

# The global financial crisis: the case for a stronger criminal response

*This collection of work explores the case for a stronger criminal response by UK law-enforcement authorities in response to the global financial crisis. The work is divided into three parts. Section 1 is a paper written by Jonathan Fisher QC, with Marine Blottiaux, Stéphane Daniel and Helena Oliveira. The paper was presented at a colloquium held on 24 April 2013 at the London School of Economics under the auspices of its Law and Financial Markets Project. Mr David Green CB QC, Director of the Serious Fraud Office, addressed the colloquium and section 2 is a record of Mr Green's presentation. Section 3 is a summary of discussion at the colloquium prepared by Ola Osoka and Agathi Trakkidi.*

## Section 1

JONATHAN FISHER QC, with MARINE BLOTTIAUX,  
STÉPHANE DANIEL AND HELENA OLIVEIRA

### Introduction

On 17 January 2013, the Chairman of the Parliamentary Commission on Banking Standards, Mr Andrew Tyrie MP, posed the following question:

“Despite the financial crisis and the spate of mis-selling scandals, we still have not seen anybody sent to jail. Is that because nobody ought to go to jail, or because there is a fundamental failure in the sanctions regime or the legal system in the UK?”<sup>1</sup>

In response, Professor Julia Black, one of three expert witnesses,<sup>2</sup> highlighted the difficulties inherent in seeking to allocate blame within a large, complex corporation where collective decision-making is generally the norm. Professor Kershaw agreed, adding, amongst other things, that the relevant regulatory framework had been overly complicated. Gregory Mitchell QC pointed to the fact that, by and large, those implicated in the financial crisis were guilty of negligence, which is generally an inadequate basis for criminal liability.

This paper explores some of the issues identified in the responses to Mr Tyrie's question. To this end, Part I offers an analysis of three high-profile cases, all of which involve breaches of the Financial Services Authority's (FSA) Principles for Businesses (PfB). It is suggested that these cases illustrate an increasing focus on regulatory fines at the expense of criminal prosecutions and we question the efficacy of this approach with regard to deterrence. Part II assesses the problems faced by the authorities responsible for investigating and prosecuting financial crime in the UK. In particular, it is suggested that the “identification theory”, which is favoured by

the courts as a means of attributing criminal liability to corporate entities, has fostered a culture of reckless risk-taking in the financial markets. Finally, Part III considers a number of possible reforms including, imposing criminal liability on corporate entities in a similar way to section 7 of the Bribery Act 2010, introducing a new offence of reckless risk-taking, and establishing a single agency with responsibility for prosecuting financial crime in the UK.

### I. Three paradigm cases

In this section, we analyse the facts in three UK cases, all of which share two common features. The first is that the offending conduct was carried out against a backdrop of failures in the respective company's compliance systems and controls. The second is that, notwithstanding these serious deficiencies, no company or senior corporate manager has been prosecuted.

#### LIBOR

The first case considered is the “LIBOR scandal”, during which certain banks manipulated the London Interbank Offered Rate (LIBOR) for their own benefit. LIBOR is the benchmark interest rate at which banks theoretically lend to each other on the overnight market. The accuracy of LIBOR is integral to the operation of both UK and international financial markets. The benchmark is set on the basis of information provided by contributing banks. Contributors are asked to submit an answer to the following question:

“At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?”

Between January 2005 and July 2008, derivatives traders in certain banks sought to manipulate the LIBOR in order to protect their own trading positions. At the time of writing,

the FSA has fined three major banks for their part in the scandal, as outlined below.

#### Barclays

On 27 June 2012, the FSA fined Barclays £59.5m for breaching Principles 2, 3 and 5 of the PfB.<sup>3</sup> In particular, the FSA found that:

1. until December 2009, Barclays had no specific systems and controls relating to its LIBOR submissions processes;
2. after that date, Barclays failed to keep its systems and controls under review; and
3. Barclays failed to deal with the problems internally when these were first escalated in 2007 and 2008.

Barclays was also fined US\$200m by the US Commodity Futures Trading Commission<sup>4</sup> and US\$160m by the United States Department of Justice.<sup>5</sup>

#### UBS

On 19 December 2012, the FSA fined UBS £160m for breaching Principles 3 and 5 of the PfB.<sup>6</sup> The FSA found that:

“UBS breached Principle 3 during the Relevant Period by failing to take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems, in relation to its LIBOR … submissions process. The duration and extent of UBS’s misconduct was exacerbated by these inadequate systems and controls.”<sup>7</sup>

UBS was also fined US\$500m by the US Department of Justice<sup>8</sup>, US\$700m by the Commodity Futures Trading Commission<sup>9</sup> and CHF60m by the Swiss Financial Market Supervisory Authority.<sup>10</sup>

#### RBS

On 6 February 2013, the FSA fined RBS £87.5m for breaching Principles 3 and 5 of its PfB.<sup>11</sup> The FSA particularly highlighted the fact that:

1. prior to March 2011, RBS failed to implement adequate risk management systems and controls in relation to its LIBOR submissions process;
2. following that date, RBS failed to ensure that its risk management system specifically addressed the risk that derivatives traders may seek to influence submissions; and
3. RBS failed to manage the relevant business areas appropriately. For example, managers were aware that derivatives traders were acting as substitute submitters but failed to resolve the problem internally.

The US Commodities Futures Trading Commission fined RBS US\$325m.<sup>12</sup> RBS was also fined US\$150m by the US Department of Justice.<sup>13</sup>

*Against this background, we question whether it is right that financial institutions such as Barclays, UBS and RBS should avoid criminal responsibility for their failure to implement and maintain adequate systems and controls to prevent the commission of serious criminal conduct by their employees in relation to the financial markets.*

#### UBS and Adoboli

On 14 September 2011, UBS became aware that substantial unauthorised trades had been carried out on its Exchange Traded Funds desk. It subsequently transpired that one of the junior traders, Kweku Adoboli, had amassed losses of US\$2.3bn. Mr Adoboli had concealed the losses by using fictitious offsetting trades, which appeared to be profitable. On 20 November 2012, Mr Adoboli was convicted of two counts of fraud by abuse of position and sentenced to 7 years’ imprisonment. Five days later, the FSA fined UBS £29.7m for breaching Principles 2 and 3 of the PfB.<sup>14</sup> In particular, the FSA found that:

1. although the “Operations Division” was established in order to “maintain an appropriate and robust control environment” it developed a culture of helping the traders, which impeded its compliance function;
2. between 23 June and 15 July 2011, the Exchange Traded Funds desk breached the desk risk limits set by the Desk Supervisor a total of four times. On one of these occasions, the Desk Supervisor congratulated the desk for the profits made; and
3. Mr Greenidge, who supervised Mr Adoboli, failed to challenge him even when the relatively junior trader told him of a daily loss exposure of \$200m, four times the then-maximum.

*In these circumstances, we repeat the question. Since UBS failed to implement and maintain proper systems and controls to prevent fraud, and at best negligently ignored the rules set down by the FSA, why should the bank as a corporate entity not also have been required to accept criminal liability alongside Mr Adoboli for its inaction?*

In point of fact, UBS had already been fined £8m by the FSA for breaching Principles 2 and 3 of the PfB.<sup>15</sup> In particular, the FSA found that UBS had failed:

1. to provide an appropriate level of supervision;
2. to challenge appropriately the employees in question; and
3. to implement effective remedial measures in response to several warning signs that occurred during the course of its business.

*In the light of failures by senior management, we ask a second question. Why should the directors responsible for systems and compliance, such as the Chairman and the CEO, not also have been required to accept personal criminal liability alongside Mr Adoboli for their inaction?*

#### Cattles

On 28 March 2012, the FSA published a Final Notice against Cattles plc which detailed the company’s breaches of both the Financial Services and Markets Act 2000 (FSMA) and the UK Listing Rules.<sup>16</sup> The FSA noted that the company would have received a “substantial financial penalty” had it still been a going concern at the time the Notice was published.

Cattles plc, a subprime lender on the London Stock Exchange, had conducted most of its business through a subsidiary, Welcome Financial Services Ltd. The principal business of Welcome Financial Services was retail consumer lending. In particular, the provision of low-value secured, unsecured and hire-purchase loans to subprime borrowers at

high levels of interest. The FSA found that between August 2007 and February 2009 Cattles had engaged in market abuse. The company's 2007 Annual Report stated that only £0.9bn of Welcome Financial Services' approximately £3bn loan book was in arrears. If accounting standards had been properly applied the correct figure would have been £1.5bn. Similarly, Cattles represented that it had made a pre-tax profit of £165.2m when in fact it had made a loss of approximately £96.5m. The FSA concluded that Cattles was guilty of disseminating misleading information about the financial health of the company. It also held that, by signing and approving the relevant audit information, James Corr (Cattles' financial director), Peter Miller (finance director of Welcome Financial Services) and James Blake (managing director of Welcome Financial Services) were in breach of their duties to the respective companies. Each director was therefore fined.

*In this context, we ask why these individuals escaped prosecution for offences of fraudulent misrepresentation contrary to section 2 of the Fraud Act 2006 and false accounting contrary to section 17 of the Theft Act 1968, in circumstances where their conduct was sufficiently egregious to justify the imposition of significant civil penalties against them and a prohibition preventing them from carrying out functions in relation to regulated activities by authorised persons?*

## II. Key issues

In this section, we consider some of the problems encountered by the authorities responsible for investigating and prosecuting financial crime in the UK.

### Corporate criminal liability

Companies have long been recognised as legal persons<sup>17</sup> in their own right. However, as expressed by Lord Reid in *Tesco Supermarkets v Nattrass*:

“A living person has a mind which can have knowledge or intention or be negligent and he had hands to carry out his intentions. A corporation has none of these.”<sup>18</sup>

In order to get around this problem the law has developed various techniques for attributing liability to corporate entities. The first technique is the application of vicarious liability, which provides that a company will be strictly liable for criminal acts carried out by its employees in the course of their employment. However, as a general rule, vicarious liability does not form part of the criminal law in the UK. The second technique is known as the “identification theory” and constitutes the primary method of imposing liability on companies under UK law. The identification theory provides that as a company has no mind of its own, it is necessary to identify the company's “directing mind and will”. If the directing mind and will possessed the necessary *mens rea* for a particular offence, this state of mind is attributed to the company, which will then be liable for the offence.

As a tool for securing the conviction of corporate entities within the context of financial crime the identification theory is weak. In large part, this is due to the narrow definition given to “the directing mind and will”. In general, this phrase has only been applied to directors and senior managers. The

problem is that in large corporations it is often difficult to prove that directors, or equivalent persons, had a direct hand in the day-to-day running of the company and particularly in large multinational corporations duties are generally subdivided between several individuals. Hence it is difficult for the prosecution to establish that any one person carried out all of the elements of the *actus reus* with the necessary *mens rea*.

### Preference for regulation over litigation

In addition to the difficulties inherent in the law, there is also a dichotomy in the approach of the two authorities responsible for investigating and prosecuting financial crime. Whereas the Serious Fraud Office (SFO) investigates with an eye to instituting criminal proceedings, the FSA (now the Financial Conduct Authority (FCA)) tends to approach its investigations from a regulatory perspective. This difference in approach was particularly visible in the wake of the LIBOR scandal.<sup>19</sup> The FSA does have standing to bring criminal proceedings. This was confirmed by the Court of Appeal in *R v Rollins*.<sup>20</sup> It is therefore surprising that Chapter 5 of the last FSA Annual Report, entitled “Delivering a Reduction of Financial Crime”, made no mention of the FSA's strategy regarding criminal prosecution.<sup>21</sup> During 2011/12, the FSA had an annual budget of approximately £505.9m, of which approximately £75.4m was allocated to the Enforcement and Financial Crime Unit.<sup>22</sup> By comparison, the SFO's annual budget for 2008 was £52m and now stands at around £32m.<sup>23</sup> However, this figure does not take account of the so-called “blockbuster funding” arrangement.<sup>24</sup> This arrangement provides that in the event of an investigation which is likely to cost more than £1.5m the SFO can ask the Treasury for additional funding. We would argue that the essence of the arrangement is, however, inherently objectionable since it confers power on the Government to veto the institution of a high-profile investigation by refusing to extend the SFO's budget.

*We suggest that a better approach must surely be to increase the SFO's budget to an appropriate amount which would enable it to decide which cases to investigate without having to go “cap in hand” to the Treasury in exceptional cases.*

There are different concerns regarding the potential for a conflict of interest in respect of the funding of the FSA. The FSA is funded by fees recouped from the very organisations which it is responsible for regulating.

## III. Possible reforms

In the final section of this paper, we consider three proposals for reform, including the possibility of imposing criminal liability on the same basis as section 7 of the Bribery Act 2010, introducing a new offence based on reckless risk-taking, and establishing a single agency with responsibility for prosecuting financial crime.

### Corporate criminal liability

If the UK legal system is reluctant to follow the position in

the United States and hold a company vicariously liable in criminal law for the actions of its employees, there is surely a case for a middle position whereby a company becomes criminally liable where its directors or senior executives have acted negligently by failing to institute proper systems and processes to prevent employees committing criminal offences in relation to the financial markets.

In 1988, the Council of Europe drew attention to the difficulty of identifying the individuals responsible for the commission of an offence and considered whether it was possible to make companies answerable for their negligent behaviour, without exonerating from liability any employees who were implicated in the commission of an offence. In Recommendation No R (88) 18, the Council of Europe suggested that consideration should be given in particular to applying corporate criminal liability to an enterprise where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences, so required, with a provision that a company would be exonerated from criminal liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission.<sup>25</sup>

Parliament has decided to apply this approach in cases of bribery and corruption, with the enactment of section 7 of the Bribery Act 2010 (the 2010 Act). The Law Commission has described the 2010 Act as creating:

“a kind of second-order form of criminal liability, liability at directorial level for failing to prevent a crime being committed by a lower level employee, on behalf of the company”<sup>26</sup>

Section 7 provides that a company will be guilty of a criminal offence where one of its employees bribes another person, intending to obtain or retain business for the company, unless the company can prove that it had in place adequate procedures designed to prevent such conduct.

As such, a company is vicariously liable for the criminal acts of its employees carried out in the course of their employment and with the intention of benefiting the company, but can insulate itself from liability by implementing and maintaining adequate systems and controls. This development in English law is expected to encourage companies to change their corporate culture so as to behave in a more ethical and responsible way in so far as incidents of bribery and corruption are concerned.<sup>27</sup> This provision having been put in place for offences of bribery and corruption, including acts of bribery and corruption committed abroad, one asks rhetorically why there should not be an equivalent corporate offence which would apply where an employee of a financial institution commits a serious criminal offence in relation to the UK’s financial markets.

The need for a new approach to the imposition of corporate criminal liability has been highlighted by the anticipated introduction in the Crime and Disorder Bill presently pending in Parliament of a framework for deferred prosecution agreements (DPAs) involving companies. However, the efficacy of this development will be predicated upon the enforcement authority’s ability to secure a criminal conviction against a company if the company were to decline to enter into the agreement which it had been offered. In this regard, it is trite

to observe that a company is unlikely to enter into a DPA in circumstances where the enforcement authority would struggle to achieve the company’s conviction at trial. It would be wrong to draw a parallel with the relatively successful way in which DPAs have been deployed in the United States since, as already noted, a company is held vicariously liable for the criminal actions of its employees in that jurisdiction.

### Reckless risk-taking

The global financial crisis has been characterised by instances of reckless risk-taking, both at managerial and board level. For example, Johnny Cameron, former Chairman of RBS’s Global Banking and Markets Division, made the following comments in the wake of the near collapse of RBS in October 2008:

“There was a view among some shareholders that the CEO did not fully appreciate the large, single name risks arising from RBS’s rapidly growing exposures in the syndicated and leveraged loans markets; and the growing accumulation of risks across the Group. ... I don’t think, even at that point, I fully, I had enough information. Brian [Crowe] may have thought I understood more than I did. ... And it’s around this time that I became clearer on what CDOs [collateralised debt obligations] were, but it’s probably later,”<sup>28</sup>

In other words, Cameron, along with the most senior people at RBS, did not understand, or fully understand, the risks inherent in derivative trading.

Against this background, the issue arises as to whether it would sensible for an enforcement authority to have in its armoury the ability to prosecute a director or senior manager for a substantive criminal offence of reckless risk-taking. Such an offence could build upon the principles set out in *R v Sinclair*<sup>29</sup> where the Court of Appeal (Criminal Division) held that that it is fraudulent to prejudice another’s rights by knowingly taking a risk which one has no right to take and that it is no defence to claim that one has an honest belief that benefit, not prejudice, would result.

*We suggest that a new offence along these lines would mean that where a person recklessly bought or sold a financial instrument on a recognised financial exchange in circumstances where he did not know how the financial instrument worked or on what basis its value had been calculated, he should be guilty of a serious criminal offence.*

### A single enforcement authority

As regards the last proposal, the LIBOR scandal has shed considerable light on the co-ordination problems generated by the coexistence of separate authorities with distinct but overlapping responsibilities for the investigation and prosecution of serious criminal conduct affecting the financial markets. In giving evidence before the Treasury Committee on the FSA’s response to the LIBOR scandal, Tracey McDermott, Enforcement Director at the FSA, explained that there was a protocol between the FSA and the SFO, which provides that the former will not take the lead in prosecuting general fraud offences.<sup>30</sup> In respect of LIBOR, Ms McDermott explained that there was some discussion between the FSA and the SFO,

with the SFO keeping a “watching brief”.<sup>31</sup> She explained that the liaison was “constant”, although:

“it wasn’t us [the FSA] saying: ‘Oh, you should believe us that there’s something dreadful going on here’. We were sharing evidence and information with them throughout.”<sup>32</sup>

Having considered this evidence, the Treasury Committee concluded that a formal and comprehensive framework was required in order to plug the:

“legislative gap between the responsibility of the FSA and the SFO to initiate a criminal investigation in a case of serious fraud committed in relation to the financial markets.”<sup>33</sup>

*Against this background, we ask whether the FSA’s responsibilities regarding criminal prosecution should be transferred to the SFO.*

## Section 2

Presentation by Mr DAVID GREEN CB QC

Yesterday was my first anniversary in post at the SFO.

Over the last 12 months, we have made significant changes to our approach to the investigation and prosecution of fraud and corruption offences. It might be useful if I point out some of those changes before I turn to the issues raised in the background paper, in particular the test for corporate criminal liability, a matter close to my heart.

### The changes

*We have restated the role and purpose of the SFO*

We are investigators and prosecutors of the topmost tier of complex fraud, bribery and corruption. We are not a regulator, although our actions may have some deterrent regulatory effect. We are not educators or lecturers. We don’t do deals. We will not shy away from the risks attendant to the prosecution of the kind of case we were set up to deal with.

*We have recalibrated our take-on criteria*

We were set up to investigate, and if appropriate, to prosecute the most difficult and complex cases. The cases that others cannot do, with all necessary disciplines working together under one roof. There are cases which undermine confidence in UK financial and commercial public limited companies in general and the City of London in particular. They might also include new species of fraud, and cases with a very high public interest.

*We have restructured the SFO*

Casework divisions and in-built layers of quality control have been added, and we have a completely new senior management team, including divisional heads, General Counsel, a special advisor, a chief investigator, head of external relations and head of accountancy profession.

*We have reviewed the caseload we inherited and commenced new investigations and pre-investigation projects*

We currently have 66 cases on our books, of which 24 are criminal investigations; 14 are post-charge, either awaiting trial or in trial; 13 are post-trial, awaiting confiscation or appeal; and 15 are under development in our intelligence section. Those 15 pre-investigation projects under development include projects which pre-date the Bribery Act 2010.

*We have agreed a return to what used to be called “blockbuster” funding with the Treasury*

To put this in context: this is closely linked to the type of business model required by an agency which is demand-led. I do not want and could not justify a large standing army of exotic expertise sitting around in Cockspur Street awaiting the call of the case that requires their particular skills. I need a core of highly effective staff, able to manage our “core” caseload, with a surge capacity when such is necessary. We cannot predict the size of the particular surge required until we see the case which demands it.

So, as a result of taking on the LIBOR investigation, we now have “son of blockbuster”. For any case forecast to cost more than a certain percentage of our budget in any year, we have recourse to the reserve. Last year I asked for and received £3.5m from HM Treasury to be ring-fenced for LIBOR, and this year, more. We are considering making similar requests in other investigations.

This has provoked reasonable concern around the principle of HM Treasury having an apparent veto over what cases an independent prosecutor decides to adopt. I would say this: the Director of the SFO alone, by statute,<sup>34</sup> decides which cases the SFO adopts. If I adopt an exceptionally large case, then HM Treasury will consider whether the SFO can fund it from existing resources. I have not encountered any difficulty in that process; it is for me a matter of principle that the SFO will never decline to investigate a case simply on the grounds of cost. As the SFO may not always acknowledge publicly the decision to commence an investigation, the fact of HM Treasury’s decision to provide blockbuster funding may not always be made public at the time the decision is made.

It is also the case that, as the Attorney-General has told Parliament that if I need more money, I can raise the matter with HM Treasury.<sup>35</sup>

*We have enhanced our intelligence capability and will continue to do so*

We need to ensure that we receive the best relevant intelligence available from all our intelligence agencies, at home and abroad.

We also have the ability to investigate crime in action, rather than just historic crime.

A strong intelligence capability also forms a stick which will, over time, encourage corporate self-reporting: some will discover that we know things that they do not know we know.

*We have issued new guidance, chiefly on self-reporting and facilitation payments<sup>36</sup>*

This is now well known. The effect of the new guidance is

to withdraw the stated presumption in favour of civil settlement where a company self-reports. No prosecutor can or should make such a presumption in advance. Instead, we have returned to compliance with the guidance previously published jointly by the Director of Public Prosecutions and the Director of the SFO (on the Bribery Act 2010 and Corporate Prosecutions)<sup>37</sup> and the application of the code test for Crown Prosecutors for any self-report.<sup>38</sup>

Obviously, a genuine self-report of misconduct, with investigation, correction and full disclosure would weigh heavily in the public interest against prosecution. This also achieves compliance with the Organisation for Economic Co-operation and Development's (OECD) recommendations<sup>39</sup> and the sentencing remarks made by Lord Justice Thomas in *R v Innospec Limited*.<sup>40</sup>

On facilitation payments: they are bribes; and many small such payments may amount to a large bribe to maintain business. We have said that we will apply the Crown Prosecution Service (CPS) code test to these as well, thus meeting OECD recommendations.

As a result of these changes, our approach and compass are very different from those applied in the past.

We have also responded to lessons learned and other stimuli, and those responses have also led to changes in the SFO's approach:

- Information provided by third parties or in the course of a self-report will never be accepted at face value, and will be subject to our own inquiries and testing. This may involve the launch of a full criminal investigation, enabling the use of the powers available under section 2 of the Criminal Justice Act 1987.
- The SFO will co-operate with any appropriate agency in order to further an investigation. An obvious example is the LIBOR investigation, where we have close co-operation with the (now) FCA, and have seconded investigators from the FCA and HMRC.
- With the anticipated introduction of DPAs, we will continue to articulate the case for corporate self-reporting. This much is obvious: it enables the company to draw a line under past misconduct; it is the right thing to do by shareholders; it addresses the risks of a whistleblower reporting, or of the SFO finding out in that way or in other ways; it presents a responsible corporate image; and when the public limb of the test is being assessed, the payment of a fine and disgorgement of profits under a DPA will be a significant factor. In co-operation with other departments, we are required to issue guidance on DPAs and will do so.
- Civil recovery is still very much alive and well. We will apply the published guidance as to when we would use it. And when we do use it, for example in last summer's settlement with a subsidiary of Oxford University Press in respect of corrupt payments in Africa, we will be as transparent as we possibly can in explaining why we took that route, why the case was not amenable to prosecution, which remedial measures have been taken, and which sanctions have been imposed.

Turning, if I may, to the background paper, and my compliments to the authors

The paper examines parts of what to the SFO is the LIBOR investigation. As to that investigation, I can say only this: I firmly anticipate significant developments in this investigation over the next quarter. The SFO will produce results on LIBOR, but we will not rush things in the hope of a heroic headline; we have a vast amount (literally millions of computer files) and other data to examine; and we now have 60 people working on the case. The investigation will be progressed systematically and efficiently, but will not end any time soon.

The paper begins with a version of the classic question: why haven't any bankers been sent to prison?

I recall Rudi Giuliani, former Mayor of New York, answering that question in *The Times*. He was quoted as saying:

"I know there's a great clamour to just prosecute people. Something bad happened, people lost money, let's put someone in jail. But the law's more complicated than that. Sometimes things go wrong and people lost money and people have done things wrong, negligently, stupidly. But negligence and stupidity are not criminal. If they were, half the world would be in jail. ... The people pursuing this (the DoJ) are about as aggressive as you can get. They have a tremendous desire to prosecute bigwigs. There's no lack of passion or desire. What there is, is a lack of evidence that will hold up in court. What a prosecutor won't do, unless he's stupid, is just to bring a case to satisfy public opinion and have the case fall apart."<sup>41</sup>

Giuliani is there addressing the issue of *individual* criminal liability, and few would quarrel with what he says.

*But what of corporate criminal liability?*

How and when should we get the company in the dock? I have repeatedly raised the question of whether the bar in relation to corporate criminal liability is set too high in English law. I am delighted that the background paper focuses on that issue. At present of course, the test relies on the identification principle. A corporate is a legal person, so *mens rea* must be established on offences other than those of strict liability. To do that, it must be established that the controlling mind was complicit in the criminality. There are obvious problems with the requirement. Board-level corporate officers might deliberately seal themselves off from the incriminating email chain. Mid-level management might simply be told that a particular course of action is what is required. A decision might be split between several individuals at different levels with different states of knowledge. A solution, of course, would be to expand the offence contained in section 7 of the Bribery Act 2010, that of a commercial organisation failing to prevent bribery by an associated person, to cover a broad range of other criminality committed by an employee or agent in the course of their employment. That other criminality could include Theft Act 1968 and Fraud Act 2006 offences. It could be confined to, say, companies listed on the stock exchange, banks and financial institutions. There would be a statutory adequate procedures defence.

The objections are deeply embedded and predictable:

- It would be a departure from the norm and would be making a corporate criminally liable on the basis of negligence.
- The individual is not subject to that degree of criminal liability, so why should a corporate be so exposed?
- It would create an undue burden on business in a time of recession.

By way of some answers to those objections, in my submission:

- Health and safety legislation and section 7 of the Bribery Act 2010 provide a very sound pedigree for making corporates criminally liable for negligence in their corporate culture in failing to provide an effective preventative regime.
- Corporates have a duty to protect the physical safety of their employees, and the corporate is liable if an employee is injured through the corporate's negligence in failing to provide an effective protective regime.
- If a corporate did not have a preventative regime in place against the commission of specified criminal offences by its agents and employees, why should it escape liability?
- Corporates enjoy the right to make money through the activities of their employees and agents: should they not also have the duty to provide an effective preventative regime? The "controlling mind" test creates a perverse incentive for a board to insulate itself from the criminal activities of its employees.
- The corporate defendant would have the protection of a jury's assessment of the adequacy of its procedures and of the precise circumstances of the offence.
- Such an offence would encourage companies to upgrade their corporate cultures.
- Health and safety legislation has reduced deaths and accidents from previous levels: it has not prevented the construction and civil engineering industry from making money.
- It would address the problem with DPAs highlighted in the background paper. Why should a corporate agree to enter into a DPA when the prosecution would struggle to prove corporate criminal liability?

It comes to this: if the public interest demands that corporates feature in the dock more often, then the current identification test is unrealistically high. The "failure to prevent" offence has

a greater chance of success and there are decent public policy arguments to support it.

## Section 3: summary of discussion

OLA OSOKA and AGATHI TRAKKIDI

Mr Green's speech triggered an animated discussion about the value of corporate criminal convictions. One participant questioned the relative importance of prosecuting corporate entities as opposed to individuals. He suggested that in this respect it is useful to bear in mind the example of the United States where prosecutors have sometimes been reluctant to prosecute corporate entities on the basis that doing so can spook the markets. The difficulty lies in designing a sanction with an effective deterrent effect.

A number of participants expressed the view that regulatory fines are not adequate sanctions. One participant noted that major corporations, such as banks, can easily afford to pay. Another gave the example of RBS which was fined £381m by the FSA for its role in the LIBOR scandal. The fine appeared as a small note in RBS's 543-page annual report.

Not all participants agreed. One wondered whether it is right to focus on corporations when crimes are committed by individuals. Applying this reasoning, someone else asked why corporations should pay fines when their effect is to punish innocent employees and shareholders. Another argued that the restoration of public confidence should be the priority and that this can only be achieved by prosecuting individuals.

A number of participants supported measures designed to shame banks. Someone noted that Barclays lost money in the 1960s due to its association with the apartheid regime. Another argued that what really angers the general public is the lack of shame. He suggested that the criminal law should have an element of "naming and shaming", which could be achieved by requiring banks to place a prominent notice of their conviction in company literature or the media. ■

Jonathan Fisher QC is a barrister at Devereux Chambers and visiting professor at the London School of Economics. Marine Blottiaux, Stéphane Daniel, Helena Oliveira, Ola Osoka and Agathi Trakkidi are postgraduate students, Master of Laws 2012-13, London School of Economics

<sup>1</sup> Corrected Transcript of Oral Evidence taken before the Parliamentary Commission on Banking Standards on Thursday 17 January 2013, Q2626. Available at: [www.publications.parliament.uk/pa/jt201213/jtselect/jtpcbs/c606-xxiv/c606xxiv.pdf](http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpcbs/c606-xxiv/c606xxiv.pdf)

<sup>2</sup> The other two being Gregory Mitchell QC and Professor David Kershaw.

<sup>3</sup> FSA Final Notice to Barclays plc, 27 June 2012. Available at: [www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf](http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf)

<sup>4</sup> In the Matter of Barclays plc, Barclays Bank plc and Barclays Capital Inc before the Commodity Futures Trading Commission, Order Instituting Proceedings Pursuant to Sections 6(C) and 6(D) of the Commodity Exchange Act, as Amended, Making Findings and Imposing Remedial Sanctions, CFTC Docket No 12-25, 27 June 2012.

<sup>5</sup> US Department of Justice (Criminal Division), Agreement in Re Barclays Bank plc, Washington DC 20530, 26 June 2012. Available at: [www.justice.gov/iso/opa/resources/337201271017335469822.pdf](http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf)

<sup>6</sup> FSA Final Notice to UBS AG, 19 December 2012. Available at: [www.fsa.gov.uk/static/pubs/final/ubs.pdf](http://www.fsa.gov.uk/static/pubs/final/ubs.pdf)

<sup>7</sup> FSA Final Notice to UBS, 19 December 2012, para 25.

<sup>8</sup> US Department of Justice (Criminal Division), Agreement in Re UBS AG, Washington DC 20530, 18 December 2012. Available at: [www.justice.gov/iso/opa/resources/1392012121911745845757.pdf](http://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf)

<sup>9</sup> In the Matter of UBS AG and UBS Securities Japan Co Ltd before the Commodity Futures Trading Commission, Order Instituting Proceedings Pursuant to Sections 6(C) and 6(D) of

- the Commodity Exchange Act Making Findings and Imposing Remedial Sanctions, CFTC Docket No 13-09, 19 December 2012.
- <sup>10</sup> FINMA Press Release, “LIBOR: FINMA Concludes Proceedings against UBS and Orders Disgorgement of Profits”, 19 December 2012. Available at : [www.finma.ch/e/aktuell/Pages/mm-ubs-libor-20121219.aspx](http://www.finma.ch/e/aktuell/Pages/mm-ubs-libor-20121219.aspx)
  - <sup>11</sup> FSA Final Notice to RBS plc, 6 February 2013. Available at: [www.fsa.gov.uk/static/pubs/final/rbs.pdf](http://www.fsa.gov.uk/static/pubs/final/rbs.pdf)
  - <sup>12</sup> In the Matter of UBS AG and UBS Securities Japan Co Ltd, *supra* n 9.
  - <sup>13</sup> US District Court District of Connecticut, *US v RBS plc*, Deferred Prosecution Agreement. Available at: [www.justice.gov/criminal/vns/docs/2013/02/2013-02-rbs-dpa.pdf](http://www.justice.gov/criminal/vns/docs/2013/02/2013-02-rbs-dpa.pdf); US Department of Justice (Criminal Division), Agreement in Re UBS AG, *supra* n 8.
  - <sup>14</sup> FSA Final Notice to UBS AG, 25 November 2012. Available at: [www.fsa.gov.uk/static/pubs/final/ubs-ag.pdf](http://www.fsa.gov.uk/static/pubs/final/ubs-ag.pdf)
  - <sup>15</sup> FSA Final Notice to UBS AG, 5 August 2009. Available at: [www.fsa.gov.uk/pubs/final/ubs\\_ag.pdf](http://www.fsa.gov.uk/pubs/final/ubs_ag.pdf)
  - <sup>16</sup> FSA Final Notice to Cattles plc, 28 March 2012. Available at: [www.fsa.gov.uk/static/pubs/final/cattles-ltd.pdf](http://www.fsa.gov.uk/static/pubs/final/cattles-ltd.pdf)
  - <sup>17</sup> See *Salomon v Salomon* [1987] AC 22.
  - <sup>18</sup> *Tesco Supermarkets v Nattrass* [1972] AC 153, para 169.
  - <sup>19</sup> See Treasury Report, “Fixing LIBOR: Some Preliminary Findings”. Available at: [www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news/fsas-response-to-its-libor-report/](http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news/fsas-response-to-its-libor-report/)
  - <sup>20</sup> *R v Rollins* [2009] EWCA Crim 1941.
  - <sup>21</sup> FSA Annual Report 2011/12, 73. Available at: [www.fsa.gov.uk/pubs/annual/ar11-12/ar11-12.pdf](http://www.fsa.gov.uk/pubs/annual/ar11-12/ar11-12.pdf)
  - <sup>22</sup> *Ibid*, 85, table 7.3.
  - <sup>23</sup> C Binham and E Hammond, “Judge Calls for More Funding for the SFO”, *Financial Times*, 24 May 2012. Available at: [www.ft.com/cms/s/0/0512178e-a597-11e1-a77b-00144feabdc0.html#axzz2NLz2PnxE](http://www.ft.com/cms/s/0/0512178e-a597-11e1-a77b-00144feabdc0.html#axzz2NLz2PnxE)
  - <sup>24</sup> C Binham, “SFO Strikes Funding Deal with Treasury”, *Financial Times*, 18 January 2013. Available at: [www.ft.com/cms/s/0/4cdede9e-6194-11e2-9545-00144feab49a.html#axzz2Qo8s9ZGq](http://www.ft.com/cms/s/0/4cdede9e-6194-11e2-9545-00144feab49a.html#axzz2Qo8s9ZGq)
  - <sup>25</sup> Recommendation No R (88) 18 of the Committee of Ministers to Member States concerning liability of enterprises having legal personality for offences committed in the exercise of their activities, adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers’ Deputies, <https://wcd.coe.int/com.intranet.IntraServlet?command=com.intranet.CmdBlobGet&IntranetImage=233230&SecMode=1&DocId=698704&Usage=2> (accessed 15 April 2013).
  - <sup>26</sup> Law Commission Report No 195, “Criminal Liability in Regulatory Contexts” (August 2010), para 5.99.
  - <sup>27</sup> See in this way “US Principles of Federal Prosecution of Business Organisations”, para 9–28.200 A. Available at: [www.justice.gov/dag/cftf/corporate\\_guidelines.htm](http://www.justice.gov/dag/cftf/corporate_guidelines.htm)
  - <sup>28</sup> FSA Report, “The Failure of the RBS” (December 2011), 387.
  - <sup>29</sup> *R v Sinclair* [1968] 1 WLR 1246.
  - <sup>30</sup> Treasury Report, *supra* n 19, para 203.
  - <sup>31</sup> *Ibid*, para 204.
  - <sup>32</sup> *Ibid*, para 204.
  - <sup>33</sup> *Ibid*, para 207.
  - <sup>34</sup> S 2 of the Criminal Justice Act 1987.
  - <sup>35</sup> Hansard, Written Answers, 12 February 2013, col 696W. Available at: [www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130212/text/130212w0004.htm#13021285000102](http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130212/text/130212w0004.htm#13021285000102)
  - <sup>36</sup> See SFO website, “Corporate Self-Reporting”. Available at [www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx](http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx)
  - <sup>37</sup> “Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.” Available at: [www.sfo.gov.uk/media/167348/bribery\\_act\\_2010\\_joint\\_prosecution\\_guidance\\_of\\_the\\_director\\_of\\_the\\_serious\\_fraud\\_office\\_and\\_the\\_director\\_of\\_public\\_prosecutions.pdf](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf)
  - <sup>38</sup> CPS Code for Crown Prosecutors, January 2013. Available at: [www.cps.gov.uk/publications/docs/code2013english\\_v2.pdf](http://www.cps.gov.uk/publications/docs/code2013english_v2.pdf)
  - <sup>39</sup> OECD, “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents” (2011). Available at: [www.oecd.org/daf/anti-bribery/anti-briberyconvention/38028044.pdf](http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/38028044.pdf)
  - <sup>40</sup> *R v Innospec Limited* [2010] EW Misc 7 (EWCC) Available at: [www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf)
  - <sup>41</sup> A Spence, “Rudy Giuliani Sticks Up for Beleaguered Prosecutors”, *The Times*, 1 February 2013. Available at: [www.thetimes.co.uk/tto/business/industries/supportservices/article3674753.ece](http://www.thetimes.co.uk/tto/business/industries/supportservices/article3674753.ece)