis] example of a firm allowing unacceptable practices to flourish on the trading floor”.⁸⁶ The regulator also imposed a financial penalty on Mark Stevenson in 2014 for manipulating gilt prices during quantitative easing.⁸⁷

⁸³ Financial Conduct Authority ‘FCA fines five banks £1.1 billion for FX failings and announces industry-wide remediation programme’, November 12 2014, available from <https://www.fca.org.uk/news/fca-fines-five-banks-for-fx-failings>, accessed February 7 2016.

⁸⁴ *Ibid.*

⁸⁵ Financial Conduct Authority ‘FCA fines Barclays £284,432,000 for forex failings’, May 20 2015, available from <https://www.fca.org.uk/news/fca-fines-barclays-for-forex-failings>, accessed February 2 2015.

⁸⁶ *Ibid.*

⁸⁷ Financial Conduct Authority ‘FCA bans and fines trader £662,700 for manipulating gilt price during QE’, March 20 2014, available from <https://www.fca.org.uk/news/fca-bans-and-fines-trader-660k-for-manipulating-gilt-price-during-qe>, accessed February 2 2016.

Another civil sanction available to the regulator is a prohibition.⁸⁸ One area in which these have been extensively used is mortgage fraud, which has “been identified as a contributor to the financial crisis”.⁸⁹ Srivastava *et al* stated that “the FSA has banned 92 mortgage brokers and imposed fines of around £1.5m”.⁹⁰ In 2008/2009, the FSA imposed prohibition orders on 58 individuals,⁹¹ and it is very interesting to note that out of the 58 prohibition orders, 23 of them were mortgage fraud related.⁹² The number of prohibition orders slightly decreased in 2009/2010 to 56,⁹³ but increased to 71 in 2010/2011.⁹⁴ However, the numbers dropped to 47 in 2011,⁹⁵ 45 in 2012,⁹⁶ 26 in 2013⁹⁷ and 26 in 2014.⁹⁸ An illustration of FSA issuing a prohibition order was against Peter Cummins, the former CEO of HBOS.⁹⁹ Additionally, he was fined £500,000 for his “breaching Statement of Principle 6 of the FSA’s Code of Practice

⁸⁸ For example, in April 2008 the FSA banned John Paul Key, who operated as Jack Key Mortgage Services “for not being competent or capable to perform any functions related to regulated activities, including giving advice”. See Financial Services Authority ‘Final Notice to Mr John Paul Key trading as Jack Key Mortgage Services’, April 21 2008, available from <http://www.fsa.gov.uk/pubs/final/JKMS.pdf>, accessed June 30 2013. For further examples see Financial Services Authority, ‘FSA bans four more brokers for mortgage fraud as the Tribunal dismisses broker’s appeal’, April 19 2011, available from <http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/038.shtml>, accessed June 30 2013.

⁸⁹ Srivastava *et al* above, n 62 at 6.

⁹⁰ *Ibid.* For a more detailed commentary on the measures introduced by the Financial Services Authority to tackle mortgage fraud see Haines, J. ‘Mortgage fraud - FSA report on thematic findings of mortgage lenders systems and controls against mortgage fraud’ (2011) *Company Lawyer*, 32(11), 344-346, Haines, J. ‘Mortgage fraud - have mortgage lenders got their house in order?’ (2011) *Company Lawyer*, 32(3), 86-88.

⁹¹ Financial Services Authority *Enforcement annual performance account 2008/2009* (Financial Services Authority: London, 2009) at 7.

⁹² *Ibid.*, at 4.

⁹³ Financial Services Authority *Enforcement annual performance account 2009/2010* (Financial Services Authority: London, 2010) at 4.

⁹⁴ Financial Services Authority *Enforcement annual performance account 2010/2011* (Financial Services Authority: London, 2011) at 8.

⁹⁵ Financial Services Authority *Enforcement annual performance account 2011/2012* (Financial Services Authority: London, 2012) at 8.

⁹⁶ Financial Services Authority *Enforcement annual performance account 2012/2013* (Financial Services Authority: London, 2013) at 5.

⁹⁷ Financial Conduct Authority *Enforcement annual performance account 2013/2014* (Financial Services Authority: London, 2014) at 3.

⁹⁸ Financial Conduct Authority *Annual Report and Accounts 2014/15* (Financial Conduct Authority: London, 2015) at 56.

⁹⁹ Financial Services Authority ‘FSA issues ban and fine of £500,000 against former HBOS executive, Peter Cummings’, September 12 2012, available from <http://www.fsa.gov.uk/library/communication/pr/2012/087.shtml>, accessed June 30 2013.

for Approved Persons, by failing to exercise due skill, care and diligence in managing HBOS's Corporate Division".¹⁰⁰ The regulator stated that:

"Despite being aware of the weaknesses in his division and growing problems in the economy, Cummings presided over a culture of aggressive growth without the controls in place to manage the risks associated with that strategy. Instead of reacting to the worsening environment, he raised his targets as other banks pulled out of the same markets. It is essential that senior executives understand that incentivizing revenue over risk is a dangerous folly. Growth is a sound ambition for any business but risk must be properly managed and robust controls are imperative to ensure growth is achieved in a way that is both stable and sustainable".¹⁰¹

The financial predicament that HBOS faced just after the start of the financial crisis was succinctly summarized by Tomasic and Akinbani who stated "the deterioration in the financial position of HBOS was largely attributable to heavy lending to its corporate customers involved in property development; while its retail arm was scheduled to make a profit of £1.2bn ... its corporate lending arm was scheduled to make a loss of almost £6.8bn".¹⁰² Willmot and James described the issue of a prohibition order against Peter Cummins as "the first case that the FSA has pursued in which disciplinary action is taken in relation to the core business risks taken by the firm ... in this case, the bank's decision as to whether or not to lend its own money to customers ... This is unprecedented in the 11 years of the FSA's existence and marks a very important shift in the FSA's own view of its

¹⁰⁰ *Ibid.*

¹⁰¹ Financial Services Authority above, n 99.

¹⁰² Tomasic, R. and Akinbami, F. 'Towards a new corporate governance after the global financial crisis' (2011) *International Company and Commercial Law Review*, 22(8), 237-249, at 243.

regulatory remit”.¹⁰³ Another example of the regulator using prohibition orders was illustrated in July 2010, when it banned and fined the former finance director of Northern Rock, David Jones, for misrepresenting mortgage arrears figures.¹⁰⁴ Furthermore, the regulator fined and banned the former deputy chief executive and credit director of Northern Rock for also misreporting mortgage arrears figures.¹⁰⁵ However, the implementation of a prohibition order against Peter Cummins can be contrasted with the lack of enforcement action against two other bankers, Fred Goodwin and Johnny Cameron. Johnny Cameron, the former Executive Director of RBS, was under investigation by the regulator. However, unlike Peter Cummins, the regulator reached a settlement with Jonny Cameron, who agreed that he will not “perform any significant influence function in relation to any regulated activity carried on by any authorized person, exempt person or exempt professional firm” or “undertake any further full time employment in the financial services industry”.¹⁰⁶ It is important to stress that that James Cameron made no admission of guilt and in response to the decision by the regulator and he stated “given the losses sustained by RBS in 2008, as a director of the RBS, I recognise that it is appropriate that I take my share of responsibility, and I will not be seeking another managerial role in the financial services industry”.¹⁰⁷

The highest profile former banker who the regulator decided not to take action against was Fred Goodwin, who was the CEO of RBS between 2001 and 2009. During his tenure, Fred

¹⁰³ Willmot, N. and James, P. ‘Reading between the lines: understanding the FSA's unwritten expectations of significant influence function holders on appointment and beyond’ (2012) Compliance Officer Bulletin, 101(Nov), 1-28, at 13.

¹⁰⁴ Financial Services Authority ‘FSA bans and fines former Northern Rock finance director £320,000 for misreporting mortgage arrears figures’, July 27 2010, available from <http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/126.shtml>, accessed July 1 2013.

¹⁰⁵ Financial Services Authority ‘FSA fines and bans former Northern Rock deputy chief executive and credit director for misreporting mortgage arrears figures’, April 13 2010, available from <http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/066.shtml>, accessed July 1 2013.

¹⁰⁶ Financial Services Authority ‘FSA statement on Johnny Cameron’, May 18 2010, available from <http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/081.shtml>, accessed July 1 2013.

¹⁰⁷ Anon. ‘Former RBS investment bank chief Johnny Cameron banned from City’, May 18 2010, available from <http://www.telegraph.co.uk/finance/financialcrisis/7736540/Former-RBS-investment-bank-chief-Johnny-Cameron-banned-from-City.html>, accessed July 7 2013.

Goodwin oversaw what can be classified as a ‘boom’ time for RBS. By 2008, the bank had demonstrated rapid growth and its assets totalled £1.9tn and it was the fifth largest bank on the stock exchange. Fred Goodwin was “deemed by the banking world and by the government to have a Midas touch. He advised the government on banking matters and was knighted for his services. He could do no wrong”.¹⁰⁸ However, this persona changed after RBS’s ill-advised purchase in 2007 of ABN Amro for £48bn,¹⁰⁹ which was unsurprising given his eagerness to expand the size of RBS via acquiring other banks.¹¹⁰ Huisman stated that “Fred Goodwin ... is the embodiment of all that is apparently wrong in the financial sectors and which caused the financial crisis. He is seen as responsible for the disastrous acquisition of ... ABN Amro Bank and the resulting rescue operation of the government”.¹¹¹ This approach was flawed and extremely risky because Fred Goodwin was “known for the way in which he aggressively cut costs within the bank”.¹¹² This created the perfect cocktail of events that contributed to the bank suffering the largest annual corporate loss in UK history,¹¹³ and the part nationalisation of RBS. The regulator decided against pursuing any action against Fred Goodwin.¹¹⁴ Despite no action being taken against Fred Goodwin he has offered a “profound and unqualified apology for all of the distress that has been caused”.¹¹⁵

¹⁰⁸ Kirk, D. ‘Criminalising bad bankers’ (2012) *Journal of Criminal Law*, 76(6), 439-441, at 440.

¹⁰⁹ BBC News ‘RBS secures takeover of ABN Amro’, October 8 2007, available from <http://news.bbc.co.uk/1/hi/business/7033176.stm>, accessed July 2 2013. It is interesting to note that during its purchase of ABN Amro, RBS did not undertake any due diligence. See House of Commons Treasury Committee *Banking Crisis: Reforming Corporate Governance and Pay in the City*, HC 519 (House of Commons Treasury Committee: London, 2009) at 22.

¹¹⁰ *Ibid.*

¹¹¹ Huisman, QW. ‘Corporate crime and crisis: causation scenarios’ in Deflem, M. (eds), *Economic Crisis and Crime* (Emerald: Bingley, 2011) at 119.

¹¹² Tomasic and Akinbami above, n 102 at 243.

¹¹³ See for example BBC News ‘RBS reports record corporate loss’, February 26 2009, available from <http://news.bbc.co.uk/1/hi/business/7911722.stm>, accessed July 2 2013, Treanor, J. ‘RBS record losses raise prospect of 95% state ownership’, February 26 2009, available from <http://www.guardian.co.uk/business/2009/feb/26/rbs-record-loss>, accessed July 2 2013 and CNN ‘RBS posts record \$34 billion loss’, February 27 2009, available from <http://edition.cnn.com/2009/BUSINESS/02/26/uk.rbs.recordloss/>, accessed July 2 2013.

¹¹⁴ For an explanation of the reasons for not pursuing action against Fred Goodwin see Financial Services Authority *The failure of the Royal Bank of Scotland – FSA Board Report* (Financial Services Authority: London, 2009) at 405-406.

¹¹⁵ House of Commons Treasury Committee above, n 109 at 58.

What has transpired since the financial crisis can be described as a *tepid* approach towards enforcing the financial crime provisions of FSMA 2000. The regulator has clearly favoured imposing financial sanctions on firms and individuals as opposed to instigating criminal proceedings, as part of its credible deterrence policy.¹¹⁶ However, the credible deterrence policy has resulted in the FSA adopting a different approach towards imposing financial sanctions by imposing them on *individuals* and not just firms. This was summarised by Peat and Mason who stated:

“The FSA’s policy of credible deterrence in enforcement cases involves bringing action not just against firms, but also against individuals. The normal sanction imposed on a firm is a financial penalty; the firm pays the fine and then carries on with its normal business. In contrast a sanction imposed on an individual may have longer-lasting consequences, for example a prohibition order may prevent an individual from working in the financial services industry for a period of years, and this has a greater deterrent effect”.¹¹⁷

It has been argued that the objective of the credible deterrence policy is to “deliver a message that breaches of law and/or regulation will result in offenders suffering ‘meaningful consequences’ including imprisonment”.¹¹⁸ Teasdale stated that the “credible deterrence agenda has relied upon not only securing meaningful convictions, judgments and regulatory decisions, but also upon clearly advertising them; to the regulated community to dissuade

¹¹⁶ Financial Services Authority ‘Delivering credible deterrence’, speech by Margaret Cole, Director of Enforcement, FSA, Annual Financial Crime Conference, 27 April 2009, available from http://www.fsa.gov.uk/library/communication/speeches/2009/0427_mc.shtml, accessed 8 March 2013.

¹¹⁷ Peat, R. and Mason, I. ‘Credible deterrence in action: the FSA brings a series of cases against traders’ (2009) *Company Lawyer*, 30(9), 278-279 at 278.

¹¹⁸ Srivastava *et al* above, n 62 at 8.

similar behaviour, and to the wider world to engender consumer and market confidence”.¹¹⁹ Lewis *et al* stated that the regulator has “levied large fines and, at worst, bans, on firms and relevant approved individuals who breached its rules – sometimes regardless of whether the breach has resulted in actual harm to customers”.¹²⁰ This point is clearly illustrated by the significant increase in the use of financial sanctions since the start of the financial crisis by the regulator.¹²¹ Srivastava *et al* stated “financial sanctions have assumed greater political importance in recent years and as a result there has been increased focus on the part of the FSA in ensuring that firms understand their obligations under the various financial sanctions regimes”.¹²² For example, in 2007 the regulator imposed a total of £5.3m financial sanctions.¹²³ A year later, it reported that the figure had increased to £22.7m.¹²⁴ In 2009 the amount of financial sanctions increased to £35m.¹²⁵ The figures for 2010 and 2011 illustrated an increase to £89.1m¹²⁶ and a decrease to £66.1m.¹²⁷ However, in 2012 the regulator imposed financial sanctions that amounted to £311.5m,¹²⁸ a majority of which are associated with the LIBOR scandal. In 2013, the regulator had imposed financial sanctions totalling £474.2m,¹²⁹ whilst in 2014 the total amount of fines imposed totalled £1.4bn.¹³⁰ In 2015, the

¹¹⁹ Teasdale, S. ‘FSA to FCA: recent trends in UK financial conduct regulation’ (2011) *Journal of International Banking Law and Regulation*, 26(12), 583-586, at 585.

¹²⁰ Lewis, A., Pretorius, R. and Radmore, E. ‘Outsourcing in the financial services sector’ (2013) *Compliance Officer Bulletin*, 106(May), 1-34, at 3.

¹²¹ For a more detailed commentary on the approach adopted by the Financial Services Authority towards imposing financial sanctions see Financial Services Authority *Financial services firms’ approach to UK financial sanctions* (Financial Services Authority: London, 2009).

¹²² Srivastava *et al* above, n 62 at 7.

¹²³ Financial Services Authority ‘FSA Fines Table 2007’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2007>, accessed 8 March 2013.

¹²⁴ Financial Services Authority ‘FSA Fines Table 2008’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2008>, accessed 8 March 2013.

¹²⁵ Financial Services Authority ‘FSA Fines Table 2009’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2009>, accessed 8 March 2013.

¹²⁶ Financial Services Authority ‘FSA Fines Table 2010’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2010>, accessed 8 March 2013.

¹²⁷ Financial Services Authority ‘FSA Fines Table 2011’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2011>, accessed 8 March 2013.

¹²⁸ Financial Services Authority ‘FSA Fines Table 2012’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2012>, accessed 8 March 2013.

¹²⁹ Financial Conduct Authority ‘Fines table - 2013’, n/d, available from <http://www.fca.org.uk/firms/being-regulated/enforcement/fines>, accessed July 2 2013.

regulator levied fines totalling £905m.¹³¹ At the time of writing this article the regulator has imposed fines totalling £15.5m.¹³² At first glance, these financial penalties demonstrate the imposition of record breaking financial penalties. However, these financial penalties can be criticised because they only represent a very small percentage of the profits generated by the financial institutions who have been subjected to enforcement action. The imposition of ‘media friendly’ financial penalties represents a worrying trend towards large financial institutions who have been involved in illegal activities. For example, the regulator has imposed record penalties on financial institutions who manipulated the LIBOR and FOREX markets yet they were reluctant to initiate criminal proceedings. This situation is extremely undesirable and somewhat surprising given the ability of the regulator to act as prosecutorial agency. For example, the FCA is able to prosecute a firm or individual who falsely claims to be authorised, where a firm undertakes a regulated activity without authorisation, where the firm makes a misleading statement that leads to an investment and where a firm or individual fails to co-operate with an FCA investigation. Additionally, the FCA is able to prosecute insider dealing offences,¹³³ misleading statements,¹³⁴ misleading statement relating to benchmarks,¹³⁵ breaches of the Money Laundering Regulations and terrorist financing.¹³⁶ The origins of these powers are to be found in s 401 and 402 FSMA 2000 and were interpreted by the Supreme Court in *R v Rollins*,¹³⁷ where the court held that the regulator were able to prosecute offences that were not limited to FSMA 2000. However, it is important to note that these financial penalties are belittled when compared to those imposed

¹³⁰ Financial Conduct Authority ‘Fines table - 2014’, n/d, available from <http://www.fca.org.uk/firms/being-regulated/enforcement/fines/2014>, accessed February 5 2016.

¹³¹ Financial Conduct Authority ‘Fines table - 2015’, n/d, available from <http://www.fca.org.uk/firms/being-regulated/enforcement/fines/2015-fines>, accessed February 5 2016.

¹³² Financial Conduct Authority ‘Fines table – 2016’, n/d, available from <http://www.fca.org.uk/firms/being-regulated/enforcement/fines>, accessed February 8 2016.

¹³³ Criminal Justice Act 1993, s. 52.

¹³⁴ Financial Services Act 2012, s. 89 and 90.

¹³⁵ Financial Services Act 2012, s. 91.

¹³⁶ Counter-Terrorism Act 2008, schedule 7.

¹³⁷ [2010] UKSC 39.

in the US. For example, in August 2014 Bank of America agreed to settle charges and paid \$16.65bn brought by the Department of Justice that it had sold defective mortgage securities before the start of the financial crisis.¹³⁸ Furthermore, in December 2012 HSBC agreed to pay the Department of Justice \$1.2bn for having inadequate anti-money laundering controls.¹³⁹

In addition to the financial sanctions and prohibition orders imposed by the regulator, they are able to use a series of preventive measures via its Senior Management Arrangements, Systems and Controls, or SYSC part of the Handbook. Part 3 provides that firms must have in place systems and controls which are appropriate for the firm to conduct its business.¹⁴⁰ In particular, a firm is required to “take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime”.¹⁴¹ Therefore, authorized firms are required to undertake consistent assessments of the adequacy of their systems to prevent themselves from being used to facilitate financial crime,¹⁴² allocate a director/senior manager with overall responsibility for establishing and the maintaining of the financial crime.¹⁴³ The regime is intended to provide the regulated sector with an even higher degree of flexibility. This means that firms are able to identify the risks and determine how they can best allocate their resources in areas which are most

¹³⁸ The United States Department of Justice ‘Bank of America to pay \$16.65bn in historic Justice Department Settlement for financial fraud leading up to and during the financial crisis’, August 21 2014, available from <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>, accessed February 11 2016.

¹³⁹ The United States Department of Justice ‘HSBC Holdings Plc. And HSBC Bank USA N.A. admit to anti-money laundering sanctions violations, forfeit \$1.256bn in deferred prosecution agreement’, December 11 2012, available from <http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations>, accessed February 11 2016.

¹⁴⁰ Financial Conduct Authority FCA Handbook Senior Management Arrangements, Systems and Controls (Financial Services Authority: London, 2006) at SYSC 3.1.1.

¹⁴¹ *Ibid.*, at SYSC 3.2.6 R.

¹⁴² Financial Services Authority, above, n 140 at SYSC 3.2.6 C.

¹⁴³ *Ibid.*, at SYSC 3.2.6 H and I.

vulnerable.¹⁴⁴ Failure to comply with these measures triggered significant enforcement activity by the regulator. For example, in May 2013 JP Morgan was fined £3m by the regulator for systems and controls failings in its wealth management business.¹⁴⁵ This was soon followed by a £28m fine on Lloyds TSB for failings in the systems and controls governing financial incentives to sales staff.¹⁴⁶ In 2014, Barclays was once again sanctioned by the regulator and fined £26m for “failing to adequately manage conflicts of interest between itself and its customers as well as systems and controls failings, in relation to the Gold Fixing”.¹⁴⁷ Furthermore, September 2013 JP Morgan Chase Bank was fined over £137m by the FCA for serious failing relating to the ‘London Whale’ trades.¹⁴⁸ Tracey McDermott, the FCA’s director of enforcement and financial crime stated:

“When the scale of the problems at JPMorgan became apparent, it sent a shock-wave through the markets. Maintaining the integrity of markets is a key part of our wholesale conduct agenda. We consider JPMorgan’s failings to be extremely serious such as to undermine the trust and confidence in UK financial markets. This is yet another example of a firm failing to get a proper grip on the risks its business poses to the market. There were basic failings in the operation of fundamental controls over a high risk part of the business. Senior management failed to respond properly to warning

¹⁴⁴ Bagge, J. ‘The future for enforcement under the new Financial Services Authority’ (1998) *The Company Lawyer* 19(7) 194-197, at 194.

¹⁴⁵ Financial Conduct Authority ‘J.P. Morgan International Bank fined for systems and controls failings in its wealth management business’, May 23 2013, available from <http://www.fca.org.uk/news/jp-morgan-international-bank-fined-systems-controls-failings>, accessed February 9 2016.

¹⁴⁶ Financial Conduct Authority ‘For serious failings in the systems and controls governing financial incentives to sales staff’, FCA Final Notice 2013: Lloyds TSB Bank plc and Bank of Scotland plc, December 11 2013, available from <http://www.fca.org.uk/your-fca/documents/final-notice/2013/lloyds-tsb-bank-and-bank-of-scotland>, accessed February 9 2016.

¹⁴⁷ Financial Conduct Authority ‘For failing to adequately manage conflicts of interest between itself and its customers as well as systems and controls failings, in relation to the Gold Fixing’, May 23 2014, available from <http://www.fca.org.uk/news/barclays-fined-26m-for-failings-surrounding-the-london-gold-fixing>, accessed February 9 2016.

¹⁴⁸ Financial Conduct Authority ‘JPMorgan Chase Bank N.A. fined £137,610,000 for serious failings relating to its Chief Investment Office’s “London Whale” trades’, September 19 2013, available from <http://www.fca.org.uk/news/jpmorgan-chase-bank-na-fined>, accessed October 9 2013.

signals that there were problems in the CIO. As things began to go wrong, the firm didn't wake up quickly enough to the size and the scale of the problems. What is worse, they compounded this by failing to be open and co-operative with us as their regulator".¹⁴⁹

It is also important to note that in relation to this penalty, the regulator fined Achilles Macris £792,900 for failing to co-operate with the regulator during the 'London Whale' trades.¹⁵⁰ However, the imposition of these financial sanctions can only result in one conclusion, that they measures are ineffective and have failed to prevent breaches of relevant rules by authorized firms.

The instigation of criminal proceedings

One of the most contentious issues surrounding the enforcement activities of the regulator is its ability to commence criminal proceedings. The regulator has the ability to prosecute for a wide range of criminal activities.¹⁵¹ For example, the regulator can prosecute, *inter alia*, carrying on or purporting to carry on a regulated activity without authorisation or exemption,¹⁵² making false claims to be authorised or exempt¹⁵³ and performing or agreeing to perform functions in breach of a prohibition order.¹⁵⁴ Furthermore, the regulator is able to pursue criminal proceedings for where someone offers securities to the public before publishing a prospectus required by listing rules,¹⁵⁵ failing to cooperate with, or giving false information

¹⁴⁹ *Ibid.*

¹⁵⁰ Financial Conduct Authority 'FCA fines former header of JP Morgan's CIO International £792,000 for failing to be open and co-operative', February 9 2016, available from <http://www.fca.org.uk/news/former-jp-morgan-cio-international-head-fined>, accessed February 11 2016.

¹⁵¹ Financial Services and Markets Act 2000, s. 401 and 402.

¹⁵² Financial Services and Markets Act 2000, s. 23.

¹⁵³ Financial Services and Markets Act 2000, s. 24.

¹⁵⁴ Financial Services and Markets Act 2000, s. 56(4).

¹⁵⁵ Financial Services and Markets Act 2000, s. 85(2).

to appointed investigators,¹⁵⁶ failing to comply with provisions about control over authorised persons,¹⁵⁷ making false claims to be a person to whom the general prohibition does not apply,¹⁵⁸ providing false or misleading information to an auditor,¹⁵⁹ disclosing confidential information,¹⁶⁰ failure by a director of an insurer carrying on long-term insurance business to notify the regulator of a general meeting to propose a resolution for voluntary winding up¹⁶¹ and misleading the regulator.¹⁶² The Financial Services Act 2012 created three new criminal offences following the LIBOR scandal which included making misleading statements,¹⁶³ misleading impressions¹⁶⁴ and misleading statements etc in relation to benchmarks.¹⁶⁵ Additionally, the regulator is able to commence prosecutions for insider dealing,¹⁶⁶ money laundering¹⁶⁷ and terrorist financing.¹⁶⁸ The criminalisation of insider dealing has attracted a great deal of discussion amongst interested academics and is beyond the scope of this article,¹⁶⁹ yet it is interest to note that the regulator appears to taking a more robust stance towards this illegal activity. Alexander notes the increasing regulatory intensity in referring to a speech by Margaret Cole, then then Director of the FSA's Enforcement Division where she emphasized that the FSA would be seeking to increase the number of criminal prosecutions it brings,¹⁷⁰ with others within the FSA calling it "one of the most significant changes in our approach" and that shortly after this speech the regulator obtained its first

¹⁵⁶ Financial Services and Markets Act 2000, s. 177.

¹⁵⁷ Financial Services and Markets Act 2000, s. 191.

¹⁵⁸ Financial Services and Markets Act 2000, s. 333.

¹⁵⁹ Financial Services and Markets Act 2000, s. 346.

¹⁶⁰ Financial Services and Markets Act 2000, s. 352.

¹⁶¹ Financial Services and Markets Act 2000, s. 366(3).

¹⁶² Financial Services and Markets Act 2000, s. 398.

¹⁶³ Financial Services Act 2012, s. 89.

¹⁶⁴ Financial Services Act 2012, s. 90.

¹⁶⁵ Financial Services Act 2012, s. 91.

¹⁶⁶ Financial Services and Markets Act 2000, s. 402 (1)(a).

¹⁶⁷ Financial Services and Markets Act 2000, s. 402 (1)(b).

¹⁶⁸ Financial Services and Markets Act 2000, s. 402 (1)(c).

¹⁶⁹ For an excellent discussion see Davies, J. 'From gentlemanly expectations to regulatory principles: a history of insider dealing in the UK: Part 1' (2015) *Company Law*, 36(5), 132-143 and Davies, J. 'From gentlemanly expectations to regulatory principles: a history of insider dealing in the UK (Pt.2)' (2015) *Company Lawyer*, 36(6), 163-174.

¹⁷⁰ Alexander, R. 'Corporate crimes: are the gloves coming off?' (2009) *Company Lawyer*, 30(11), 321-322.

conviction for insider dealing.¹⁷¹ This increase in intensity and focus toward criminal prosecutions has borne fruit with the first criminal conviction for insider dealing brought by the FSA in which a solicitor was sentenced to eight months for passing on information to his father-in-law about an impending takeover.¹⁷² Despite this optimism though, a freedom of information request in 2014 illustrates that the regulator only made four arrests in 2012, one in 2011, 17 in 2010, 16 in 2009 and 11 in 2008.¹⁷³ Following the realignment of financial regulation system, the spotlight has now turned onto the FCA and it is to them that we now look for better regulation and an increase in prosecution and conviction rates.

However, there is some *uncertainty* if the regulator is able to enforce its *own* fraud policy and instigate criminal proceedings.¹⁷⁴ For example, the regulator stated that “we cannot prosecute most types of fraud and dishonesty ... in contrast with money laundering; we have no direct powers to prosecute fraud or dishonesty offences. Prosecution is the responsibility of other law enforcement agencies”.¹⁷⁵ This explanation was reiterated by Lord Turner, the former Chairman of the regulator, who said:

“My understanding is that the FSA is *not* [authors emphasis] able to bring a criminal case in the UK. If it falls within the category of fraud, which is a general category of malfeasance quite separate from financial regulation, the Serious Fraud Office has a right to look at it, and we have been in contact with the SFO throughout this. I think

¹⁷¹ See *R v. Christopher McQuoid* [2009] EWCA Crim 1301 and Financial Services Authority ‘Solicitor and his father-in-law found guilty in FSA insider dealing case’, March 27 2009, available from <http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/042.shtml>, accessed November 4 2015.

¹⁷² Ibid.

¹⁷³ Financial Conduct Authority ‘FOI3519 response’, November 21 2014, available from <https://www.fca.org.uk/your-fca/documents/foi/foi3519-response>, accessed November 4 2015.

¹⁷⁴ The fraud policy of the Financial Services Authority can be divided into four parts and includes a direct approach, increased supervisory activity, promoting a more joined up approach and Handbook modifications. See Ryder, N. *Financial crime in the 21st century: law and policy* (Edward Elgar: Cheltenham, 2011) at 130.

¹⁷⁵ Financial Services Authority *Developing our policy on fraud and dishonesty – discussion paper 26* (Financial Services Authority: London, 2003) p. 18.

that it announced a week or so ago that it would increase its focus on this issue. In the UK, this issue— as I understand it, but I would defer to my legal expert here—is *not* one where we, the FSA, have an ability to bring a criminal case”.¹⁷⁶

Further uncertainty was also expressed by Tracey McDermott who added “we are *not* a general fraud prosecutor ... we have spent quite a lot of time and energy on prosecuting both section 397 offences and indeed insider dealing offences ... we do *not* have is a remit to prosecute false accounting, conspiracy”.¹⁷⁷ However, it is strongly suggested that the FSA *does* have the regulatory remit to prosecute certain fraudulent activity based on the following cases. For example, in March 2000 the regulator successfully prosecuted Paul Haslam, for breaches of the Banking Act 1987.¹⁷⁸ Furthermore, in February 2008, the William Anthony ‘Robin’ Radclyffe was successfully prosecuted and convicted of a series of offences under the Theft Acts, the Financial Services Act 1986 and FSMA 2000. The defendant, who was not authorised by the regulator, made a series of false and misleading statements to his clients.¹⁷⁹ The regulator stated “our prosecution of this case is indicative of the FSAs determination to deter wrongdoing of this sort”.¹⁸⁰ Therefore, it is unsurprising that The HM Treasury Select Committee criticised the decision of the regulator not to initiate criminal proceedings in relation to LIBOR:

¹⁷⁶ HM Treasury Select Committee above, n 72 at 102.

¹⁷⁷ *Ibid.*

¹⁷⁸ Section 35 of the Banking Act 1987 provides that a person commits the offence of fraudulent inducement to make a deposit if a person “(a) makes a statement, promise or forecast which he knows to be make a deposit, misleading, false or deceptive, or dishonestly conceals any material facts; or (b) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive, is guilty of an offence if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not the person to whom the statement, promise or forecast is made or from whom the facts are concealed) – (i) to make, or refrain from making, a deposit with him or any other person; or (ii) to enter, or refrain from entering, into an agreement for the purpose of making such a deposit”.

¹⁷⁹ Financial Services Authority ‘Fake stockbroker sentenced to 15 months’, 13 February 2008, available from <http://www.fsa.gov.uk/library/communication/pr/2008/011.shtml>, accessed 12 November 2012.

¹⁸⁰ *Ibid.*

“The FSA’s decision whether to initiate a criminal prosecution should not be influenced by the fact that its income is derived from firms which it regulates. The FSA has an obligation under section 2(1)(b) of FSMA to discharge its functions in the way in which it considers most appropriate for the purpose of meeting its regulatory objectives. Under section 2(2)(d) the reduction of financial crime is one of these objectives. Financial crime is defined in section 6(3) as including not only misconduct in relation to a financial market but also any criminal offence of fraud or dishonesty. The FSA took a narrow view of its power to initiate criminal proceedings for fraudulent conduct in this case”.¹⁸¹

This was also supported by George Osborne who stated that the then legislation contained “gaping holes” and that amendments would be made to the Financial Services Act 2012.¹⁸² Therefore, the inability of the regulator to prosecute those involved in financial crime during the financial crisis must be criticised.

Conclusion

The regulatory response to the financial crisis in the UK resulted in the publication of numerous reports, consultation papers, the creation of new regulatory agencies, the introduction of new legislation and new misconduct related criminal offences. The former Labour government must be credited with actually attempting to tackle financial crime attempting to forge a response that combined financial regulation with a series of financial crime measure, including the financial crime statutory objective. The regulator has continued

¹⁸¹ HM Treasury Select Committee above, n 72 at 103.

¹⁸² HM Treasury ‘Statement by the Chancellor of the Exchequer, Rt Hon George Osborne MP, on LIBOR’, July 2 2012, available from <https://www.gov.uk/government/speeches/statement-by-the-chancellor-of-the-exchequer-rt-hon-george-osborne-mp-on-libor>, accessed July 15 2013.

to adopt its credible deterrence strategy which has resulted in the continued imposition of financial sanctions on both firms and individuals who have breached its regulations. The regulator has imposed record levels of financial penalties on those firms who have manipulated LIBOR and FOREX, yet they decided against instigating criminal proceedings and left that with the SFO. The decision over whether or not they were able to bring criminal proceedings in relation to LIBOR remains unclear as the evidence provided above suggests that the regulator did have the ability to initiate criminal proceedings for fraud despite its contradictory statements. Nonetheless, the regulator must be credited for increasing the number of insider dealing convictions and how it has vigorously enforced the market abuse regime. However, the regulator must be criticised for its initial response to LIBOR, which amounted to nothing more than playing regulatory tennis with the SFO with the most serious financial scandal in the UK since the collapse of Barings Bank. The Coalition government have not continued to follow the financial crime strategies introduced by the former Labour government. One of the major criticisms of the response to financial crime emanating from the financial crisis has been the lack of criminal prosecutions. During the height of the financial crisis, and whilst leader of the Conservative party, David Cameron boldly proclaimed that the City of London faced a “Day of Reckoning” and that severe penalties would be imposed for those bankers whose reckless activities causes the financial crisis.¹⁸³ During his ‘Day of Reckoning’ speech, David Cameron stressed the importance of punishment and deterrence and stated:

“[the] most important step we must take in enforcing responsibility in the City is to make sure that when rules are broken, and culprits are found, they are properly punished. That’s only fair - because those responsible must be held to account ...

¹⁸³ Prince. R. ‘Cameron calls for criminal charges against bankers responsible for credit crunch’, December 15 2008, available from <http://www.telegraph.co.uk/finance/financetopics/bernard-madoff/3775925/Cameron-calls-for-criminal-charges-against-bankers-responsible-for-credit-crunch.html>, accessed May 7 2013.

around the world, bankers sat up and took notice not when global finance ministers issued some new communiqué on unauthorized speculative trading - it was when Nick Leeson was caught and put behind bar ... the problem in Britain ... is that there just doesn't seem to be the will to see appropriate justice done at the highest level. Not from the Government. And not much will evident in the FSA either".¹⁸⁴

A number of interesting points can be raised from this section of the speech. For example, David Cameron stated that when "rules are broken, and culprits are found, they are properly punished". This raises a very important question, how many of those who are responsible for the financial crisis or contributed to it have been held accountable? The answer at the time of writing is very few, only one trader has been convicted for the manipulation of LIBOR and many more have been acquitted. Furthermore, not one director of a bank has been disqualified under the Company Director Disqualification Act 1986. Therefore, the response towards financial crime during and after the financial crisis hasn't dramatically altered and it is likely that the regulator will continue to impose 'media friendly' financial penalties and err on the side of caution when attempting to instigate criminal proceedings. It seems that the culprits of the financial crisis will continue to avoid any meaningful consequences for their actions.

¹⁸⁴ Conservatives 'David Cameron: A day of reckoning', December 15 2008, available from http://www.conservatives.com/News/Speeches/2008/12/David_Cameron_A_day_of_reckoning.aspx, accessed June 29 2013.