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Can competition law aid the United Kingdom in its fight against financial crime?

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ABSTRACT

This article investigates the laws used in the United Kingdom (UK) to enforce the financial crime of benchmark interest rate manipulation, the most well-known example of which took place in the London Interbank Offered Rate (LIBOR) and the Foreign Exchange (FX) benchmark manipulation scandal in 2012. The LIBOR and FX scandal followed hard on the heels of the 2007/2008 financial crisis and involved bankers from different banks working together to manipulate benchmark interest rates for their own gain. Benchmark interest rates are used in many financial instruments, such as mortgages and loans, so the manipulation of a benchmark interest rate negatively affects a large proportion of the population. The use of competition law would increase deterrence for this financial crime by providing a wider range of enforcement tools to regulators. This article recommends that competition law should be used by regulators, either on its own or in conjunction with financial regulation, to enforce future incidents of benchmark interest rate manipulation. The article argues that the use of competition law to enforce this financial crime will increase the deterrent effect of sanctions due to the wide range of significant enforcement options available to regulators when a breach of competition law is established.

1. Introduction

Since the 2007/2008 financial crisis the United Kingdom (UK) banking sector has shown itself to be vulnerable to infringements of competition law, due in part to the small number of large banks, each of whom has a significant market share, known as an oligopoly.[1] The oligopolistic structure of global banking was identified by the Organisation for Economic Co-operation and Development (OECD) who stated that the oligopolistic structure is likely to have contributed to the global financial crisis.[2] An oligopolistic market is an ideal situation for a criminal cartel to emerge, as illustrated in the London Inter-bank Offered Rate (LIBOR) and Foreign Exchange (FX) benchmark manipulation scandal. Here, bankers from competing banks colluded to raise or lower the LIBOR and FX benchmark interest rates in order to benefit their own trading positions.[3] However, although the LIBOR and FX benchmark interest rate scandal involved bankers from competing banks operating cartels, which are illegal under competition law, no competition law was used to enforce this crime in the UK. In fact, there is a paucity of competition law cases in the financial sector, with the application of competition law to the financial sector being an overlooked and somewhat obscure subject in the UK.[4]

This article examines the role that competition law should play in the UK in relation to the enforcement of the financial crime of benchmark interest rate manipulation (benchmark manipulation). The aim of this article is to demonstrate that extensive competition law enforcement powers can and should be used by the Financial Conduct Authority (FCA) and the Competition and Markets Authority (CMA) to enforce benchmark manipulation. The article argues that UK regulators

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[1] See M Dong, S Huangfu, H Sun, and C Zhou 'A Macroeconomic Theory of Banking Oligopoly' (2021) 138 European Economic Review 103864 and Unknown, 'Cracking the Oligopoly: British Banks' *The Economist* (14 September 2013) 63.

[2] Organisation for Economic Co-operation and Development, 'Bank Competition and Financial Stability' (OECD 5 October 2011) 19 < https://www.oecd-ilibrary.org/finance-and-investment/bank-competition-and-financial-stability/competition-in-retail-banking-and-financial-stability_9789264120563–4-en > accessed 10 July 2023.

[3] L Vaughan and G Finch, 'Libor Scandal: The Bankers who Fixed the World's most Important Number' *The Guardian* (London, 18 January 2017) < https://www.theguardian.com/business/2017/jan/18/libor-scandal-the-bankers-who-fixed-the-worlds-most-important-number > accessed 4 June 2023.

[4] Alexander K Pascall, 'Tail Wagging the Dog: The Manipulation of Benchmark Rates - A Competitive Bone of Contention' (2016) 39(2) World Competition 161.

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could have obtained successful criminal prosecutions of individual traders and imposed significantly higher fines on individuals and banks, in conjunction with other competition law enforcement measures, such as commitments and director disqualifications, if the regulators had used competition law to enforce the benchmark manipulation cartels. It will be argued that the FCA and CMA must use competition law to enforce future instances of benchmark manipulation to ensure the competitiveness of the banking industry. It appears that the CMA agrees with this viewpoint, as illustrated by its recent provisional decision that five major banks, Citi, Deutsche Bank, HSBC, Morgan Stanley and Bank of Canada, unlawfully shared commercial information relating to UK government bonds using internet chatrooms.[5] This case has many parallels with the LIBOR and FX cartels, where traders also operated using internet chat rooms, and it appears that the CMA is investigating this behaviour as a cartel and a breach of competition law, unlike the UK approach for the LIBOR and FX crisis, which is discussed below.

This article considers how the LIBOR and FX scandal was enforced in the UK through the lens of competition law and offers an innovative approach by considering both financial crime and competition law in relation to this financial scandal. A great deal of research has been published in these two subject areas, however very little has investigated how competition law could be used to enforce financial crime. Financial crime is an umbrella term covering many individual crimes, such as market manipulation,[6] money laundering,[7] terrorism financing[8] and bribery.[9] The aspects of financial crime relevant to this article include market manipulation and the LIBOR and FX benchmark manipulation, together with subsequent benchmark manipulation cases.[10] Market manipulation damages market integrity, undermines investor confidence and makes markets subject to systemic crises.[11] Some commentators have looked at ways in which the laws governing market manipulation can be improved to prevent further instances of financial misconduct in the future.[12] However, there is very little literature that focuses on how competition law could be used to enforce market manipulation in the financial sector in the UK,[13] although some academics have written about its use in the US and EU for market manipulation in the financial services sector.[14] Most importantly, there is no literature which examines how the LIBOR and FX scandal could have been enforced with competition law. This gap in the literature is addressed in this article by formulating proposals about the future use of competition law in benchmark manipulation cases in the UK.

Therefore, the article critically considers why competition law was not used to enforce any of the LIBOR or FX benchmark manipulation cartels, even though competition laws were in place to prohibit cartels and bank collusion at that time. This article is split into three sections. The first section outlines the relevant financial services regulation used in the enforcement of the LIBOR and FX benchmark manipulation scandal and the competition law which was in place at the time but not used. The second section of the article examines in detail the LIBOR and FX benchmark manipulation and analyses the ways in which the scandal was enforced by the UK regulator. It will be demonstrated that the lack of use of competition law in the UK for benchmark manipulation is unusual when compared to the enforcement approach taken in the European Union (EU) and the United States (US), as both the US and EU investigated and fined offending banks for LIBOR and FX benchmark manipulation offences using competition law.[15]

The third section critically analyses the legislative changes which came into force after the LIBOR and FX crisis, some of which promoted the use of competition law in the financial services sector. Key changes such as the relatively recent sharing of competition law powers between

[5] Competition and Markets Authority, 'CMA Provisionally Finds 5 Banks Broke Competition Law on UK Bonds' (GOVUK, 24 May 2023) < https://www.gov.uk/government/news/cma-provisionally-finds-5-banks-broke-competition-law-on-uk-bonds#:~:text=The%20Competition%20and%20Markets%20Authority,to%2Done%20conversations%20in%20chatrooms > accessed 4 July 2023.

[6] See E Herlin-Karnell and N Ryder, *Market Manipulation and Insider Trading* (Hart 2019), J Austin, *Insider Trading and Market Manipulation: Investigating and Prosecuting Across Borders* (Edward Elgar 2017) and J Markham, *Law Enforcement and the History of Financial Market Manipulation* (Routledge 2015).

[7] See SC Brown and B Hertstein, 'Failure to Prevent Money Laundering and the Supervisory Principle' (2022) 8 Criminal Law Review 648, E Herlin-Karnell and N Ryder, 'The Robustness of EU Financial Crime Legislation: A Critical Review of the EU and UK Anti-Fraud and Money Laundering Scheme' (2017) 27(4) European Business Law Review 427, D Chaikin and J Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (Palgrave 2009), P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart 2003) and M Galland, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar 2005).

[8] See J Gurule, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Edward Elgar 2010) and N Ryder, *The Financial War on Terror: A Review of Counter-Terrorist Financing Strategies Since 2001* (Routledge 2015).

[9] See D Hall, 'Financial Crises and Fraud: A Pattern Emerges' in L Pasculli and N Ryder (eds), *Corruption in the Global Era: Causes, Sources and Forms of Manifestation* (Routledge 2019), RD Luz and G Spagnolo, 'Leniency, Collusion, Corruption and Whistleblowing' (2017) 13(4) Journal of Competition Law & Economics 729, A Palmer *Countering Economic Crime: A Comparative Analysis* (Routledge 2017), D Chaikin and J Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (Palgrave, 2009) and J Fisher, 'Who Should Prosecute Fraud, Corruption and Financial Markets Crime?' (London School of Economics and Political Science December 2013) < https://www.lse.ac.uk/law/Assets/Documents/law-and-financial-markets-project/fisher-who-should-prosecute.pdf > accessed 8 February 2023.

[10] See RM Abrantes-Metz and others, 'Libor Manipulation?' (2012) 36(1) Journal of Banking and Finance 136, A Akhigbe and others, 'Foreign Exchange Manipulation and the Equity Returns of Global Banks' (2020) 57(2) Journal of Financial Services Research 207, JA Batten, 'Financial Market Manipulation, Whistleblowing, and the Common Good: Evidence from the LIBOR Scandal' (*footnote continued*)
(2022) 58(1) ABACUS 1, R Calo, 'Digital Market Manipulation' (2014) 82(4) George Washington Law Review 995, SE Foster, 'LIBOR Manipulation and Antitrust Allegations' (2013) 11(29) DePaul Business & Commercial Law Journal 291, J Fouquau and PK Spieser, 'Statistical Evidence about LIBOR Manipulation: A 'Sherlock Holmes' Investigation' (2015) 50(1) Journal of Banking and Finance 632.

[11] See E Lomnicka, 'Preventing and Controlling the Manipulation of Financial Markets: Towards a Definition of 'Market Manipulation'' (2001) 8(4) Journal of Financial Crime 297, K Sergakis, *The Law of Capital Markets in the EU: Disclosure and Enforcement* (Palgrave 2017), TCW Lin, 'The New Market Manipulation' (2017) 66(6) Emory Law Journal 1253 and E Herlin-Karnell and N Ryder, *Market Manipulation and Insider Trading* (Hart 2019).

[12] For instance, see J Grey, 'Financial Services and Markets Tribunal Orders That Costs of Successful Challenge to Enforcement Action for Market Abuse be Paid By FSA' (2007) 15(2) Journal of Financial Regulation and Compliance 217 and E Herlin-Karnell and N Ryder, *Market Manipulation and Insider Trading* (Hart 2019).

[13] See B McGrath, 'Banking and Antitrust: The View from the UK' (2010) 127 Banking Law Journal 563, D Harrison, *Competition Law and Financial Services* (Routledge 2016) 14 and R Ball, 'Competition Law and LIBOR in Three Jurisdictions: US, UK and EU' in N Ryder (ed), *White Collar Crime and Risk – A Critical Reflection* (Routledge 2018).

[14] For instance, see J Hamburger, 'Crowding the Market: Is there Room for Antitrust in Market Manipulation Cases?' (2015) 21(4) International Trade Law and Regulation 120, D Scheld and Others, 'Managing Antitrust Risks in the Banking Industry (2016) 12(1) European Competition Journal 113 and SD Ledgerwood and JA Verlinda, 'The Intersection of Antitrust and Market Manipulation Law' (2017) < https://ssrn.com/abstract= 2908878 > accessed 10 July 2023.

[15] D Johnson, 'What Are the Merits of Taking a Hybrid Regulatory Approach towards the Enforcement of Corporate Financial Crime in the United Kingdom and United States of America?' (2022) 3(1) Journal of White Collar and Corporate Crime 23 and R Ball, 'Competition Law and Libor in Three Jurisdictions: US, UK and EU' in N Ryder (ed), *White Collar Crime and Risk – A Critical Reflection* (Routledge 2018).

the CMA and the FCA in relation to the regulation of competition law in the financial sector are critically analysed. Since April 2015 the FCA has had competition law enforcement powers,[16] however its primary function has historically been to regulate the financial sector using financial regulation, rather than to enforce competition law in relation to financial crime, so it may be reluctant to use its new competition law powers.[17] This section therefore considers the potential challenges which remain in the application of competition law to enforce the financial crime of benchmark manipulation. Finally, recommendations are made for the improved enforcement of benchmark manipulation using a combination of competition law and financial regulation, with the aim of providing considerably more of a deterrent to the financial crime of benchmark manipulation.

2. Financial services regulation and competition law

This section examines the financial services regulation used to enforce the LIBOR and FX benchmark manipulation and the competition law which was in force at the same time. The competition law will be critically analysed to determine whether it would have been appropriate or better for regulators to have used competition law to enforce the benchmark manipulation than financial regulation alone.

2.1. Financial services regulation

In the UK numerous financial penalties, described in detail below, were imposed by the financial services regulators for manipulation of various benchmark interest rates, but none of these fines were made using the UK's competition law powers.[18] At the time the LIBOR and FX benchmark manipulation scandal came to light, the financial services regulation used was enforced by the financial services regulator – first the Financial Services Authority (FSA) and then the FCA. In the aftermath of the 2007/2008 financial crisis, it became apparent that the FSA had failed in its regulation of the financial services sector.[19] The light-touch approach[20] to the supervision of banks and other financial firms taken by the FSA failed to question or prevent the sectoral practices that led to the financial crisis.[21] This perceived failure of the FSA ultimately led to the government replacing the FSA with new tougher authorities, including the FCA.[22]

In addition to leading to a change of financial services regulator, the 2007/2008 financial crisis led to a plethora of banking regulations and reforms,[23] including the Banking Act 2008, then the Banking Act 2009 and the Financial Services Act 2010. Following on from these legislative reforms, both the Turner Report[24] and the Walker Report[25] outlined possible culprits said to have played a part in causing the financial crisis.[26] The response of the then coalition government was to set up the wide-ranging Independent Commission on Banking (Banking Commission),[27] which was asked to consider structural and related non-structural reforms to the UK banking sector to promote financial stability and competition.[28] The Banking Commission recommended a ring-fencing of retail banking from investment banking and found that competition in the UK retail banking sector was not functioning effectively.[29] One of the Banking Commission's recommendations was to ensure that the primary duties of the future FCA include the promotion of competition within the UK banking sector, which is discussed further below.[30] The Banking Commission was followed by a series of statutes, implementing its recommendations, which affected both the financial services sector and UK competition law.[31] It is positive that the Banking Commission identified the benefits of increasing the use of competition law in the banking sector, but it would have been better if the competition law existing at the time had been used in the LIBOR and FX crisis instead of financial regulation.

2.2. Competition law

To understand better the missed opportunity, this section not only explains the competition law regime in place at the time of the LIBOR and FX scandal but also demonstrates that UK competition law can and should be used to enforce the financial crime of benchmark manipulation. Use of competition law to enforce this financial crime would provide regulators with extremely strong sanctions for both the individuals involved in the cartels and the employer banks who profited from the illegal activity. The importance of UK regulators being able to impose significantly stronger sanctions than those actually imposed post the LIBOR and FX scandal is that the deterrent effect for this type of crime will be increased.

The primary purpose of competition law is to ensure strong and effective markets.[32] Lord St. John of Bletso stated that 'competition law provides the framework for competitive activity (…) as such it is of vital importance'.[33] However, during the 2007/2008 financial crisis and the LIBOR and FX manipulation scandals competition law was not used by UK regulators. The government and regulators were heavily involved in resolving the financial crisis and financial regulation was the key instrument used. However, this article argues that competition law is another tool available to regulators to combat financial criminal offences. In sub-Section 1 it will be demonstrated that the UK government has clearly advocated, on numerous occasions, for the use of

[16] Enterprise and Regulatory Reform Act 2013 s 51.

[17] For instance, the fines issued by the regulator to banks following the LIBOR crisis were made pursuant to s91 (Misleading statements in relation to benchmarks) of the Financial Services Act 2012 and s206(1) (Financial Penalties) of the Financial Services and Markets Act 2000.

[18] Financial Conduct Authority, 'Benchmark Enforcement' (Financial Conduct Authority, 13 September 2018) < https://www.fca.org.uk/markets/benchmarks/enforcement > accessed 21 May 2023.

[19] A Arora, 'The Global Financial Crisis: A New Global Regulatory Order?' (2010) 8(1) Journal of Business Law 670, 673 and G Wilson and S Wilson, 'The FSA, "Credible Deterrence" and Criminal Enforcement – A "Haphazard Pursuit"?' (2014) 21(1) Journal of Financial Crime 4.

[20] G Wilson and S Wilson, 'The FSA, "Credible Deterrence" and Criminal Enforcement – A "Haphazard Pursuit"?' (2014) 21(1) Journal of Financial Crime 4.

[21] Ibid.

[22] The majority of the FSA's functions were transferred to the Financial Conduct Authority and the Prudential Regulation Authority from 1 April 2013. See G Wilson and S Wilson, 'The FSA, "Credible Deterrence" and Criminal Enforcement – A "Haphazard Pursuit"?' (2014) 21(1) Journal of Financial Crime 4.

[23] House of Commons Treasury Committee, *The Run on the Rock* (HC 56–1).

[24] Financial Services Authority, 'The Turner Review: A Regulatory Response to the Global Banking Crisis' (Financial Services Authority 2009) < http://www.actuaries.org/CTTEES_TFRISKCRISIS/Documents/turner_review.pdf > accessed 13 February 2023.

[25] D Walker, 'A Review of Corporate Governance in UK Banks and Other Financial Industry Entities Final Recommendations' (National Archives 26 November 2009) < https://webarchive.nationalarchives.gov.uk/ukgwa/+ /www.hm-treasury.gov.uk/d/walker_review_261109.pdf > accessed 12 January 2023.

[26] C Chambers-Jones, 'The Vickers Report' (2011) 32(11) Business Law Review 280.

[27] Ibid.

[28] Independent Commission on Banking, 'Independent Commission on Banking: Final Report, Recommendations' (GOV.UK, 12 September 2011) < https://webarchive.nationalarchives.gov.uk/ukgwa/20120827143059/http://bankingcommission.independent.gov.uk/// > accessed 10 July 2023.

[29] Ibid, 16.

[30] Ibid, 242.

[31] The Financial Services Act 2012, the Enterprise and Regulatory Reform Act 2013 and The Financial Services (Banking Reform) Act 2013.

[32] A Bradford and A Chilton, 'Competition Law Around the World From 1889–2010: The Competition Law Index' (2018) 14(3) Journal of Competition Law & Economics 393.

[33] HL Deb 30 October 1997, vol 582, cc1144–95.

competition law in the financial services sector. In sub-Section 2 the UK competition laws will be outlined to demonstrate their relevance to the cartels which were central to the LIBOR and FX benchmark manipulation, although these laws were not used in the enforcement of the benchmark manipulation. In sub-Section 3 below the UK approach to the enforcement of the benchmark manipulation scandal is compared to that of the EU and US, both of which used competition law in their enforcement of the same benchmark manipulation. In sub-Section 4 the possible reasons for the UK not using competition law to enforce the LIBOR and FX scandal will be analysed.

2.2.1. Government support for the use of competition law

As noted above, there has been a notable lack of application of competition law to the financial services sector in the UK.[34] This is despite the fact that over the last two decades the government has commissioned reports which have identified concerns about the lack of competition in parts of the banking industry.[35] In 1998, Sir Donald Cruickshank was invited to review the retail banking sector in the UK. The Cruickshank Report concluded that 'competition problems were found in all markets investigated' after examining the levels of innovation, competition and efficiency both within the industry and in comparison, to international standards.[36] The report was closely followed by the Treasury Select Committee report into competition and choice in the retail banking sector, which stated:

> We believe effective competition cannot take place in an environment where firms which are perceived as 'too important to fail' are both protected from the discipline of the marketplace and derive tangible benefits from this status.[37]

The reference to 'too big to fail' refers to the perception that certain banks would cause catastrophic effects to a country's economy should they fail, which therefore prevents regulators from penalising them for breaches of the law in the same way that other firms would be penalised for the same crimes. However, the Cruickshank report concluded:

> Competition cannot be divorced from wider regulatory issues, including the 'too important to fail' problem.[38]

Other official investigations indicate a long–standing and widespread concern about the effectiveness and nature of competition in the banking sector.[39] Following the financial crisis the government took legislative action to ensure that the financial services regulator can use competition law in the enforcement of financial crime (see 3).

2.2.2. The UK competition law regime at the time of the LIBOR and FX scandal

It is remarkable that even though the UK had competition law legislation at the time, no prosecutions of individuals involved in the LIBOR or FX manipulation cartels were brought by UK regulators using competition law. The advantages which the use of competition law would bring to the enforcement of benchmark rate manipulation cartels are outlined below, together with an explanation of the relevant law and how it is applicable to the LIBOR and FX scandal.

The UK's civil penalties for breach of competition law are extensive and are set out in the Competition Act 1998, the Enterprise Act 2002 and the Company Directors Disqualification Act 1986. In particular, Chapter I of the Competition Act 1998 and the cartel offence in the Enterprise Act 2002 are most relevant to the collusion which took place between bankers at competing banks in the LIBOR and FX scandal. The most significant civil penalty for breach of competition law is the power to impose fines of up to 10% of a company's worldwide turnover in the business year preceding the CMA's decision.[40] Regulators can also impose directions on infringing undertakings in order to bring an infringement to an end.[41] Interim measures can be adopted by a regulator in a matter of urgency, in order to bring an infringement to an end, also legally binding commitments can be entered into between the regulator and infringing undertakings.[42] Commitments may be both structural and behavioural, and may involve, for example, a business agreeing to cease or modify its conduct, terminating an arrangement, removing a particular clause from an agreement, withdrawing from a particular activity, licensing specific assets, or even divesting itself of part of its business. Commitments are therefore a powerful tool for regulators to end a competition investigation by agreement between the regulator and the infringing company.[43] In addition to these powers, the Enterprise Act 2002[44] gave competition regulators the power to disqualify directors for up to 15 years where the director knew, or ought to have known that their company has breached competition law, a power which the CMA has been making more use of in recent years.[45]

Additionally, the Enterprise Act 2002 provides regulators with the ability to instigate criminal proceedings against individual members of a cartel who, if convicted, can receive a custodial sentence of up to five years and/or a fine.[46] The UK's criminal penalties for hard-core cartels are the toughest of any country in the EU.[47] The criminal cartel offence applies to individuals who engage in hard-core cartel activity, which is fulfilled by the price-fixing carried out in the benchmark manipulation cartels.[48] However, there are problems associated with the prosecution of individuals under the criminal cartel offence (see 2.4). Furthermore,

[34] D Harrison, *Competition Law and Financial Services* (Routledge 2016) 89.

[35] B McGrath, 'Banking and Antitrust: The View from the UK' (2010) 127 Banking Law Journal 563 and D Harrison, *Competition Law and Financial Services* (Routledge 2016) 61.

[36] HM Treasury, 'Competition in UK Banking: A Report to the Chancellor of the Exchequer' (National Archives, 20 March 2000) < https://webarchive.nationalarchives.gov.uk/ukgwa/20050301221631/http://www.hm-treasury.gov.uk/documents/financial_services/banking/bankreview/fin_bank_reviewfinal.cfm > accessed 13 February 2023.

[37] House of Commons Treasury Committee, *Competition and Choice in Retail Banking* (HC612-I).

[38] Ibid.

[39] For example see Competition and Markets Authority, 'Retail Banking Market Investigation' (Competition and Markets Authority 14 July 2015) < https://assets.publishing.service.gov.uk/media/55a4eb9040f0b61560000005/Barriers_to_entry_and_expansion_-_capital_requirements_IT_and_payment_systems.pdf > accessed 13 February 2023 and Office of Fair Trading, 'OFT Review of Barriers to Entry, Expansion and Exit in Retail Banking' (Office of Fair Trading 4 November 2010) < https://uk.practicallaw.thomsonreuters.com/1–503–8196?transitionType=Default&contextData=(sc.Default)&firstPage=true > accessed 13 February 2023 and European Commission, 'Report on the Retail Banking Sector Inquiry ' (Europa 31 January 2007) < https://ec.europa.eu/competition/sectors/financial_services/inquiries/sec_2007_106.pdf > accessed 13 February 2023.

[40] Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, SI 2000/309.

[41] Competition Act 1998, s32(1).

[42] Barry KKJ Rodger, 'Application of the Domestic and EU Antitrust Prohibitions: An Analysis of the UK Competition Authority's Enforcement Practice' (2020) 8(1) Journal of Antitrust Enforcement 86.

[43] Competition and Markets Authority, 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8' (GOV.UK, 21 January 2022) para 10.16 < https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#investigation-outcomes > accessed 21 May 2022.

[44] Enterprise Act 2002, s204.

[45] Chijioke Chijioke-Oforji, 'Director Accountability for Breach of Competition Law: Practical Lessons from the CMA's Increased Use of Disqualification Powers' (2020) 42(1) European Competition Law Review 24.

[46] Enterprise Act 2002, s190.

[47] Eleanor J Morgan, 'Criminal Cartel Sanctions under the UK Enterprise Act: An Assessment' (2010) 17(1) International Journal of the Economics of Business 67.

[48] Enterprise Act 2002, s.188(2)(a).

an important omission for UK regulators is that there is no criminal corporate offence to punish the companies who employ cartel participants, even though the company itself will often benefit from the cartel.

Competition law in the UK could have been used by regulators to enforce the benchmark manipulation, however, there were no prosecutions of individuals, or any sanctions imposed on the banks involved in the LIBOR or FX manipulation cartels by UK regulators using competition law.

2.2.3. The use of competition law by comparable jurisdictions in the LIBOR and FX scandal

Other jurisdictions which have similar competition laws to the UK, such as the US and the EU,[49] made extensive use of competition law in their enforcement of the LIBOR and FX scandal, unlike the UK.

EU competition law forms the basis of UK competition law, due to the UK's former membership of the EU. The only difference between the civil competition law powers in the EU and UK are the references to 'Member States' in the EU rules, substituted by 'United Kingdom' in UK competition law.[50] In the LIBOR and FX benchmark manipulation the European Commission found, using almost identical competition law provisions to those of the UK, that traders from competing banks had colluded, using internet chatrooms and phone calls, in the manipulation of the benchmarks for their own gain, which fulfils the definition of a cartel.[51]

The US antitrust (competition) laws were established before the EU competition law rules and formed the inspiration for the development of the EU rules.[52] Therefore the US, EU and UK competition laws all share a common basis and are substantially the same, providing a good starting point for comparing the use of competition law in each jurisdiction for the LIBOR and FX benchmark manipulation scandal. In relation to the FX benchmark manipulation, banks and their employees were prosecuted by the Department of Justice (DoJ) under Section 1 of the Sherman Act,[53] for engaging in a conspiracy to fix the price of and rig bids for the Euro/US dollar currency pair in the FX spot market by agreeing to eliminate competition in violation of the Sherman Antitrust Act.[54] This is an interesting difference in approach to that taken by the DoJ to its enforcement of the LIBOR manipulation. In that case, the Antitrust Division of the DoJ did not use the Sherman Act in all cases to charge the traders from competitor banks, who had colluded and conspired together to raise or lower the LIBOR benchmark interest rate. In the LIBOR enforcement, the DoJ frequently used 'wire fraud' rather than Section 1 of the Sherman Antitrust Act.

Therefore, both the EU and US used their competition laws to enforce some or all of the LIBOR and FX benchmark manipulation, whilst the UK did not use its competition law at all for the same financial scandal.

2.2.4. Potential reasons for the UK not using competition law for the LIBOR and FX crisis

This comparison leads us to question the reasons for the lack of use of competition law in the UK for the LIBOR and FX scandal, with all the associated range of enforcement powers.

One possible reason is the perception or fear by the government and regulatory bodies that the banks involved in the LIBOR and FX benchmark manipulation were too big to fail, as noted in the Cruickshank report and mentioned above.[55] This concern was also raised by the Parliamentary Commission on Banking Standards (Banking Commission), in which certain reasons were identified to explain why it is difficult to allow banks to fail.[56] The reasons included the provision by banks of essential services, the destruction of value that insolvency brings to a business which can magnify creditor losses and the risk that disorderly failure can cause contagion:

> Allowing one bank to fail in a disorderly way could spread panic among creditors of other similar institutions and cause a wider financial crisis.[57]

These fears have historically led to resistance by banks and prudential authorities to the application of competition law to the financial services sector as the failure of one bank for a serious breach of competition law could lead to other banks failing as a result, due to the interconnectedness between the world's largest banks.[58] In an investigation into the professional standards and culture of the UK banking sector following the LIBOR rate-setting scandal, the Banking Commission identified three key areas that have prevented reform in the banking sector: a pervasive attitude that 'it's all under control'; a perception that reform would result in 'risks to the competitiveness of the UK banking sector'; and a reluctance to participate in 'biting the hand that feeds us'.[59]

However, in response to these concerns, it must be noted that both the US and the EU used their competition law powers to enforce the LIBOR and FX benchmark manipulation cartels, imposing far more significant fines on the banks involved than the UK did, without causing these banks to fail. A balance must be found between fining a bank a sum which the bank will view as simply a cost of doing business and fining a bank such a significant sum as to cause its corporate death. Competition law may bridge that gap, by enabling UK regulators to impose more significant fines than were imposed by the FSA and FCA for the benchmark manipulation, thus increasing the deterrent but without causing the banks in question to fail.

The next section of this article will focus on the ways in which the law was enforced against the LIBOR and the FX benchmark cartels in the UK. The examination of the ways in which these cartels were enforced will be compared to the enforcement action taken in the US and EU, which used their competition laws for some or all of the enforcement. The case will be made that the UK should have used its competition law instead of or in conjunction with the financial regulation in order to achieve more of a deterrent to the formation of future banking cartels.

[49] For example see the European Commission press release: 'Antitrust: Commission Fines Banks €1.49 billion for Participating in Cartels in the Interest Rate Derivatives Industry', dated 4 December 2013 < https://europa.eu/rapid/press-release_IP-13–1208_en.htm > accessed 8 January 2023 and the US Department of Justice press release: 'Five Major Banks Agree to Parent-Level Guilty Pleas', dated 20 May 2015 < https://www.justice.gov.opa/pr/five-major-banks-agree-parent-level-guilty-pleas > accessed 4 July 2023.

[50] See the consolidated version of the Treaty on the Functioning of the European Union OJ *C 326,* Articles 101 and 102 and the Competition Act 1998, Chapters I and II.

[51] European Commission, 'Commission Fines Barclays, RBS, Citigroup, JPMorgan and MUFG E107 Billion for Participating in Foreign Exchange Spot Trading Cartel' (European Commission, 16 May 2019) < https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2568 > accessed 10 July 2023.

[52] M Monti, 'Antitrust in the US and Europe: A History of Convergence' (American Bar Association, 14 November 2001) < https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_01_540/SPEECH_01_540_EN.pdf > accessed 18 January 2022.

[53] Sherman Antitrust Act, 15 U.S.C. §1.

[54] United States District Court District of Connecticut, 'United States of America v Barclays PLC Plea Agreement' (*United States District Court District of Connecticut*, 20 May 2015) < https://www.justice.gov/file/440481/download > accessed 8 June 2022.

[55] H Pontell and others, 'Too Big to Fail, Too Powerful to Jail? On the Absence of Criminal Prosecutions After the 2008 Financial Meltdown' (2014) 61 Crime, Law and Social Change 1.

[56] Parliamentary Commission on Banking Standards, *Changing Banking for Good* (HL 2013–14 HL 27-II, HC 171-II).

[57] Ibid, para 68.

[58] D Harrison, *Competition Law and Financial Services* (Routledge 2016) 12 & 84.

[59] Parliamentary Commission on Banking Standards, *Changing Banking for Good* (HL 2013–14 HL 27-II, HC 171-II) 166.

3. The LIBOR and FX scandal and enforcement

In this section, the LIBOR and FX benchmark manipulation scandal will be analysed, whilst considering whether the use of existing competition law powers would have created a more significant deterrent effect than the use of financial regulatory powers alone.

3.1. The LIBOR and FX benchmark manipulation

Created in 1986 LIBOR was an important benchmark interest rate used in many financial contracts for more than forty years.[60] The LIBOR benchmark has now been abandoned due to its involvement in the 2007/2008 financial crisis as well as the LIBOR benchmark manipulation scandal.[61] At the time of the LIBOR benchmark manipulation crisis however, the benchmark was prepared by reference to the average of submissions provided by 16 of the world's largest banks and was regulated by the British Bankers' Association (now UK Finance).[62] Each daily submission indicated what each bank estimated to be the interest rate which banks can charge each other on commercial loans in the London market.[63] LIBOR was considered a good indicator of liquidity in the financial system, and underpinned $300 trillion worth of financial contracts worldwide.[64] British Bankers' Association officials had previously insisted that LIBOR could not be manipulated, demonstrating that self-regulation by the banking industry was not a success.[65] The significance of any benchmark manipulation is hard to assess, yet it has been estimated that for transactions which utilised LIBOR as a benchmark for establishing borrowing costs, even a slight understatement of the rate may have generated sizable wealth transfers from lenders to borrowers and vice versa.[66] Because the LIBOR benchmark was used as the basis for settlement of interest rate contracts on many of the world's major futures and options exchanges as well as most over the counter and lending transactions (commercial and individual), the impact and reach of the LIBOR manipulation is unquantifiable but hugely significant.[67] In 2012 an international investigation led by the US into the LIBOR uncovered collusion by various international banks to manipulate LIBOR for their own purposes, namely to make profit.[68]

In the LIBOR benchmark manipulation, which came to light in 2012, some of the contributor banks fraudulently reported artificially low or high interest rates as their LIBOR submissions, so that their traders could make profits on derivatives pegged to the base rate.[69] There was a further incentive for banks to report LIBORs higher than they were in practice because LIBOR is viewed by the market as an indicator of a bank's health, so some banks were able to make themselves appear healthier than they actually were by reporting inflated fictitious rates. The banks found to have been involved with the fraudulent LIBOR reporting included Barclays Bank,[70] JP Morgan Chase,[71] HSBC,[72] the Bank of America,[73] Citigroup,[74] UBS,[75] Royal Bank of Scotland[76] and Deutsche Bank.[77] Evidence suggests that this collusion between the banks preceded the 2007/2008 financial crisis and before the resulting re-regulation of the financial markets.[78]

Like the LIBOR benchmark manipulation, the FX benchmark interest rate was also manipulated by competing bankers and this manipulation came to light at the same time as the LIBOR manipulation, so it is considered alongside the LIBOR benchmark manipulation in this article. The FX market is one of the largest markets in the world with a daily turnover of $5.3tn, 40% of which takes place in London.[79] Between 2007 and 2012 a series of cartels made up of some individual traders in charge of FX trading of G10 currencies in competing banks manipulated the FX benchmark interest rate by exchanging sensitive information and trading plans, and occasionally coordinating their trading strategies through various online professional chatrooms. The cartels called themselves 'the players', 'the 3 musketeers', '1 team, 1 dream', 'a co-operative' and 'the A-team'.[80]

The enforcement actions taken for both the LIBOR and FX benchmark manipulation in the UK can be divided into civil enforcement action, criminal and private collective actions. Under each of these subheadings, the viability of competition law as an alternative or a supplemental source of power for the regulators is explained, with conclusions drawn as to the advantages of using competition law to enforce this type of financial crime.

3.2. LIBOR and FX benchmark manipulation and competition law

In the UK, the banks and individuals involved in LIBOR benchmark manipulation fared significantly better than they did when prosecuted

[60] M Marquit, B Curry, 'What Is Libor And Why Is It Being Abandoned?' *Forbes Advisor* (New Jersey, 21 December 2021) < https://www.forbes.com/advisor/investing/what-is-libor/ > accessed 22 August 2022.

[61] E Fuller and others, 'The End of LIBOR' (2018) 135(3) Banking Law Journal 183.

[62] British Banking Association, 'BBA to Hand over Administration of LIBOR to Intercontinental Exchange Benchmark Administration Ltd' (BBA, 17 January 2014) < https://www.bba.org.uk/news/press-releases/bba-to-hand-over-administration-of-libor-to-intercontinental-exchange-benchmark-administration-ltd/#.XtN0hS-ZNhE > accessed 10 May 2022.

[63] *R v Tom Alexander William Hayes* [2015] EWCA Crim 1944.

[64] Ibid.

[65] I Kaminska and others, 'Bankers Embark on Libor Rate-setting rethink for LIBOR' *Financial Times* (London, 6 March 2012) < https://www.ft.com/content/cefbc2a6–677c-11e1-b6a1–00144feabdc0 > accessed 8 June 2022.

[66] R Abrantes-Metz and others, 'Libor Manipulation?' (2012) 36(1) Journal of Banking and Finance 136.

[67] Ibid.

[68] L Vaughan and G Finch, 'Libor Scandal: The Bankers who Fixed the World's most Important Number' *The Guardian* (London, 18 January 2017) < https://www.theguardian.com/business/2017/jan/18/libor-scandal-the-bankers-who-fixed-the-worlds-most-important-number > accessed 4 June 2022.

[69] FCA, 'Barclays Fined £ 59.5 million for Significant Failings in Relation to LIBOR and EURIBOR' (*Financial Conduct Authority*, 22 March 2012) < https://www.fca.org.uk/news/press-releases/barclays-fined-%C2%A3595-million-significant-failings-relation-libor-and-euribor > accessed 24 May 2022.

[70] Financial Services Authority, 'Final Notice to Barclays Bank Plc' (Financial Services Authority, 27 June 2012) < https://www.fca.org.uk/publication/final-notices/barclays-jun12.pdf > accessed 24 May 2022.

[71] BBC News, 'JP Morgan Fined £ 26 m over Interest Rate Cartel' (BBC News, 21 December 2016) < https://www.bbc.co.uk/news/business-38389576 > accessed 31 May 2022.

[72] J Treanor, 'Bleak Day for British Banking as Libor Arrests Follow Record Fine for HSBC' *The Guardian* (London, 11 December 2012) < https://www.theguardian.com/business/2012/dec/11/banking-libor-fine-hsbc > accessed 31 May 2020.

[73] P Crowe, 'LIBOR Rigging Criminal Charge and Fines' *Insider* (New York, 20 May 2015) < https://www.businessinsider.com/libor-rigging-criminal-charges-and-fines-2015–5?r = US&IR = T > accessed 31 May 2022.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] J Treanor, 'Deutsche Bank Hit by Record $25bn Libor-rigging fine' *The Guardian* (London, 23 April 2015) < https://www.theguardian.com/business/2015/apr/23/deutsche-bank-hit-by-record-25bn-libor-rigging-fine > accessed 31 May 2022.

[78] R Stokes, 'LIBOR Manipulations: The Limits and Potential of Corporate Criminal Liability' in N Ryder and others (eds), *Fighting Financial Crime in the Global Economic Crisis* (Routledge 2015).

[79] Financial Conduct Authority, 'FCA Fines Barclays £ 284,432,000 for Forex Failings' (Financial Conduct Authority 19 May 2015) < https://www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A3284432000-forex-failings#:~:text = The%20Financial%20Conduct%20Authority%20(FCA,(FX)%20business%20in%20London. > accessed 12 January 2023.

[80] Financial Conduct Authority, 'FCA Fines Five banks £ 1.1 Billion for FX Failings and Announces Industry-Wide Remediation Programme' (Financial Conduct Authority 12 November 2014) < https://www.fca.org.uk/news/press-releases/fca-fines-five-banks-%C2%A311-billion-fx-failings-and-announces-industry-wide-remediation-programme > accessed 5 July 2023.

under antitrust and competition law by US and EU regulators for the same crime.[81] The competition regulator of the time, the Office of Fair Trading (OFT), did raise competition concerns about benchmark manipulation with the FSA,[82] however, the FSA warned the OFT against investigating possible LIBOR benchmark manipulation. Transcripts from a meeting between the FSA's Chief Executive Officer (CEO) and the OFT's CEO as early as November 2008 state that the OFT was 'contemplating looking at (…) LIBOR'.[83] An exchange of emails took place between the FSA and OFT in which the OFT made it clear it was concerned about the potential for collusion amongst the LIBOR submitting banks to the detriment of consumers or other banks.[84] The exchange ended in a letter sent from the FSA CEO to the OFT saying that:

> At the present time, the FSA would not encourage a further investigation into LIBOR as the BBA has recently conducted its own review of the process and made some changes.[85]

The letter also stated:

> More importantly, we believe there may be financial stability implications of announcing an investigation at the present time, due to the LIBOR-OIS spread being such a key indicator of funding costs.[86]

This exchange shows that the competition regulator wanted to investigate the LIBOR manipulation as a suspected cartel between the banks, but was warned off by the FSA, due to fears of political instability. The competition regulator did not take matters further, to the detriment of the enforcement of the LIBOR manipulation, taking the UK out of step with the EU enforcement of LIBOR, which was entirely carried out using competition law and which resulted in significantly higher fines than those imposed in the UK for the same financial crimes.[87]

The FX benchmark manipulation was carried out by traders from competing banks who colluded to fix the prices of the FX benchmark interest rate, which comes within the definition of a cartel[88] and is prohibited by competition law in the UK.[89] However it is not clear why neither the OFT/CMA nor the FCA used their competition law enforcement powers in relation to these cartels. The FX benchmark manipulation cartels were identified by the FCA as: 'traders at different Banks [who] formed tight knit groups in which information was shared about client activity'[90] but these same 'tight knit groups' of competitors were identified as anti-competitive 'cartels' by the European Commission using substantially the same competition law provisions as those of the UK. The enforcement of the FX benchmark manipulation cartels came after new legislation had been passed, which gave the FCA concurrent powers with the CMA to enforce competition law in the financial services sector,[91] however no competition law was used by either regulator. The use of competition law to enforce these cartels would have given regulators the power to impose even more significant fines (up to 10% of each bank's worldwide turnover), to agree behavioural or structural commitments with co-operating banks and the power to disqualify directors found to have breached competition law.[92] Given that competition law was used for these same benchmark manipulation cartels in both the US and EU, there is no obvious reason why the UK did not use competition law to enforce these cartels, with the associated significant penalties for breach of competition law that regulators would have had the power to impose.

3.3. LIBOR and FX civil enforcement in the UK

In this sub-section, the fines imposed by the UK regulators for the LIBOR and FX benchmark manipulation will be compared with the fines imposed by the EU, which used entirely competition law for its enforcement, and the US, which used some of its antitrust/competition law in the enforcement. It will be demonstrated that the use of competition law for the financial crime of benchmark manipulation is not only suitable but provides regulators with far greater enforcement powers than the use of financial regulation alone, which is what the UK regulators used for the civil enforcement against the banks.

In the UK, six banks were fined for breaches of the FSA's Principles for Businesses in relation to LIBOR benchmark manipulation.[93] Barclays Bank Plc was fined £ 59.5 m in 2012, discounted by 30% from £ 85 m due to Barclays' agreement to settle at an early stage of the FSA's investigation.[94] By comparison, Barclays was fined $160 m by the US Department of Justice[95] and $200 m by the US Commodity Futures Trading Commission (US CFTC) for LIBOR benchmark manipulation.[96] Barclays did not receive a fine from the European Commission because it received full immunity in exchange for revealing the existence of the cartel and thereby avoided a fine of around €690 m for its participation in the benchmark manipulation.[97] The UK fine represented

[81] R Ball, 'Competition Law and LIBOR in Three Jurisdictions: US, UK and EU' in N Ryder (Ed), *White Collar Crime and Risk – A Critical Reflection* (Routledge 2018).

[82] Financial Services Authority, 'Internal Audit Report: A Review of the Extent of Awareness Within the FSA of Inappropriate LIBOR Submissions' (Financial Services Authority 2013) Section 3.4.1 < https://www.fca.org.uk/publication/corporate/fsa-ia-libor.pdf > accessed 18 January 2023.

[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Ibid.

[87] H Hillman, 'Current Laws and Potential Enforcement Measures', in N Ryder, U Turksen and S Hassler (Eds), *Fighting Financial Crime in the Global Economic Crisis* (Routledge 2015) and D Johnson, 'What are the Merits of Taking a Hybrid Regulatory Approach Towards the Enforcement of Corporate Financial Crime in the United Kingdom and United States of America?' (2021) 3(1) Journal of White Collar and Corporate Crime 23–32.

[88] Enterprise Act 2002, s188.

[89] Competition Act 1998, s2 and Enterprise Act 2002, s188.

[90] Financial Conduct Authority, 'FCA Fines Barclays £ 284,432,000 for Forex Failings' (Financial Conduct Authority 19 May 2015) < https://www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A3284432000-forex-failings#:~:text=The%20Financial%20Conduct%20Authority%20(FCA,(FX)%20business%20in%20London. > accessed 15 February 2023.

[91] Financial Services (Banking Reform) Act 2013, s129 and Schedule 8.

[92] Competition Act 1998, ss36 and 31 A and Company Director Disqualification Act 1986, s9A.

[93] Financial Services Authority, 'Final Notice to Barclays Bank Plc' (Financial Services Authority, 27 June 2012) < https://www.fca.org.uk/publication/final-notices/barclays-jun12.pdf > accessed 8 January 2023, Financial Services Authority, 'Final Notice to UBS AG' (Financial Services Authority, 19 December 2012) < https://www.fca.org.uk/publication/final-notices/ubs.pdf > accessed 24 February 2023 and

Financial Services Authority, 'Final Notice to The Royal Bank of Scotland plc' (Financial Services Authority, 6 February 2013) < https://www.fca.org.uk/publication/final-notices/rbs.pdf > accessed 24 February 2023.

[94] Ibid.

[95] Department of Justice, 'Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty' (US Department of Justice, 27 June 2012) < https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and > accessed 24 February 2023.

[96] Commodity Futures Trading Commission, 'CFTC Orders Barclays to pay $200 Million Penalty for Attempted Manipulation of and False Reporting Concerning LIBOR and Euribor Benchmark Interest Rates' (CFTC, 27 June 2012) < https://www.cftc.gov/PressRoom/PressReleases/6289–12 > accessed 4 January 2023.

[97] European Commission, 'AMENDED - Antitrust: Commission Fines Banks € 149 Billion for Participating in Cartels in the Interest Rate Derivatives Industry' (European Commission, 3 December 2013) < https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1208 > accessed 5 July 2023.

approximately 1% of Barclays Bank's profit of £ 5879 m before tax in 2010–11, which the House of Commons Treasury Select Committee noted did not appropriately reflect the gravity of the misconduct.[98] This discrepancy in the level of fines issued for the same instances of benchmark manipulation in the UK, compared to the fines issued in the EU and US, highlights a serious concern about the level of enforcement and deterrence against financial crime in the UK. If competition law had been used by the UK regulator, a fine of up to 10% of Barclay's worldwide turnover could have been imposed on the bank,[99] which would have had a significantly increased deterrent effect compared to the fine actually issued to Barclays, which amounted to approximately 1% of the bank's turnover.

A further illustration of the different levels of fines imposed for LIBOR benchmark manipulation can be seen with the fines imposed on the Royal Bank of Scotland plc (RBS) by the UK, EU and US regulators. In the UK, RBS was fined £ 87.5 m,[100] however it was fined £ 207 m by the US CFTC[101] and £ 150 m by the US Department of Justice[102] based on charges of wire fraud and antitrust/competition law. In the EU, RBS was fined €260 m by the European Commission for the same LIBOR manipulation based on a breach of competition law which was substantially the same as the competition in place in the UK at the time, with a further settlement penalty of €131 m for its participation in the manipulation of the Euro Inter-Bank Offered Rate (EURIBOR) benchmark interest rate.[103] The fines imposed in the UK are significantly smaller than those imposed in the EU and US where competition law was used to enforce the benchmark manipulation. The size of the sanctions imposed should be comparable to the offence committed and in the case of the LIBOR manipulation, the offence was the same in each jurisdiction, so the fines should have been comparable.[104] Therefore, the fines imposed by UK regulators using financial regulation, not competition law, had significantly less of a deterrent effect than those imposed by the EU or US for the same offences.

As with the LIBOR manipulation, the FCA imposed regulatory fines on the banks involved with the FX benchmark manipulation.[105] The banks fined were Citibank N.A., HSBC Bank Plc, JPMorgan Chase Bank N.A., RBS and UBS AG, who were collectively fined £ 1.1bn.[106] Following the fines imposed on the above five banks, Barclays was fined £ 284.4 m by the FCA in 2015 for failing to adequately control its FX business.[107] These fines were the largest ever imposed by the FCA or the FSA and the then FCA's director of supervision said that these measures 'will help make sure that real cultural change is delivered across the industry, and that senior management take responsibility for ensuring that the highest standards of integrity operate across all of their trading businesses'.[108]

However, with the imposition of civil regulatory fines rather than the prosecution of the banks involved, questions must be asked about deterrence. Fines are easily absorbed within the operating costs of a bank and often will not even equal or exceed the profit made from the illegal activity.[109] If competition law had been used, regulators would have had the option to fine the banks up to 10% of their previous year's worldwide turnover, as well as the option to use other enforcement tools, such as commitments and director disqualifications, which would have provided a far greater deterrent and deterred the banks from engaging in this financial crime again.

3.4. Criminal prosecution

There were no corporate criminal prosecutions of banks in the UK, unlike in the US,[110] in relation to the LIBOR and the FX benchmark manipulation accusations due to the difficulties associated with the identification doctrine. To provide a deterrent against this type of financial crime from being undertaken in the future, it is important to reform the law to provide regulators with the option to bring a corporate criminal prosecution against companies such as banks that collude to manipulate a benchmark for their own gain. The introduction of the new corporate criminal offence of failure to prevent fraud[111] may help regulators to prosecute banks for their role in future benchmark rate manipulation cartels, however competition law again seems a more relevant option for regulators when prosecuting cartels, providing that the cartel offence is reformed to apply to corporate bodies as well as to individuals. This is discussed further below.

In the absence of a suitable corporate criminal offence to use in future instances of benchmark manipulation competition law would provide regulators with substantial civil enforcement penalties to impose on the banks involved. Other civil enforcement measures which are more severe than a civil fine alone could also be taken against companies if a competition law breach is found, for instance, the disqualification of one/more directors and the acceptance of commitments (for instance the commitment to introduce a suitable compliance programme to prevent future benchmark manipulation, including a regular

[98] House of Commons Treasury Committee, *Fixing LIBOR: Some Preliminary Findings* (HC 2012–13 HC481-I).

[99] Competition Act 1998, s36(8).

[100] Financial Services Authority, 'Final Notice Issued to The Royal Bank of Scotland Plc' (Financial Conduct Authority, 6 February 2013) para 1 < https://www.fca.org.uk/publication/final-notices/rbs.pdf > accessed 20 January 2023.

[101] Commodity Futures Trading Commission, 'CFTC Orders the Royal Bank of Scotland plc and RBS Securities Japan Limited to Pay $325 Million Penalty to Settle Charges of Manipulation, Attempted Manipulation, and False Reporting of Yen and Swiss Franc LIBOR' (Commodity Futures Trading Commission, 6 February 2013) < https://www.cftc.gov/PressRoom/PressReleases/6510–13 > accessed 16 February 2023.

[102] US Department of Justice, 'RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates' (Department of Justice, 6 February 2013) < https://www.justice.gov/opa/pr/rbs-securities-japan-limited-agrees-plead-guilty-connection-long-running-manipulation-libor > accessed 16 December 2022.

[103] European Commission, 'AMENDED - Antitrust: Commission Fines Banks € 149 Billion for Participating in Cartels in the Interest Rate Derivatives Industry' (European Commission, 3 December 2013) < https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1208 > accessed 12 January 2023.

[104] H Hillman, 'Current Laws and Potential Enforcement Measures', in N Ryder, U Turksen and S Hassler (Eds), *Fighting Financial Crime in the Global Economic Crisis* (Routledge 2015).

[105] Transparency International UK, 'Corporate Liability for Economic Crime' (Transparency International UK 30 June 2017) < https://issuu.com/transparencyuk/docs/ti-uk_submission_-_corporate_liabil > accessed 5 July 2023.

[106] Financial Conduct Authority, 'FCA Fines Five Banks £ 1.1 Billion for FX Failings and Announces Industry-Wide Remediation Programme' (Financial Conduct Authority 12 November 2014) < https://www.fca.org.uk/news/press-releases/fca-fines-five-banks-%C2%A311-billion-fx-failings-and-announces-industry-wide-remediation-programme > accessed 2 July 2023.

[107] Financial Conduct Authority, 'FCA Fines Barclays £ 284,432,000 for Forex Failings' (Financial Conduct Authority 19 May 2015) < https://www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A3284432000-forex-failings#:~:text=The%20Financial%20Conduct%20Authority%20(FCA,(FX)%20business%20in%20London. > accessed 8 January 2023.

[108] Ibid.

[109] H Macartney and P Calcagno, 'All Bark and No Bite: The Political Economy of Bank Fines in Anglo-America' (2019) 26(4) Review of International Political Economy 630.

[110] US Department of Justice, 'Five Major Banks Agree to Parent-Level Guilty Pleas' (US Department of Justice, 20 May 2015) < https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas > accessed 4 February 2023.

[111] This offence is currently in the draft Economic Crime and Corporate Transparency Bill. See Uk parliament, 'Economic Crime and Corporate Transparency Bill' (GOV.UK, 11 July 2023) < https://bills.parliament.uk/bills/3339 > accessed 13 July 2023.

system of monitoring by the regulator). These measures, available when a breach of competition law is found, are a good alternative to a corporate criminal prosecution and are better than the comparatively low fines imposed by the FSA/FCA for the LIBOR and FX benchmark manipulation.

Although no corporate criminal prosecutions were instigated in the UK against banks in relation to the LIBOR fixing accusations, criminal proceedings were taken against some of the individual traders involved in benchmark manipulation using the common law offence of conspiracy to defraud. This offence has been used in the past to prosecute cartel members but has not been successful due to the difficulty in proving the fraud element of the offence.[112] A criminal offence more appropriate and fitting to the crime is the cartel offence. This offence was on the statute books at the time of the LIBOR and FX benchmark manipulation enforcement, but legislators did not use competition law and so it was not used. The cartel offence is not perfect and does need reform to make it easier for prosecutors to obtain successful prosecutions, [113] but it is tailor-made for the cartels of traders which were operated in the LIBOR and FX benchmark manipulation.

Using the above-mentioned criminal offence of conspiracy to defraud, the Serious Fraud Office (SFO) launched a criminal investigation into LIBOR manipulation.[114] The investigation resulted in charges being brought against 13 individuals, the highest profile of whom, Tom Hayes, a former derivatives trader at both UBS and Citigroup in Tokyo, was the first to be found guilty. Hayes was convicted on eight counts of conspiracy to defraud in relation to the manipulation of the Japanese Yen LIBOR between 2006 and 2010.[115] Four other bankers were also jailed for their part in the LIBOR manipulation, with jail terms ranging from two to six years.[116]

The high level of acquittals, six in total, and low level of convictions suggest that the common law offence of conspiracy to defraud was not the best option for prosecutors for the benchmark manipulation cartels. The SFO stated that the key problem it faced in the prosecutions was in convincing a jury that the defendants were party to a dishonest agreement with Tom Hayes, which the jury could not be sure of.[117] Change is needed in order for prosecutors to secure more convictions in similar circumstances.[118] It is submitted that if the criminal cartel offence had been used by the SFO to prosecute the individuals involved in the benchmark manipulation, prosecutors may have had a greater chance of success. However, as mentioned briefly above, although the criminal cartel offence in the Enterprise Act 2002[119] looks relevant to the LIBOR benchmark manipulation cartels, it has not been entirely successful in practice. There have only been seven criminal cartel cases commenced by the CMA, with only five successful criminal prosecutions of the cartel offence in total,[120] with the last criminal conviction having been secured in 2017.[121] In this light, it is suggested that the offence should be reformed by the introduction of a *mens rea* of intention in order for it to operate effectively and fairly.[122] The first iteration of the cartel offence contained a *mens rea* of dishonesty,[123] which the OFT felt created too much uncertainty in jury trials.[124] This led to the reform of the cartel offence in 2013 where the requirement for dishonesty to be proved was removed, however at that point three defences were introduced to the offence to ensure fairness.[125] Some commentators argue that the amendments to the offence made in 2013 have created a fundamentally flawed offence which is unworkable in practice,[126] however, in 2020 the CMA and SFO entered into a Memorandum of Understanding enabling them to investigate cartel offences either together or independently.[127] This renewed commitment to investigate criminal cartel offences from the CMA and SFO can perhaps be attributed to the removal of the requirement to prove dishonesty which, as mentioned above, proved a problem for successful prosecutions. The requirement to prove dishonesty continues to apply to all cartel agreements which commenced prior to 1 April 2014, however as this is almost 10 years ago it is likely that the CMA now considers there is an increased likelihood of successful cartel prosecutions.[128] It will be interesting to see whether any cartel prosecutions of individual traders result from the CMA's recent provisional decision that five banks unlawfully shared competitively sensitive information via internet chatrooms in relation to the buying and selling of UK government bonds.[129]

[112] M Lester, 'Prosecuting Cartels for Conspiracy to Defraud' (2008) 7(1) Competition Law Journal 134.

[113] P Reddy, 'The Future of the Criminal Cartel Offence in the UK' (Norton Rose Fulbright 2021) < https://www.nortonrosefulbright.com/en/knowledge/publications/51dd9da8/the-future-of-the-criminal-cartel-offence-in-the-uk > accessed 8 January 2023.

[114] Serious Fraud Office, 'SFO Concludes Investigation into LIBOR Manipulation' (Serious Fraud Office, 18 October 2019) < https://www.sfo.gov.uk/2019/10/18/sfo-concludes-investigation-into-libor-manipulation/#:~:text=The%20SFO's%20investigation%20into%20LIBOR,LIBOR%20offence%20in%20the%20UK. > accessed 11 February 2023.

[115] Hayes was sentenced to fourteen years imprisonment in 2015, which was reduced to eleven years on appeal. Hayes was freed from prison in January 2021 after serving five and a half years. See Judgment in *R v Tom Alexander William Hayes* [2015] EWCA Crim 1944, paras 1 & 2 and Editorial, 'Libor-Rigging Trial: Ex-Barclays Traders Jailed for Two to Six years' *The Guardian* (London 7 July 2016) < https://www.theguardian.com/business/2016/jul/07/libor-rigging-trial-ex-barclays-traders-jailed-merchant-pabon-mathew-johnson > accessed 6 July 2023.

[116] Editorial, 'Libor-Rigging Trial: Ex-Barclays Traders Jailed for Two to Six years' *The Guardian* (London 7 July 2016) < https://www.theguardian.com/business/2016/jul/07/libor-rigging-trial-ex-barclays-traders-jailed-merchant-pabon-mathew-johnson > accessed 6 July 2023.

[117] Serious Fraud Office, 'LIBOR Defendants Acquitted (update)' (SFO, 29 January 2016) < https://www.sfo.gov.uk/2016/01/29/libor-defendants-acquitted-update/ > accessed 7 July 2023.

[118] See N Ryder, ''Too Scared to Prosecute and Too Scared to Jail?' A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK' (2018) 82(3) The Journal of Criminal Law 243 for discussion about the effect of criminal proceedings against financial institutions and the likely deterrent effect to reduce future misconduct.

[119] Enterprise Act 2022, s188(1).

[120] Competition and Markets Authority, 'Competition and Markets Authority Cases' (Competition and Markets Authority 2022) < https://www.gov.uk/cma-cases?case_type%5B%5D=criminal-cartels > accessed 10 July 2023.

[121] Pinsent Masons, 'UK Anti-Cartel Laws and Their Enforcement' (Pinsent Masons 5 March 2020) < https://www.pinsentmasons.com/out-law/guides/uk-anti-cartel-laws-and-their-enforcement > accessed 16 January 2023.

[122] L Danagher, 'Strict Liability and the Mens Rea of Cartel Crime' (2020) 9(1) Criminal Law Review 789.

[123] The test for determining dishonesty for the purposes of the Cartel Offence was set out by the Court of Appeal in *R v Ghosh* [1982] QB 1053.

[124] Office of Fair Trading, 'OFT's Response to the Government's Consultation: A Competition Regime for Growth: A Consultation on Options for Reform' (National Archives June 2011) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/312068/L-O-competition-regime-for-growth.pdf > accessed 16 January 2023.

[125] Enterprise and Regulatory Reform Act 2013, s47.

[126] P Whelan, 'Section 47 of the Enterprise and Regulatory Reform Act 2013: A Flawed Reform of the UK Cartel Offence' (2015) 78(3) Modern Law Review 493.

[127] CMA and SFO, 'CMA and SFO Memorandum of Understanding' (GOVUK, 21 October 2020) < https://www.gov.uk/government/publications/cma-and-sfo-memorandum-of-understanding > accessed 7 July 2023.

[128] Norton Rose Fulbright, 'The Future of the Criminal Cartel Offence in the UK: Will the New Cooperation between the SFO and the CMA cause an increase in convictions?' (Norton Rose Fulbright, January 2021) < https://www.nortonrosefulbright.com/en/knowledge/publications/51dd9da8/the-future-of-the-criminal-cartel-offence-in-the-uk > accessed 7 July 2023.

[129] Competition and Markets Authority, 'CMA provisionally finds 5 banks broke competition law on UK bonds' (GOV.UK, 24 May 2023) < https://www.gov.uk/government/news/cma-provisionally-finds-5-banks-broke-competition-law-on-uk-bonds#:~:text=Our%20provisional%20decision%20has%20found,

Although the alleged behaviour took place between 2009 and 2013, there will still be a requirement to prove dishonesty in a cartel prosecution relating to this behaviour. It is encouraging to see the CMA identifying this behaviour, which is almost identical to the LIBOR and FX benchmark manipulation, as anti-competitive. This does appear to be a step in the right direction towards making use of competition law enforcement powers in the financial services sector.

In relation to the FX benchmark manipulation, the SFO opened a criminal investigation in 2014, however the investigation was closed due to insufficient evidence.[130] The closure of the investigation was attributed by the SFO to the problems associated with the identification principle which led to both regulators and commentators calling for a change in the law on corporate criminal responsibility, to enable successful corporate criminal prosecutions to be brought against large companies.[131] This again highlights the need for a reform of the existing cartel offence to make it applicable to corporate bodies when their employees operate cartels. This would then enable prosecutors to impose more significant sanctions on companies, with the aim of deterring future criminal behaviour.

3.5. Private enforcement action

In addition to the financial penalties imposed by regulators using financial regulation, there have been various private enforcement claims against the banks involved in LIBOR manipulation in the UK. Some cases have used competition law as their basis. These claims will be briefly outlined below and the advantages of the use of bringing collective actions based on competition law will be considered.

One private enforcement case was brought by Leeds City Council and others against Barclays Bank plc in relation to alleged LIBOR manipulation between 2006 and 2008 which affected long term loans entered into between Barclays and Leeds City Council and other local authorities.[132] All the loans referenced LIBOR in order to calculate interest rates or break fees. The claim was based on an allegation by the claimants that they entered into various loan agreements with Barclays on the basis of fraudulent misrepresentations to the effect that Barclays would not engage in LIBOR manipulation.[133] Another private enforcement case was brought by the Property Alliance Group Ltd against RBS.[134] Although neither of these two private enforcement actions against the banks were successful in relation to the LIBOR manipulation, private enforcement actions can be viewed as an additional type of sanction for banks, as ongoing litigation is expensive and is often associated with the risk of reputational damage.

Unlike the unsuccessful private enforcement cases based on fraudulent misrepresentation relating to LIBOR in the UK, in the US class actions have been successfully brought using competition law against some of the banks involved in the LIBOR crisis.[135] This demonstrates that competition law can be used successfully against banks to enforce benchmark rate manipulation, providing financial services regulators with a wider range of enforcement options than are available when financial regulation alone is used. Although there were no successful private enforcement claims using competition law in the UK based on the LIBOR manipulation, in December 2019 a competition law collective damages action was commenced in the Competition Appeal Tribunal against six banks on behalf of asset managers, pension funds, hedge funds and corporates that suffered losses as a result of the FX market manipulation.[136] Because there was no finding by a UK regulator of a breach of competition law, the class action is based on a decision made by the European Commission which fined the six banks for participating in two cartels which manipulated the FX benchmark, in breach of competition law.[137] There is another class action which relates to the same FX manipulation by the same banks.[138] Both class actions are being heard by the Competition Appeal Tribunal and, if successful, will require the banks to pay out compensation to the victims of the benchmark manipulation they have been fined for by the European Commission based on competition law.[139] Competition law class actions, when successful, introduce a further level of deterrence for companies who have been found by a regulator to be in breach of competition law. The cases take many years to progress through the court system to reach a judgment, involving defendant companies in significant time, expenses and inconvenience, all of which contribute to a deterrent effect not present when financial regulation alone is used by the regulator.

This is yet another reason why regulators should use their competition law powers to enforce the financial crime of benchmark manipulation in the future – it will give private individuals who have suffered financial loss due to benchmark manipulation the tools to bring a successful collective private enforcement action against the infringing banks. This will help those individuals adversely affected by the crime and will also provide a further deterrent to the banks against committing the financial crime of benchmark manipulation.

The changes made to the UK competition regime following the 2007/2008 financial crisis which encourage the use of competition law in the financial services sector will now be examined. It will be considered whether the changes have done all that is necessary to ensure that competition law will be applied in the financial services sector in future instances of benchmark manipulation in the UK. If competition law is used in future instances of benchmark manipulation it will lead to more significant civil and criminal sanctions being imposed than was seen in the LIBOR and FX enforcement in the UK. It will also lead to more private enforcement claims based on competition law, which have

(*footnote continued*)
trading%20strategies%20on%20UK%20bonds. > accessed 13 July 2023.

[130] Serious Fraud Office, 'SFO Closes Forex Investigation' (Serious Fraud Office 15 March 2016) < https://www.sfo.gov.uk/2016/03/15/sfo-closes-forex-investigation/ > accessed 3 July 2023.

[131] Law Commission, 'Corporate Criminal Liability: An Options Paper' (Law Commission 10 June 2022) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf > accessed 23 February 2023 and J Quinn, 'SFO Ends Foreign Exchange Probe But Admits Wrongdoing Occurred In City of London' *The Telegraph* (London 15 March 2016) < https://www.telegraph.co.uk/business/2016/03/15/serious-fraud-office-ends-foreign-exchange-probe-but-admits-wron/ > accessed 23 February 2023.

[132] *Leeds City Council & London Borough of Newham v Barclays Bank Plc & Barclays Bank UK Plc* [2021] EWHC 363 (Comm).

[133] L Freeman and others, 'English Court Judgment Increases the Challenges for LIBOR Claimants' (Covington & Burling LLP 9 March 2021) < https://www.cov.com/en/news-and-insights/insights/2021/03/english-court-judgment-increases-the-challenges-for-libor-claimants > accessed 7 July 2023.

[134] *Property Alliance Group Limited v The Royal Bank of Scotland PLC* [2018] EWCA Civ 355.

[135] M McSherry, 'Barclays Pays $20 m to Settle US Class-Action Lawsuit over Libor Fixing' *The Independent* (London 9 October 2014) < https://www.independent.co.uk/news/business/news/barclays-pays-20m-to-settle-us-classaction-lawsuit-over-libor-fixing-9783555.html > accessed 3 August 2023.

[136] *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others* [2022] CAT 16 and UK Foreign Exchange Cartel Claim, 'Michael O'Higgins FX Class Representative Limited' (UK FX Cartel Claim 13 April 2022) < https://www.ukfxcartelclaim.com/Home/About > accessed 28 January 2023.

[137] European Commission, 'Antitrust: Commission Fines UBS, Barclays, RBS, HSBC and Credit Suisse € 344 Million for Participating in a Foreign Exchange Spot Trading Cartel' (European Commission 2 December 2021) < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6548 > accessed 28 January 2023.

[138] *Mr Phillip Evans v Barclays Bank PLC and Others* [2020] CAT 9.

[139] European Commission, 'Antitrust: Commission Fines UBS, Barclays, RBS, HSBC and Credit Suisse € 344 Million for Participating in a Foreign Exchange Spot Trading Cartel' (European Commission 2 December 2021) < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6548 > accessed 1 February 2023.

a greater chance of being successful, as demonstrated by the US competition law private enforcement actions.

4. Legislation introduced following the LIBOR and FX scandal

This section focuses on legislative changes made to the competition law regime in the aftermath of the LIBOR and FX benchmark manipulation crisis. Following the 2007/2008 financial crisis, the government started the process of consulting and then changing the legal regime in order to prevent a repeat of the crisis. These laws were passed at the time the LIBOR and FX crisis came to light and will be examined here in order to determine whether some of the changes made are likely to achieve their aim of increasing the use of competition law by regulators in the financial services sector. If not, further reforms will be recommended.

The main post-LIBOR legislative changes were made following the government's 2011 consultation entitled: A Competition Regime for Growth, in which it invited opinions on how to reform the competition law regime.[140] The response of the government to its consultation, set out proposals, which were included in the Enterprise and Regulatory Reform Act 2013.[141] The government stated that its case for reforming the competition regime included the difficulties in successfully prosecuting infringements of the Competition Act 1998 at reasonable cost and in reasonable time and the duplication and inefficiencies caused by the division of responsibility for competition enforcement between two competition authorities.[142] These perceived difficulties led to the changes introduced in the three key Acts analysed below.

The government was also influenced in its legislative changes by the report of the Banking Commission, which was set up to establish an inquiry into professional standards in the banking industry following the exposure of the scandal of the LIBOR manipulation in late June 2012.[143] The Banking Commission[144] made a number of interesting observations about the reasons for the lack of competition law enforcement in the wake of the LIBOR crisis and stated that 'regulators tend to regulate and they do not think about competition as a tool that they can use'.[145] This can certainly be seen from the UK's response to the LIBOR benchmark manipulation, as the financial services regulator did not work with the competition law regulator, the OFT at the time, to consider the competition law implications of the LIBOR and FX crisis, whilst other countries affected by the benchmark manipulation successfully used their competition law powers to investigate and then prosecute the traders and banks involved.[146] The Banking Commission appears to have influenced the policy of the UK government as, following its publication, a raft of competition legislation relating to the regulation of financial crime was introduced in the UK.

In total, three Acts affecting competition law in the financial services sector were passed by the UK government following the financial crisis. The Financial Services (Banking Reform) Act 2013 conferred competition powers on the FCA.[147] In particular, the Act inserted a new provision[148] into the Financial Services and Markets Act 2000 (FSMA) which places a 'primacy' obligation on the FCA to consider, before using certain of its powers as financial regulator, whether its competition enforcement powers are more appropriate than financial regulation and, if so, to use them instead.[149] This is a significant change of direction and policy, especially given that no competition law was used by any UK regulator in the prosecution of any of the LIBOR or FX benchmark manipulation perpetrators. The FCA's new competition powers can be used concurrently with those of the previously sole competition regulator, the CMA.[150] However, since the introduction of these new powers, the above-cited concern that 'regulators tend to regulate and they do not think about competition as a tool that they can use',[151] appears to have been a valid one, given that only one competition law case has been brought by the FCA since it received its new competition powers in 2015.[152]

The second Act which affected competition law in the financial services sector following the LIBOR and FX benchmark manipulation crisis was the Financial Services Act 2012. Under this Act the FSA was replaced by the Prudential Regulatory Authority and the FCA[153] and a new competition objective was introduced for the FCA, to promote competition in the interests of consumers.[154] This competition objective, alongside the other objectives of the protection of consumers from bad conduct and the protection of the integrity of the UK financial system, makes the FCA one of the few financial regulators in the world with a core objective to promote competition.[155] The Financial Services Act 2012 also created a new criminal offence for knowingly or deliberately making false or misleading statements relating to benchmark-setting.[156] This criminal offence has not yet been used by a regulator but is a significant addition to the armoury that the FCA will have available in any future benchmark manipulation. The introduction of this new criminal offence, in addition to the existing criminal cartel offence in the Enterprise Act 2002,[157] gives the FCA two alternative options for criminal prosecutions against individuals and presumably will at least increase the regulator's chances of securing criminal convictions in any future benchmark manipulation cartel.

A third piece of legislation was the Enterprise and Regulatory Reform Act 2013. This Act amended the concurrency provisions found in the Competition Act 1998 and abolished both the Office of Fair Trading (OFT) and the Competition Commission (CC) and established

[140] Department for Business, Innovation and Skills, 'A Competition Regime for Growth: A Consultation on Options for Reform' (GOV.UK March 2011) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11–657-competition-regime-for-growth-consultation.pdf > accessed 4 July 2023.

[141] Department for Business, Innovation and Skills, 'Enterprise and Regulatory Reform Bill: Updated Policy Paper' (Parliament Publications January 2013) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/87928/bis-13–654-enterprise-and-regulatory-reform-bill-policy-paper-jan-2013.pdf > accessed 7 July 2023.

[142] Department for Business, Innovation and Skills, 'A Competition Regime for Growth: A Consultation on Options for Reform' (GOV.UK March 2011) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11–657-competition-regime-for-growth-consultation.pdf > accessed 1 August 2023.

[143] Parliamentary Commission on Banking Standards, *Changing Banking for Good* (HL 2013–14 HL 27-II, HC 171-II).

[144] Ibid.

[145] Ibid.

[146] In particular the USA which used its anti-trust powers and the EU which used competition law to enforce the LIBOR rate fixing.

[147] Financial Services (Banking Reform) Act 2013, s129 and Schedule 8.

[148] The Financial Services (Banking Reform) Act 2013, Schedule 8 Part 1(3) inserted a new s234K into the Financial Services and Markets Act 2000, Part 16 A.

[149] Ibid.

[150] Financial Conduct Authority, 'Competition Law' (Financial Conduct Authority 21 April 2016) < https://www.fca.org.uk/about/promoting-competition/powers > accessed 20 February 2023.

[151] Parliamentary Commission on Banking Standards, *Changing banking for good* (HL 2013–14 HL 27-II, HC 171-II).

[152] Financial Conduct Authority, 'FCA Issues its First Decision Under Competition Law' (Financial Conduct Authority 21 February 2019) < https://www.fca.org.uk/news/press-releases/fca-issues-its-first-decision-under-competition-law > accessed 17 January 2023.

[153] Financial Services Act 2012 s 6.

[154] Financial Services Act 2012, s6(1).

[155] Financial Conduct Authority, 'FCA Mission: Our Approach to Competition' (Financial Conduct Authority October 2018) < https://www.fca.org.uk/publication/corporate/our-approach-competition-final-report-feedback-statement.pdf > accessed 8 December 2022.

[156] Financial Services Act 2012, s 91 and 92.

[157] Enterprise Act 2002, s.188(1).

the CMA.[158] The removal of the OFT and CC was carried out in order to address two key concerns identified by the government.[159] The government's concerns were firstly, that there had been too few competition law cases initiated by the OFT and secondly, that, of the cases which had been brought, they took too long to prosecute.[160] The government stated that it intended to create the CMA to provide the impetus to use competition powers, enable more efficient and effective use of scarce public resources and to create a single powerful advocate for competition in the UK.[161] This aim expressed by the government shows the importance it attached to the use of competition law, including its use in the 'regulated sectors', one of which is the financial services sector.[162] However, although the legislative changes that were enacted came into place at the same time as the LIBOR and FX benchmark manipulation came to light, no competition law was used by the UK in the enforcement of these crimes.

Since the Enterprise and Regulatory Reform Act came into force, the CMA is jointly responsible with the FCA for competition law enforcement in the financial services sector. 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. The government gave a 'strategic steer' to the CMA, stating that it: .

> Should work with sector regulators, including the Financial Conduct Authority for the financial services sector, to build up its sector capabilities and continuing to share competition expertise, including through joint enforcement work.[163]

The concurrency of regulation between the CMA and the various sector regulators now allows each sector regulator, including the FCA, to apply competition law and to conduct market studies in order to identify areas where the sector market is not working competitively for the benefit of consumers. However, it does not appear that these legislative changes, or the strategic steer by the government to the CMA, have had the effect they were designed to produce – the FCA has only issued one Decision in the financial sector using its competition law powers.[164] Also, the recent provisional decision made by the CMA of a breach of competition law which involves five banks exchanging commercially sensitive information, which is likely to constitute a cartel, has been made by the CMA, not the financial services regulator, the FCA.[165] Of the wide range of enforcement powers available to it, the FCA imposed just fines in this case and those fines were only equivalent to 1% of the turnover of the three asset management firms involved.[166] However, because the FCA had the power to fine up to 10% of the turnover of each firm using its competition powers, the fines imposed look small by comparison. The competition law investigation took an unusually long time to reach the decision stage, with fifteen months elapsing since the Statement of Objections was issued by the FCA to the infringing parties. This is a long time compared to the more usual five months which the CMA takes from the Statement of Objection stage to the issuance of a fine.[167] The FCA and CMA have opened six competition law cases in the financial sector since 2015, only one of which has reached the stage of an infringement decision.[168] Three of the six cases were closed without a decision and two, commenced in 2018 and 2020 respectively, remain open.[169] It is clear from this record that the FCA has not embraced its competition law powers since its concurrent competition powers in the financial services sector came into force in April 2015.[170]

In its most recent report, the CMA states that the concurrency arrangements have been working well, with high levels of collaboration between sector regulators.[171] Despite this positive review, as the FCA has made just one Competition Act decision since 2015 it is apparent that the concurrency arrangements are not working well in the financial services sector. The Penrose Report stated that the UK competition regime is ranked behind that of the US, France, Germany, EU and Austria and concludes that reform is needed to updated, improved and refreshed.[172] The government proposed a further set of legislative changes to the competition regime in its consultation response, published in April 2022.[173] Many of the proposals are aimed at strengthening powers for the CMA and sector regulators such as the FCA under the Competition Act 1998, including the ability to take interim measures to ensure competition authorities can intervene to prevent harm while investigations are still ongoing and powers to obtain information and sanction businesses which refuse to cooperate or comply the CMA

[158] Enterprise and Regulatory Reform Act 2013, s26(2) and s25.

[159] Department for Business, Innovation and Skills, 'A Competition Regime for Growth: A Consultation on Options for Reform' (GOV.UK March 2011) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11–657-competition-regime-for-growth-consultation.pdf > accessed 6 February 2023.

[160] P Freeman, 'The Competition and Markets Authority: Can the Whole be Greater than the Sum of its Parts?' (2013) 1(1) Journal of Antitrust Enforcement 4.

[161] Department for Business, Innovation and Skills, 'Growth, Competition and the Competition Regime: Government Response to Consultation' (GOV.UK March 2012) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192722/12–512-growth-and-competition-regime-government-response.pdf > accessed 14 January 2023.

[162] Ibid.

[163] Department for Business, Innovation and Skills, 'Competition Regime: Response to Consultation on Statement of Strategic Priorities for the CMA' para 9, Annex 1 (Parliament Publications 1 October 2013) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/245607/bis-13–1210-competition-regime-response-to-consultation-on-statement-of-strategic-priorities-for-the-cma.pdf > accessed 19 February 2023.

[164] Financial Conduct Authority, 'FCA Issues its First Decision Under Competition Law' (Financial Conduct Authority 21 February 2019) < https://www.fca.org.uk/news/press-releases/fca-issues-its-first-decision-under-competition-law > accessed 17 December 2022.

[165] Competition and Markets Authority, 'CMA Provisionally Finds 5 Banks Broke Competition Law on UK Bonds' (GOV.UK, 24 May 2023) < https://www.gov.uk/government/news/cma-provisionally-finds-5-banks-broke-competition-law-on-uk-bonds#:~:text=Our%20provisional%20decision%20has%20found,trading%20strategies%20on%20UK%20bonds. > accessed 13 July 2023.

[166] C Gottlieb, 'FCA Issues First Penalties for Competition Infringements' (Cleary Gottlieb 26 February 2019) < https://www.clearygottlieb.com/-/media/files/alert-memos-2019/fca-issues-first-penalties-for-competition-infringements.pdf > accessed 8 July 2023.

[167] Ibid.

[168] Financial Conduct Authority, 'FCA Issues its First Decision Under Competition Law' (Financial Conduct Authority 21 February 2019) < https://www.fca.org.uk/news/press-releases/fca-issues-its-first-decision-under-competition-law > accessed 17 February 2023.

[169] Competition and Markets Authority, 'Competition Act 1998 Cases in the Regulated Sectors' (GOV.UK 22 September 2020) < https://www.gov.uk/government/publications/competition-act-1998-cases-in-the-sectors-regulated-by-ukcn-members/competition-act-1998-cases-in-the-regulated-sectors > accessed 17 February 2023.

[170] Competition and Markets Authority, 'Annual Report on Concurrency 2022' (GOV.UK 27 April 2022) < https://www.gov.uk/government/publications/annual-report-on-concurrency-2022 > accessed 10 July 2023.

[171] Ibid.

[172] Penrose Report, 'Power to The People: Stronger Consumer Choice And Competition So That Markets Work For People, Not the Other Way Around' (Parliament Publications February 2021) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf > accessed 17 December 2022.

[173] Department for Business, Innovation and Skills, 'Reforming Competition and Consumer Policy: Government Response' (GOV.UK 20 April 2022) < https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response > accessed 21 February 2023.

or regulators' Competition Act 1998 investigations and remedies.[174] A key priority of the government in the forthcoming legislative changes to the competition regime is to provide stronger enforcement powers to regulators to protect consumers.[175]

It remains to be seen whether giving the CMA and sector regulators increased enforcement and investigative powers will encourage the regulators to start more Competition Act cases in the regulated sectors. The FCA has had its competition powers for a substantial amount of time now but does not seem ready to use these powers in place of its financial regulatory powers in the foreseeable future.

5. Recommendations

The primary recommendation of this article is that the FCA and CMA use competition law, with its wide variety of enforcement options, to enforce the financial crime of benchmark manipulation in future. The sanctions imposed by the UK financial services regulator against banks and individuals for the manipulation of the LIBOR and FX benchmark interest rates do not act as a sufficient deterrent, whereas competition law provides regulators with a wide range of enforcement tools. Before taking direct regulatory enforcement, the FCA is now obliged to consider whether enforcement under the Competition Act is more appropriate than taking enforcement action under its own regulatory powers (the 'primacy' of competition law for regulators, as provided for by the Enterprise and Regulatory Reform Act 2013).[176] However, it remains to be seen whether the FCA's ability to use its competition law powers will be sufficient to ensure that competition law is used in any future benchmark manipulation cartel in the financial services sector. A change in attitude, not just in law, by the financial services regulator will be needed for the FCA to use the competition enforcement powers it now has.

This article also recommends the creation of a suitable criminal corporate offence for the FCA or CMA to use against companies who participate in benchmark manipulation. This could be done by amending the cartel offence to expand its scope of application to companies and individuals. This will enable employers to be held vicariously liable for the actions of their employees in forming a cartel, from which the employer banks benefit financially. Any such corporate criminal liability offence could then be used in conjunction with deferred prosecution agreements with companies who wish to cooperate with the regulators to regulate their future behaviour. These are aspects of the competition law regime that should be addressed as a matter of urgency by the two UK competition regulators to ensure that the competition enforcement powers are more likely to be used for future benchmark manipulation cartels in the UK.

6. Conclusion

This article has addressed the omissions in the existing literature by providing a unique examination of the role that competition law could and should have played in the enforcement of the LIBOR and FX benchmark manipulation scandal by UK authorities. This article has demonstrated that extensive and significant competition law enforcement powers exist in the UK and can be used by the FCA and the CMA to enforce benchmark manipulation cartels.

It is clear though that without a significant change of attitude by the UK financial services regulator competition law will not be used by the FCA to enforce financial crime, although it now appears that the CMA might take competition law enforcement action in the financial services sector.[177] The FCA is currently 'talking the talk' when referring to its motivation for using its new Competition Act powers; it is stated in the 2019 Memorandum of Understanding between the FCA and the CMA that '[t]he CMA and the FCA seek to use their powers to achieve more competitive outcomes in the financial services industry in the UK (…)'.[178] However, just because the FCA now has competition powers and speaks positively in public about its use and intended use of them, it does not mean it will use them if future benchmark manipulation cartels come to light.

As set out above, the CEO of the FCA's predecessor did not want competition law to be used in the enforcement of LIBOR manipulation in 2009 and wrote to the OFT warning of 'financial stability implications' of announcing a competition law investigation into LIBOR at that time.[179] Additionally, the Parliamentary Commission on Banking Standards stated that competition economists had expressed concern about how seriously the FCA would take its competition remit.[180] They were concerned in particular that the FCA would continue to use financial regulation rather than competition law as its primary tool.[181] This concern appears to have materialised because the FCA has only concluded one case since 2015 using its competition law powers and the fines imposed were significantly lower than the 10% of worldwide turnover maximum fine that could have been imposed. [182] In addition to this, the lack of other competition law cases in the financial services sector is also concerning; the FCA has opened a total of five Competition Act cases in the financial sector since gaining competition law powers, however three were closed without a decision and only one, commenced in September 2020, remains open.[183] So it appears that something is holding back the regulator from using its concurrent competition powers instead of its pre-existing regulatory powers, with which it is more familiar.

There may be a lingering concern in the FCA about penalising banks too severely for breach of financial crime, as enunciated in the 2013 report of the Parliamentary Committee on Banking Standards, where it states that the Parliamentary Commission was 'warned that over-zealous action to improve banking standards would damage the competitiveness of British banks and of the UK as a financial centre (…)' and that 'measures which reduce London's attractiveness to banks could result in wider damage to the economy.'[184] However, it

[174] Ibid.
[175] Ibid.
[176] Enterprise and Regulatory Reform Act 2013, Schedule 14
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[181] Ibid para 1075.
[182] Financial Conduct Authority, 'FCA Issues its First Decision Under Competition Law' (Financial Conduct Authority 21 February 2019) < https://www.fca.org.uk/news/press-releases/fca-issues-its-first-decision-under-competition-law > accessed 17 January 2023.
[183] Competition and Markets Authority, 'Competition Act 1998 Cases in the Regulated Sectors' (GOV.UK 22 September 2020) < https://www.gov.uk/government/publications/competition-act-1998-cases-in-the-sectors-regulated-by-ukcn-members/competition-act-1998-cases-in-the-regulated-sectors > accessed 17 January 2023.
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can be seen from the competition law enforcement which took place in the EU and US for the same manipulation of the LIBOR and FX benchmark interest rates[185] that the significantly larger fines and other penalties handed out by regulators in the EU and US have not resulted in harm to the competitiveness of the banks or to the EU or US as financial centres. If these fears continue to hold back the FCA from using its competition enforcement powers, a change in attitude is urgently needed.

Conflict of interest

No competing interests to be declared.

Declaration of Competing Interest

No competing interests to be declared.

[185] SE Foster, 'LIBOR Manipulation and Antitrust Allegations' (2013) 11(29) DePaul Business & Commercial Law Journal 291 and AK Pascall, 'Tail Wagging the Dog: The Manipulation of Benchmark Rates – A Competitive Bone of Contention' (2016) 39 (2) World Competition 161.