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ISSUES ON FINANCIAL MARKET REGULATION, BUSINESS DEVELOPMENT AND GOVERNMENT'S POLICIES ON GLOBALIZATION

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The "Law and Economics Yearly Review" is an academic journal to promote a legal and economic debate. It is published twice annually (Part I and Part II), by the Fondazione Gerardo Capriglione Onlus (an organization aimed to promote and develop the research activity on financial regulation) in association with Queen Mary University of London. The journal faces questions about development issues and other several matters related to the international context, originated by globalization. Delays in political actions, limits of certain Government's policies, business development constraints and the "sovereign debt crisis" are some aims of our studies. The global financial and economic crisis is analysed in its controversial perspectives; the same approach qualifies the research of possible remedies to override this period of progressive capitalism's turbulences and to promote a sustainable retrieval.

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FOCUS ON GLOBAL PERSPECTIVES

THE BANKER'S DUTIES IN THE UK AND EU REGULATORY FRAMEWORK: AN ANALYSIS OF THE ACCOUNTABILITY REGIME

Martin Berkeley*

ABSTRACT: *This paper examines the utility and effectiveness of enforcing banker's duties. In the aftermath of the Global Financial Crisis there has been increased desire by both the public and regulators to make bankers more accountable for their actions. New legislation and regulations have been introduced to address what is essentially and old problem – making bankers responsible for their alleged misdemeanours. Despite the reassurances of regulators and legislators, this paper argues that the effectiveness of sanctions is doubtful and the claims that 'this time it is different and 'something will change' are unlikely to be correct.*

1. While hanging bankers may seem a little harsh, the possibility of jailing them for criminal transgressions appears very popular. Moneylenders have never enjoyed a good reputation; historic religious texts warn of the risks of usury,[1] and the fallout of the Global Financial Crisis (GFC) has more recently reinforced the view of bankers as embodying the worst excesses of the capitalist system. Politicians and the media have been quick to tap into public sentiment with even

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[1]For example Exodus 22:25, '*If thou lend money to my people poor by thee, thou shalt not be to him as an usurer*' or The Qur'an 3:130 '*Devour not usury, doubling and quadrupling*'.

the former Mayor of London Ken Livingstone stating: 'hang a banker a week until the others improve'.[2]

This article discusses how this sentiment has manifested it itself in legal and policy terms and what duties bankers owe, how they are judged, punished and the potential consequences and effectiveness. This article primarily focuses on the UK perspective but with reference to wider jurisdictions to illustrate key points. Themes including the unpopularity of banks as institutions and bankers as individuals are considered as well as the effects of formal and informal sanctions.

2. The desire for banker accountability is understandable not only for members of society who have either been harmed or outraged by apparent banking excesses, but also regulators, politicians and members of the banking profession who appreciate the necessity of a stable and orderly financial system.[3] Banks can be lightning rods for socioeconomic frustrations; the impact of a catastrophic financial crisis can have a profound impact on the global economy as well as individuals. The ostensible willingness of governments to intervene in order to regain financial stability with substantial liquidity injections when funds are seemingly unavailable for more popular causes such as education or healthcare fuels the politics of envy, as does the inequality of pay and perceived special treatment of banks as being 'too big to fail'.[4] The apparent absence of accountability of bank bosses and lack of senior management 'paying the price' or even taking responsibility or apologising for failures further fuels the dislike and distrust of both banks and bankers.

[2]See MULHOLLAND, *Ken Livingstone sparks anger with 'hang bankers' speech,* The Guardian 17 February 2012, https://www.theguardian.com/politics/2012/feb/17/ken-livingstone-hang-bankers-speech.

[3]For a comprehensive review and analysis of the state of the banking industry and how it is perceived by different sections of the industry see Joris Luyendijk, *Swimming with Sharks: My Journey into the World of the Bankers*, Faber 2016.

[4] Andrew Ross Sorkin provides a detailed account of this concept in his book *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System—and Themselves,* Viking 2009

The necessity of a healthy, efficient and fully functioning financial system is often lost in the criticism of bailouts; without an operative banking system commerce would effectively stop, payments would not take place and trade would be reduced to little more barter.[5] It would seem the vital nature of the financial system, where it is effectively an indispensable utility, leads to the requirement to impose on those responsible for its efficient and stable organisation and functioning obligations and duties of care. Some of these have now found their way into regulation and law.[6]

3. With possibly the exception of central banks and state owned banks, most banks are private or joint stock companies. The directors have duties to comply with the requirements of directors under The Companies Act 2006 in the UK or similar laws.[7] The principle duties for directors are to operate within the law, ensure success of the company, be competent and avoid conflicts of interest.[8] As commercial organisations they are usually ultimately responsible to their shareholders or owners, and without returning a profit, the tenure of a bank's Chief Executive Officer is unlikely to be long. Due to inherent risks in financial systems additional regulations are imposed to ensure financial stability, efficient market functioning, assist in reducing financial crime, enhance competition and additionally to ensure consumer protection.[9] To this end detailed

[5]See BOAIT, *What would the world look like if the banks crashed tomorrow?* The Independent, 7 February 2016, http://www.independent.co.uk/voices/what-would-the-world-look-like-if-the-banks-crashed-tomorrow-a6859221.html.

[6]For example The Financial Services Act 2012, led to the formation in the UK of the Prudential Regulation Authority whose main focus is the stability of the financial system and the Financial Conduct Authority, whose role encompasses appropriate market conduct and consumer protection. See also footnote 10 for full list of the FCA's statutory objectives.

[7]See The Companies Act 2006 http://www.legislation.gov.uk/ukpga/2006/46/contents.

[8]See The Companies Act 2006, sections 171 – 177.

[9]In the UK the statutory objectives of FCA predecessor the FSA are described in the Financial Services and Markets Act 2000 (FSMA 2000) part 1. The objective to promote competition was added in 2013 to the newly formed FCA's objectives.

and obligatory conduct of business regulations have developed in addition to high-level financial principles and more detailed conduct rules.[10]

What are bank's duties and where do these come from? These duties may be self-imposed through internal codes or moral standards that pervade an organisation, or they may be externally imposed through laws and regulations. Examples of these external duties would be the duty is to investigate such as the Know Your Customer (KYC) rules, duties to disclose all relevant information and warn of unsuitable investments (unless a client knows the risks). There are also duties to act in good faith and in some situations fiduciary duties may arise. How these duties are implemented depends on the circumstances of each client and the duty towards commercial clients is less than those towards inexperienced private client.[11]

There are more restricted rights of action for companies to pursue legal redress than individuals in the UK.[12] Individuals are better protected by the UK financial regulations, as companies cannot sue for breach of statutory duty under the FCA's COBS rules. The Financial Services and Markets Act 2000 (FSMA) describes those that have rights of action as principally being 'private persons',[13] and the case of *CGL v RBS* [2017] confirms that UK courts will not allow small companies to hold banks to the same standards that the regulator requires of them for individuals.[14] Does this also mean that the duties owed by bank directors to companies are less than individuals, and what does this mean for shareholders and investors? The situation is not uniform across Europe, for example the Dutch Supreme Court; the *Hoge Raad,* has ruled that banks have a special duty of care

[10]For example the FCA's COBS, Conduct of Business Rules and PRIN, Principles of Regulation in the UK.
[11]See BUSCH and VAN DAM (eds), *A Bank's Duty of Care,* Hart (2017) Ch 12.
[12]However MiFID 2 is narrowing this discrepancy. How this will develop practically is yet to be seen.
[13]FSMA 2000 Section 138D and FSMA 2000 (Rights of Action) Regulations, 3(1)(a). Lloyd Maynard notes it would be straightforward for HM Treasury to redefine the meaning of 'private person' within FSMA 2000 Rights of Actions regulations. See Lloyd Maynard '*Holmcroft Properties: will a contractual phoenix rise from its ashes*?*' JIBFL* Vol. 31 No. 6 (June 2016) 358.
[14]*CGL v RBS* [2017] EWCA Civ 1073.

for investors and certain third parties due to the special roll banks play in society.[15]

4. The Markets in Financial Instruments Directive (MiFID)[16] imposes threshold conditions for national regulators to implement not only the detailed rules but also the high level principles required under the so-called 'Lamfalussy' process of Principle-Based Regulation.[17] This process in essence establishes the high-level regulatory objectives with detailed rules being written at a supranational level (such as MiFID) and national regulators implementing these requirements through national business conduct rules, such as the Conduct of Business Rules (COBS) in the UK.

An example of a duty imposed by MiFID is the requirement for banks to classify customers and treat them appropriately according to their circumstances. In essence, more sophisticated and wealthy customers will have less statutory protection because they are deemed to have sufficient knowledge, understanding and experience to enter into a financial contract. This is principally true of individuals, but the same principle applies to commercial customers, who may be deemed to be professional clients or market counterparties. The duty to classify clients and treat appropriately is aimed to addressing the information asymmetries between contracting parties. This classification assists in deducing what level of information is appropriate to be supplied to a customer before entering into financial contract, specifically an investment. MiFID also requires investment firms to act honestly fairly and professionally and in accordance with the best interests of the clients, this is sometimes known as a general duty of

[15]The Netherlands Hoge Raad, NJ/1999/285, *Mees Pierson/ Ten Bos,* 9 January 1998, Cited in Busch & van Dam (2017).
[16]MiFID, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/securities-markets/investment-services-and-regulated-markets-markets-financial-instruments-directive-mifid_en
[17]The Lamfalussy architecture of regulation: https://ec.europa.eu/info/node/11713/.

loyalty.[18] However, this duty to act in the best interests does not preclude making a profit. The concept of best interests, while worthy does seem hard to quantify and agree on. Bank directors have what seem to have conflicting duties – the duty to maximise profits for their company and to act in their customer's best interests.

MiFID has now been superseded by MiFID II (and also the Markets in Financial Instrument Regulation - MiFIR).[19] Notably, MiFID II has expanded and clarified duties of banks and consequently directors, for example widening the scope of what are classified as investments from conventional products such as securities to new asset classes such as structured deposits, insurance based investments and emissions trading.[20] The consequence of the requirements of classification; KYC and suitability will be extended to these assets and resultantly consumers should have greater protection.

In respect of client classification, MiFID II also increases significantly the number of customer types that will be now deemed to be retail customers. For example effectively all customers will be treated as retail clients unless they meet the requirements for professional or counterparty status. In practice this means that even local authorities and municipalities will be treated as retail clients.[21] The thresholds for a business to be defined as a professional client are contained in COBS 3.5 in the UK. It is unclear as yet how the rights of UK companies will balance the new classification realignments against their current limited rights of action. There is divergence in the implementation of the regulations, for example EU Member states are being permitted to apply their own opt up criteria from retail to professional classification.[22] This could potentially lead to regulatory arbitrage between jurisdictions by financial institutions.

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[18]MiFID, Art 19(1) and MiFID II, Art 24(1) Notably, the general duty of loyalty has been extended to eligible counterparties under MiFID II.
[19]MiFID II, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.173. 01. 0349.01.ENG and MiFIR: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_201 4.173.01.0084.01.ENG.
[20]Busch van Dam (2017) Ch 2, 14.
[21]Ibid, 19.
[22]See COLLINS, DOLAN and BROWN, *MiFID II - client classification, agreements, reporting to clients and telephone taping,* Lexology 10 November 2016, https://www.lexology.com/library/

MiFID II introduces many other new provisions the consequences of which will take sometimes to manifest their effectiveness. Inducement regulations are expanded and clarified in order to reduce conflicts of interest between a bank and its clients. This could be seen as part of the general duty of loyalty and if a bank allowed its interests to be unduly influenced by external parties, it may be judged to have failed to act in an honest, fair and professional manner.[23] The subject of inducements is potentially problematic for bank directors: banks are rewarded for their business not only in financial terms, but also by provision of research, favourable terms or at a personal level through corporate entertainment. At what point does corporate hospitality cross the boundary to become bribery that may fall foul of anti-bribery laws? In the UK the Bribery Act 2010 introduced stringent requirements for companies to prevent bribery and penalties of up to ten years custody, director disqualification and seizure of assets where guilt is established.[24] The FCA has warned of its concerns in the finance sector, and the law extends to acts of bribery outside the UK. [25] The first prosecution of a bank under the Act took place in 2015 and this will be of concern to bank directors as they may be held liable for the failure to prevent bribery within their organisation, even where the act itself took place abroad.[26]

5. The regulatory burden for bank directors and senior managers have further been augmented in the UK through the introduction in 2017 of the Senior Managers and Certification Regime (SM&CR), which aims to increase personal responsibility of bankers and is being further extended to smaller firms and

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detail.aspx?g=52de09c9-cb30-4e5f-b05e-bfbb0433c8a1.

[23]See Busch van Dam (2017) Ch 2, 53.

[24]See Bribery Act 2010, https://www.legislation.gov.uk/ukpga/2010/23/contents.

[25]See PICKWORTH, *Beware the Regulator cracking down on Corporate Hospitality*, The Financial Times, 22 May 2016, https://www.ft.com/content/e37a1632-1da9-11e6-b286-cddde55ca122.

[26]*See Serious Fraud Office v Standard Bank Plc* (Now Known As ICBC Standard Bank Plc) [2016], The Bank was prosecuted under section 7 of the 2010 Bribery Act, however, this was also a Deferred Prosecution Agreement was entered into, potentially limiting the immediate punishment of bank directors. See https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/.

insurance companies in 2018.[27] This framework has its genesis in the UK Parliamentary Commission on Banking Standards (PCBS),[28] which considered the professional standards and culture in the UK banking sector with the aim of improving standards in banking and restoring public trust in the industry.

The PCBS recommended 'making individual responsibility in banking a reality, especially at the most senior levels,'[29] as it believed that senior bankers had operated without culpability and with little real chance of being penalised or sanctioned. The PCBS also was of the view that senior bankers would hide behind collective decision-making or claim ignorance of events that happened on their watch. The new approach also made recommendations as to changes to incentives and remuneration structures. The PCBS felt that the existing Approved Persons Regime (APR),[30] benefits were largely illusory and responsibilities were not meaningfully assigned with little risk of enforcement. The UK SM&CR is also an example of where a jurisdiction imposes regulatory requirements above the standard required by MiFID.[31]

Regimes such as the SM&CR bring with it administrative overheard in terms of establishment by the regulator and on-going monitoring, as well as the firms own implementation of the scheme.[32] Mapping exercises of staff reporting lines, as well as scoping and definition of director's responsibilities have to be undertaken to establish clearly who is responsible for each business area or function. Accountability realignment or organisational reorganisation may be required to ensure that there is no replication or omission of responsibilities. There is also the requirement by the regulator to approve the individuals in the

[27]See Senior Managers and Certification Regime https://www.fca.org.uk/firms/senior-managers-certification-regime.
[28]See Report of the Parliamentary Commission on Banking Standards, *Changing Banking for Good*, June 2013, http://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/news/changing-banking-for-good-report/.
[29]Ibid, 8.
[30]See https://www.fca.org.uk/firms/approved-persons.
[31]See *Senior management accountability: diverging paths across Europe,* King & Wood Mallesons, 2 December 2016.
[32]*See Senior Managers & Certification Regime (SM&CR): An Overview – Getting Ready for 2018*, Phasellus, undated, 1.

roles. The aim of ensuing personal responsibility, while worthy does open up the possibility of 'gamesmanship' by firms in terms of indistinct roles and lack of clarity.[33] Unsurprisingly, a bank is not going to ask for approval of an individual who is likely to be deemed inappropriate by the regulator. The acceptance of a key role also entails risk for the individuals involved. This may raise questions about the rights of the senior manager not only as company officers but also their wider employment rights.

The UK SM&CR regime is not without its weaknesses. There are plans to permit 'grandfathering' to allow already approved persons to be transferred without the need to complete any documentation, with the exception of non-executive chairman who will be required to submit documentation.[34] This will result in existing staff that may have committed historic, but yet undiscovered misdemeanours to have the mantle of respectability by being within the curtilage of the SM&CR without any apparent scrutiny as to their probity. Though, being inside the regime will mean that they are potentially now answerable for their historic actions. The use of a 'grandfathering' approach is often found in UK financial services and is seen as a pragmatic method of migrating large numbers of staff to new regimes. Whether this is the best method of ensuring better behaviour within banks and senior management accountability remains to be seen, but such an approach does little to increase public confidence in banks. There may be the perception that new regimes such as the SM&CR and little more than bureaucratic public relations exercise and little will actually change as a result.

6. Bank directors like any other actors have to comply with the law. Criminal acts can take place in the corporate environment as well as on an

[33]See WILLIAMS-GRUT, *Britain's top banking watchdog says some banks are gaming new rules designed to punish execs,* Business Insider UK, 28 September 2016.
[34]See COLLINS, *Key Issues from the FCA Extending the SMCR Meeting 29th January 2018*, Eversheds Sutherlands Consulting, 12 February 2018, https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Financial_services/fca-extending-smcr-meeting-120218.

individual basis.[35] Fraud and dishonestly are criminal acts and standard test for criminal dishonesty in the UK is the so-called *Ghosh Test*.[36] This has two elements, the objective test – whether ordinary honest people would regard a behaviour as dishonest, and the subjective test, whether a defendant realised that ordinary honest people would regard a behaviour as dishonest. The media if it accurately reflects public opinion, suggests that many people may regard bankers as criminally dishonest due to the disenchantment with the banking sector in general,[37] thereby superficially satisfying the first test in their minds, but this may fail the second test, as the modus operandi of business operations for banks are no more than standard commercial practice. However the UK Supreme Court recently ruled that it was for a tribunal to judge whether a defendant was guilty of dishonesty in civil cases, which would be consistent with the jury system in criminal cases.[38]

The criminal law remains a method of bringing 'white collar' criminals to account and the test for a criminal offence, being higher than civil offence may cause difficulties in obtaining convictions. The difficulty of obtaining criminal convictions led to the creation of a new civil offence in the UK of Market Abuse as opposed to the criminal offence of Insider Trading. Insider trading is described in the *Criminal Justice Act 1993* (CJA),[39] and originally Market Abuse was a criminal offence under FSMA.[40] However, the difficulty in obtaining convictions and lack of effectiveness as a deterrent led to new civil offences being classified as Market Abuse; for example the provision of false or misleading impressions or distortion

[35]For example both individuals and corporations can be responsible for an unlawful death. An individual causing an involuntary death may be found guilty of manslaughter and a company may cause accidental death for example through safety violations and may be found guilty of corporate manslaughter. See Corporate and Corporate Homicide Act 2007, http://www.legislation.gov.uk/ukpga/2007/19/contents.

[36]*R v Ghosh*, [1982] EWCA Crim 2, [1982] 3 WLR 110, [1982] QB 1053, [1982] 2 All ER 689.

[37]See HASTINGS, *Yes, the bankers who robbed us all are criminals. Now let's throw them in jail!* The Daily Mail 29 July 2014, http://www.dailymail.co.uk/debate/article-2709066/MAX-HASTINGS-Yes-bankers-robbed-criminals-Now-let-s-throw-jail.html.

[38]See *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67.

[39]See CJA Section 52 states that an individual who has information as an insider is guilty of insider dealing if he/she deals in stocks or shares whose price will be affected by that information when it is publicly disclosed.

[40]See FSMA Section 397.

of the market. The test of dishonest intention is not required and negligent action or inaction is sufficient.[41] While this demonstrates proactive recognition of legislative failures, it also shows the lack of deterrent effectiveness of the criminal law in particular for white-collar crime. Where the rewards are high and the chances of detection are low, and the prospect of punishment seems remote, it is unsurprising that market abuse or insider trader is still commonplace.[42]

Would ordinary people consider the action of bankers during the GFC dishonest? Certainly the views expressed by the PCBS if representative, reflect the views of ordinary people. Additionally, there is the question whether it is the conduct of individual bankers or banks as institutions that are the dishonest parties or both. If it is individual bankers who are found guilty of a criminal act it is easy to see how the Ghosh test may apply. However, if a bank due to its organisation and lack of oversight is it the directors that are then responsible for these organisational failings. Will the directors of the bank be the ones that ultimately pay the price, or will a lower-level executive effectively become the scapegoat?[43] This raises the question of do senior bankers or directors really know what is going on in their organisations, or are they too big to manage?[44] If the banks are too big and too complex to manage, how can the directors of the bank be held responsible for what happened about local level, especially if they do not have direct control? The head of Global Compliance at HSBC, David Bagley, in

[41]See BARNES, *Insider dealing and market abuse: The UK's record on enforcement,* undated, http://www.paulbarnes.org.uk/images/Z_IMAGES/Ijlcj.pdf.

[42]Paul Barnes reports that research has shown 75% of a share's price rise may be attributable to insider knowledge 'leaking'. See BARNES, *The Regulation of Insider Dealing in the UK: Some Empirical Evidence concerning Share Prices, Merger Bids and Bidders' Advising Merchant Banks*, *Applied Financial Economics*, 6:383-391 (1996).

[43]Tom Hayes a former UBS banker was sentenced to 14 years for LIBOR manipulation in 2015. He maintained that a guide to rigging LIBOR was widely distributed among UBS employees as the practice was commonplace and that he was made a scapegoat. See Ian Fraser, *Libor scapegoat found guilty, sentenced to 14 years*, 3 August 2015, https://www.ianfraser.org/libor-scapegoat-found-guilty-sentenced-to-14-years/.

[44]See HEINEMAN JR, *Too Big to Manage, JP Morgan and the Mega Banks*, Harvard Business review, 3 October 2013, https://hbr.org/2013/10/too-big-to-manage-jp-morgan-and-the-mega-banks.

defence of his role in the HSBC Mexican Money Laundering Scandal,[45] stated he did not manage or control compliance departments at HSBC subsidiaries, despite his job title, but only set policy and escalated any issues that were reported to him.[46]

Additionally, if key information is being kept from the bank's directors should they be punished for not knowing it if it was effectively impossible to know due to the deceit? In large complex organisations with confused reporting lines it may be difficult to know exactly who was responsible for particular area. A senior manager working for the UK regulator, the FCA also has commented: 'the real threat is not a bank's management hiding things from us: it's the management not knowing themselves what the risks are, either because nobody realises it or because some people are keeping it from their bosses'.[47] In essence, the problem is deciding who is responsible and whether they should have known through their role, and what is an appropriate level or punishment to deter others from committing similar offences. The question at stake is: when criminal penalties are a real rather than a remote possibility, do they act as a deterrent?

7. The GFC reignited or perhaps reinvigorated the desire for bankers to be punished and the PCBS report paints a dire picture of the state of banking and the public's perception of it. Though it is UK in focus, many of the criticisms could be levelled at banks in different jurisdictions.[48]

The actual number of bankers punished is perhaps smaller than the public perception and desire following the GFC. In the UK the Serious Fraud Office (SFO)

[45]In 2012 HSBC admitted laundering money for Mexican drug cartels and other criminal entities. The bank entered into a Deferred Prosecution Agreement with the US Department of Justice, giving undertakings to improve its internal controls.
[46]See NASIRIPOUR, *HSBC's Mexico nightmare on money laundering*, The Financial Times, 18 July 2012, https://www.ft.com/content/832b582a-d0f2-11e1-8a3c-00144feabdc0.
[47]See Joris Luyendijk Banking Blog: *Senior FSA regulator: Can you say no to four or five times your salary?* The Guardian, 25 June 2012.
[48]For further details see Report of the Parliamentary Commission on Banking Standards, *Changing Banking for Good*, June 2013, Chapters 1- 4.

charged 28 people with LIBOR and Euribor manipulation and fraud,[49] of which only 5 have been convicted to date.[50] In the USA the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) charged 402 individuals of whom 324 were convicted 222 were sentenced to prison, of this number 97 were bankers.[51] Possibly Iceland with a population of 330,000 was the country propositionally most damaged by the GFC.[52] In terms of jailing bankers, 26 senior Icelandic bankers have been convicted since 2010, with terms of up to over 5 years imprisonment for individuals such as the Chairman and Chief Executive Officer of Iceland's largest banks.[53] In juxtapose to Iceland, in the UK and USA charges and conviction of bankers have not been at the CEO or senior director level.

The reasons for the effectiveness of the Icelandic approach to director accountability and its higher incarceration rate of bankers may be complex, but one reason may be Icelandic judicial system is not jury based, instead using neutral experts who help judges understand the intricacies of the financial system.[54] The small population and well connected nature of Icelandic society would also make difficult to constitute a jury of individuals unknown to one another, either directly or indirectly, thereby potentially undermining the rule of law and independence of the judiciary. The contention that the shame of wrongdoing and public censure may have a punishing or deterrent effect, particularly in a small and closely knit society, while attractive does not seem valid as it appears that in Iceland that fears of 'crony capitalism' are on the rise again.[55]

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[49]London Interbank Offer Rate and European Interbank Offer Rate, bench mark interest rates.

[50]See LEE, *How many bankers were jailed for their part in the financial crisis?* Channel 4 Fact check, 20 November 2017.

[51]Ibid.

[52]By 2008 the Icelandic economy had become grossly distorted with bank balance sheets growing to 10 times Iceland's $17.5 Billion economy. Bank defaults shortly after reduced Icelandic purchasing power by 20% and ultimately IMF intervention was required.

[53]See ROBINSON and VALDIMARSSON, *This is where bad bankers go to jail*, Bloomberg Markets, 31 March 2016.

[54]Ibid.

[55]Ibid, the so-called 'Borgun affair', where state assets are allegedly being sold to relatives of politicians via offshore entities without proper scrutiny or oversight, as well as the Icelandic Prime Minister, Sigmundur Davíð Gunnlaugsson, having to stand down following the disclosure of his offshore holdings in the so-called 'Panama Papers'. The continued lack of trust in the established Icelandic political and financial system is also reputed to be a factor in the growth of popularity in

Problems of investigations into bankers and banks are the effectiveness of investigation itself, the timescales and the costs. As already observed, only a handful of senior bankers have faced formal sanction following the GFC. This problem still persists, for example after an investigation of over 10 years incurring enormous costs, the Central Bank of Ireland punished the former Chairman of Irish Nationwide Building Society with a €20,000 fine and a three year disqualification for breaches of the Irish Financial Services Law.[56]

The jailing of bankers may be popular, but understanding what are the duties of bankers and at what point does their breach constitute a criminal rather than a civil offence is more complex.

8. The objective of making senior directors responsible for misdemeanours in their bank can have unintended consequences. The case of JP Morgan Chase and the so-called 'London Whale' illustrates the risk that senior managers of banks, who are not at director level, now may run.[57] In 2013 the FCA concluded there were failings by the bank and fined the bank £137.6 million.[58] These failings were set out in a Decision Notice and Final Notice by the regulator. The FCA published only the latter of these, as it was its practice at the time. Though not named in the notices it was possible to identify Mr Macris by his job title as CIO of the bank's International Unit based London.[59] Mr Macris was not supplied with a

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the new left leaning Icelandic 'Pirate Party', who won 14.5% of the vote and 10 parliamentary seats in 2016 Icelandic election.

[56]See GLEESON, *Former Irish Nationwide chairman censured by Central Bank*, The Irish Times, 12 February 2018, https://www.irishtimes.com/business/financial-services/former-irish-nationwide-chairman-censured-by-central-bank-1.3389383.

[57]JP Morgan Chase suffered losses of over US$6 billion on a synthetic credit portfolio in 2012. The trader responsible for the loss Bruno Iksil and no senior managers faced initially any criminal charges because of the loss, however Iksil's boss Javier Martin-Artajo and junior trader were subsequently charged for hiding the true extent of the losses and there was widespread criticism of the bank's senior management and regulator due to oversight failures. https://www.hsgacsenate.gov/subcommittees/investigations/hearings/chase-whale-trades-a-case-history-of-derivatives-risks-and-abuses.

[58]See FCA, *JPMorgan Chase Bank N.A. fined £137,610,000 for serious failings relating to its Chief Investment Office's "London Whale" trades,* 19 September 2013, https://www.fca.org.uk/news/press-releases/jpmorgan-chase-bank-na-fined-%C2%A3137610000-serious-failings-relating-its-chief.

[59]CIO – Chief Investment Officer.

copy of the notices and was thus unable to make representations to the Regulator before the information appeared in the public domain. Subsequently, Mr Macris took his case to the UK Court's Upper Tribunal who ruled in his favour, agreeing that notices had prejudiced him, as Mr Macris was identifiable from the content of the notices.[60] The FCA appealed to the Court of Appeal who upheld the Upper Tribunal's decision. The FCA made a further appeal to The Supreme Court who upheld the FCA's contention that they had not breached Mr Macris rights as members of the public could not identify him easily.

The Supreme Court was not unanimous in this view and did recognise that the ruling had implications for individuals who may have their reputation or career harmed by public notices. [61] The effect of *FCA v Macris* is that even senior managers who are not bank directors and are not named in a formal notice, but may be identifiable through circumstantial material and hence may find their names appearing in the public domain. This may have the effect of making managers more reluctant to take on roles carrying this type of risk, and raises the issue as to individuals who are not censured by the FCA, may still suffer detriment in the court of public opinion by association.

9. The fear of having one's reputation tarnished by public scrutiny is very real, even when a banker maintains they have done nothing wrong. The appearance of four senior bankers from the failed banks RBS and HBOS before the Treasury Select Committee in 2009, [62] elicited only 'lame partial and insincere' apologies, which angered politicians and increased public fury at both bankers and bank post the GFC. [63] The bankers appeared not to take responsibility for their

[60]The Upper Tribunal is an administrative tribunal of record in the UK, broadly similar to a High Court, can set and enforce precedents and has the power of Judicial Review, https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about.
[61]See *FCA v Macris* [2017] UKSC 19.
[62]HM Treasury Committee, *Banking Crisis – Examination of Witnesses (Questions 1880-1899)*, 10 February 2009, https://publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/144/09021014.htm.
[63]See FRASER, *Shredded: Inside RBS: The Bank that broke Britain*, Location 7402, Birlinn 5 Jun. 2014.

actions, maintaining they had done nothing wrong and only expressing regret at the distress the collapse of their banks had caused.

The trepidation of appearing before a Parliamentary Committee or other public body that can hold banker's to account may also have a deterrent effect or alternately give a banker a chance to give their explanation of events. Appearances before Parliamentary Committee's may as noted do little to enhance the reputation of a bank or an individual banker. An example of this is the exchange of the former Barclays Bank Chief Executive Bob Diamond who appeared before the HM Treasury Select Committee and was asked by John Mann MP if he: 'could remind me of the three founding principles of the Quakers who set up Barclays?'[64] Mr Diamond was unable to assist Mr Mann who reminded the former Barclays CEO the founders of Barclays' values could be summarised, with some irony as 'honesty, integrity and plain dealing'.[65] The inference that was drawn was that even the CEO of a major bank did not know the most fundamental principles of his own bank. As judged in the court of public opinion, this did little to rebuild trust in banks or bankers.

The notion that the fear of publicity should act as a deterrent, while appealing is probably simplistic. Analysis of has shown that in the United States when large corporations are prosecuted individuals are often not charged. Nonetheless, Individuals must have committed the crimes within the organisations and the charge rate of individuals is reported to be 34%.[66] Where there have been prosecutions, the majority of these have been low-level employees. Though appearing before a Parliamentary Committee is not the same as being prosecuted, the possibility of having to publically account for the actions of your company may act as a deterrent. The adverse publicity may have long-term consequences; Fred Goodwin, the Ex-CEO of RBS, despite not being found guilty of any criminal

[64]See https://www.home.barclays/about-barclays/history/our-quaker-roots.html.
[65]Evidence by Barclays Bank CEO Bob Diamond to HM Treasury Select Committee - 4 July 2012.
[66]See STEWART, *In Corporate Crimes, Individual Accountability is Illusive*, The New York Times, 19 February 2015, available at https://www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html. See also GARRETT, *Too Big to Jail*, Harvard University Press, 2015.

offences was the focus of much public anger and suffered the public humiliation of being stripped of his knighthood.[67]

10. The quest for banker answerability is understandable given the long history of lack of senior accountability by bank directors. It is therefore unsurprising that legislation has been enacted by many countries to act as a deterrent or as a punitive method and potentially as a route to redress for banking system failures by bank directors. The effectiveness of this regulation is however questionable, not only because banks may 'game' systems, but also the use of judicial devices such as Deferred Prosecution Agreements (DPA) give the appearance of letting bankers 'get away' with a crime. The HSBC Mexican money-laundering affair is illustrative of this; the bank was with served with a 5-year DPA, and the bank deferred selected bonuses of some senior bank officials. The fine paid by the bank of $1.9Bn, which was less than five weeks income for HSBC's US subsidiary. This was despite HSBC having been found to have had 'stunning failures of oversight' allowing drugs cartels and sanctioned countries to launder money with apparent impunity.[68] It does appear that in such cases bank bosses have paid very little in terms of a personal price for extraordinary levels of negligence, incompetence or criminality, the fines of course being paid ultimately by the shareholders, rather than the directors who had responsibility for the failures. Whether the UK's SM&CR regime will be effective in prevention of such cases is perhaps too early to tell, but the concerns of banks 'gaming' the system and the use of 'grandfathering' do not inspire confidence.

The phenomenon of badly behaved banks and bankers is not new, as is the wishing for responsibility to be taken where there is culpability. The lack of trust in bankers and the banking system is not helped by the apparent ease with which

[67]See WINTOUR, *A Reputation Shredded: Sir Fred loses his Knighthood*, The Guardian, 31 January 2012, https://www.theguardian.com/business/2012/jan/31/fred-goodwin-loses-knighthood.
[68]See VULLIAMY, *HSBC has form: Remember Mexico and laundered drug Money*, The Guardian, 15 February 2015, https://www.theguardian.com/commentisfree/2015/feb/15/hsbc-has-form-mexico-laundered-drug-money.

effective sanctions can be avoided. The apparent low risk of detection of profitable, but unscrupulous behaviour, will still motivate some to commit misdemeanours and while the senior directors may be criticised a more junior employee may be the one who faces jail. As Walter Bagehot noted: 'a bank lives on credit. Till it is trusted it is nothing; and when it ceases to be trusted, it returns to nothing'.[69] Continuing and repeated financial scandals, lack of deterrence and effective punishment has rapidly emptied the banking industry's credit account in the court of public opinion.

[69]Attributed to Walter Bagehot, the editor-in-chief of The Economist in the 1860s.