‘The regulation of Market Abuse – is it time for an alternative approach?’

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Abstract

This chapter explores the regulatory framework governing market abuse, particularly focusing on market manipulation, and advocates that an alternative approach is necessary. The introduction provides an overview of the LIBOR and FX benchmark manipulation scandals, highlighting the context and importance of robust regulatory measures. The chapter examines the existing United Kingdom (UK) and European Union (EU) legal frameworks, detailing the roles of the Financial Conduct Authority (FCA) and the European Commission in civil proceedings related to market abuse. The discussion then shifts to corporate liability for economic crime, scrutinising the appropriateness of the failure to prevent offence. It delves into the concept of corporate legal personality and the corporate veil, tracing the evolution of the failure to prevent doctrine and its impact on corporate culture through the adoption of ‘reasonable procedures’. The paper also evaluates the effectiveness of Deferred Prosecution Agreements (DPAs) in cases of market manipulation and insider dealing, providing illustrative examples.

Finally, the paper assesses the role of financial penalties in deterring market abuse and whether they effectively minimise the potential for re-offending. The conclusion synthesises the findings and offers recommendations for improving the current regulatory approach, contemplating whether a failure to prevent offence market abuse

is appropriate and whether it could enhance the prevention and prosecution of market abuse more effectively. This comprehensive analysis aims to contribute to the ongoing debate on the optimal regulation of market abuse, ensuring financial markets operate with greater integrity and transparency.

In a rapidly evolving financial landscape, the persistent challenge of market abuse raises a pressing question: is the current regulatory framework fit for purpose, or has the time come for an alternative approach? This chapter aims to contribute a novel perspective around the effectiveness of the regulatory framework surrounding market abuse and insider dealing, taking into consideration the approaches taken by the United Kingdom (UK) and the European Union (EU). To achieve that, the chapter employs a comparative study with the goal to establish the similarities and differences among the two approaches and therefore provide recommendations for a more successful framework to minimise reoffending and improve the current corporate culture.

Throughout this chapter, the current regulatory framework, past cases and the approaches towards the reform of corporate culture will be discussed. Firstly, the definitions of market manipulation and insider dealing will be looked along the relevant legal frameworks of the UK and the EU. Secondly, following the close examination of the UK and EU legal frameworks surrounding market manipulation and insider dealing, relevant civil proceedings made by the Financial Conduct Authority (FCA) and the European Commission (the Commission) will be critically analysed to evaluate any common ground between the approaches taken. Understanding any common ground is crucial to refer to the effectiveness of the UK's corporate criminal liability framework. The third part will focus on the corporate criminal liability framework, common law and failure to prevent offences successes and failures, whilst the functionality in preventing economic crime of deferred prosecution agreements and financial penalties will be considered. This will be assessed using the framework utilised for the resolution of financial scandals, the London Inter Bank Offered Rate (LIBOR) scandal and Foreign

Exchange (FX) benchmark manipulation scandals. These examples posed challenges, and the reason of their critical analysis is to provide recommendations for improvement in corporate criminal liability relating to market abuse.

The Doctrine of Corporate Criminal Liability and market abuse scandals

The market abuse case studies will be used aim to contribute to the understanding of the role of financial institutions in market abuse, and the role of corporate criminal liability in their resolution and future prevention. The UK's corporate criminal liability framework has been heavily criticised by academics with the main reason being the application of common law rules. In the case of *Tesco v Nattrass*, the identification doctrine was created, when Lord Diplock stated that to find the directing mind of the company, the memorandum and articles of association should be checked, which should indicate the directors and senior officers of the company.[1] This provided a restrictive interpretation of the test and created great challenges for larger companies which were highlighted in the cases of Herald of Free Enterprise[2] and difficulties in the prosecution of financial institutions such as HSBC who were able pay for a settlement of $19 billion for a money laundering case in 2012, yet criminal liability was avoided due to the difficulty in applying the identification doctrine.[3] With the known avoidance of prosecution of large companies due to the interpretation of the identification doctrine, it is essential to understand how market abuse cases are affected by it.

[1] [1972] A.C. 153, at 198.
[2] *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72 (Central Crim Ct).
[3] Learnsignal, 'The HSBC Money Laundering Scandal: A Comprehensive Overview' (2023) <https://www.learnsignal.com/blog/hsbc-money-laundering/#:~:text=However%2C%20the%20investigations%20into%20HSBC's,reforms%20to%20prevent%20financial%20crimes> accessed 27th September 2024.

The global financial crisis 2008 was caused by various forms of market abuse with the leading issue being the subprime mortgage fraud and misrepresentation.[4] This involved financial institutions giving loans to borrowers with inadequate credit history and proceeded to turn these mortgages into complex financial products, such as mortgage-backed securities (MBS) and collateralised debt obligations (CDOs) in the United States of America (US).[5] These financial products are risky and before the financial crisis, there was no set regulation around the issuance of loans until the Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law in 2010.[6] The aim of this Act was 'to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other practices'.[7] In the UK, payday loans were the equivalent of MBS and CDOs offered to people who should not have been offered a loan based on their affordability. Payday loans in the UK were controlled through the introduction of a price cap by the FCA, with a cap of 0.8% interest per day, fixed default fees at £15 and the total cost of cap being at 100%, which means that the borrowers must never pay back more than the whole amount borrowed in fees and interest.[8] The FCA price cap was kept after a three year review made from the FCA,

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[4] J. V. Duca, 'Subprime Mortgage Crisis' (Federal Reserve History, 22 November 2013) <https://www.federalreservehistory.org/essays/subprime-mortgage-crisis> accessed 28th September 2024; D. Listokin and E. K. Wyly, 'Making new mortgage markets: Cast studies of institutions, home buyers and communities' (2010) 11(3) Housing Policy Debate 575-664.

[5] National Bureau of Economic Research, 'Mortgage-Backed Securities and the Financial Crisis of 2008: A Post Mortem' <https://www.nber.org/system/files/working_papers/w24509/w24509.pdf> accessed 28th September 2024.

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, Pub L No 111-203, 124 Stat 1376.

[7] Authenticated U.S. Government Information, 'Dodd-Frank Wall Street Reform and Consumer Protection Act' (2010) <https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf> accessed 5th October 2024.

[8] Financial Conduct Authority, 'FCA confirms price cap rules for payday lenders' (2014) <https://www.fca.org.uk/news/press-releases/fca-confirms-price-cap-rules-payday-lenders> accessed 5th October 2024.

where it was seen that the reforms 'lead to cheaper loans, better affordability assessments, and fewer customers experiencing debt problems with payday loans'.[9] Whilst payday loans do not meet the definition of market abuse, they represent a form of consumer exploitation which were seen as abusive towards financially vulnerable individuals. The use of payday loans was limited using consumer protection laws and oversight of the conduct of lenders by the Financial Conduct Authority with the introduction of loan caps.

In the LIBOR scandal, with LIBOR being 'a benchmark interest rate based on the rates that banks lend unsecured funds to each other on the London interbank market' and it is published daily, large banks were found to have manipulated interest rates between 2003 and 2012.[10] LIBOR has a significant power over the global economy since it is used to 'provide private-sector economists and central bankers with insights into market expectations' with these including the prediction of economic performance and how interest rates will develop.[11] The FCA imposed fines on firms that attempted to manipulate LIBOR, gold and foreign exchange (FX) benchmarks.[12] For example, Barclays was fined £284m for their FX failings and £60m for their LIBOR failings.[13] Even though the FCA has the power to bring criminal prosecutions for conduct around setting up benchmarks through the Financial Services Act 2012.[14] However, the FCA

[9] Financial Conduct Authority, 'High-cost short-term credit' (2019) <https://www.fca.org.uk/firms/high-cost-credit-consumer-credit/high-cost-short-term-credit#:~:text=The%20impact%20of%20our%20changes&text=Our%20reforms%20have%20led%20to,the%20second%20half%20of%202020> accessed 5th October 2024.
[10] Council on Foreign Relations, 'Understanding the Libor Scandal' (2016) <https://www.cfr.org/backgrounder/understanding-libor-scandal#chapter-title-0-2> accessed 5th October 2024.
[1111] ICE Benchmark Administration, 'LIBOR: Frequently Asked Questions' (2017) <https://www.ice.com/publicdocs/IBA_LIBOR_FAQ.pdf> accessed 5th October 2024.
[12] Financial Conduct Authority, 'Benchmark Enforcement' (2016) <https://www.fca.org.uk/markets/benchmarks/enforcement> accessed 5th October 2024.
[13] Ibid.
[14] Financial Services Act 2012, s.91.

decided to impose financial penalties rather than commence criminal proceedings. This emphasises the issue of reoffending due to 'affordable' fines for large financial institutions, and this includes the financial crime of market abuse. In the case of Barclays, since their fine relating to the LIBOR scandal, they have been fined another three times regarding forex failings, the case of Qatar raising capital for Barclays and regarding Premier FX, which is a payments firm that Barclays worked with without performing adequate due diligence.[15] These fines reflected the ongoing scrutiny over Barclays' practices in different financial areas and their patterns regarding reoffending with their recurring failures in oversight and risk-taking culture.

Comparative Analysis on Approaches taken by the UK and the EU

The Serious Fraud Office (SFO) responded to these scandals and successfully prosecuted Tom Hayes, who was fined for £878,806 and was sentenced to 11 years of imprisonment, for the manipulation of the Japanese Yen LIBOR.[16] However, appeal has been granted by the Supreme Court for Carlo Palombo and Tom Hayes with another hearing planned in March 2025.[17] The Supreme Court is now expected to either consign or uphold the 'one true rate' theory which will be an important decision

[15] Financial Conduct Authority, 'FCA fines Barclays £284,432,000 for forex failings' (2015) <https://www.fca.org.uk/news/press-releases/fca-fines-barclays-£284432000-forex-failings> accessed 9th October 2024; Financial Conduct Authority, 'FCA published Decision Notes for Barclays plc and Barclays Bank plc (together "Barclays")' (2022) <https://www.fca.org.uk/news/press-releases/fca-publishes-decision-notices-barclays-plc-and-barclays-bank-plc> accessed 9th October 2024; Financial Conduct Authority, 'Barclays fined £783,800 and agree to make a voluntary payment to Premier FX customers' (2022) <https://www.fca.org.uk/news/press-releases/barclays-fined-agrees-voluntary-payment-premierfx-customers> accessed 9th October 2024.

[16] Serious Fraud Office, 'LIBOR Yen (Hayes)' (2021) <https://www.sfo.gov.uk/cases/libor-hayes/> accessed 9th October 2024.

[17] Hickman and Rose, 'Carlo Palombo and Tom Hayes granted permission to appeal to Supreme Court' (2024) <https://www.hickmanandrose.co.uk/carlo-palombo-and-tom-hayes-granted-permission-to-appeal-to-supreme-court/> accessed 8th December 20024; Clyde&Co, 'Libor/Euribor – Endgame' (2024) <https://www.clydeco.com/en/insights/2024/12/libor-euribor-endgame> accessed 8th December 2024.

regarding ‘natural justice and fairness in the UK’.[18] The regulatory reform aspect in the UK was fuelled from the LIBOR being phased out, and its full discontinuation in 2023 with Sterling Overnight Index Average (SONIA) taking over.[19] The end of LIBOR has been completed in October 2024, with its objective being met and SONIA being the new equivalent risk free rate for Great British Pounds (GBP).[20] The results from the transition remain unknown and the impact of the change will be understood from any relevant publications from the FCA and the Bank of England. Overall, the UK emphasised on domestic reform and enforcement for the way forward towards the improvement of the market manipulation framework.

In the EU, the LIBOR and FX scandal were focused on fining financial institutions for their anti-competitive behaviour and strengthening existing regulation such as the Market Abuse Regulation (MAR) and Market Abuse Directive II (MAD II).[21] For example, the MAR extended its regulatory reach to cover areas such as instruments traded on ‘multilateral trading facilities’ and ‘organised trading facilities’.[22] As a result, the LIBOR and FX scandals, since they involved the manipulation of benchmarks, would fall within the scope of MAR.[23] Furthermore, the European Central Bank (ECB) have worked towards stricter standards regarding the FX market. Consequently, the

[18] Ibid.
[19] Bank of England, ‘Transition from LIBOR to risk-free rates’ (2024) <https://www.bankofengland.co.uk/markets/transition-to-sterling-risk-free-rates-from-libor> accessed 9th October 2024.
[20] Bank of England, ‘The end of LIBOR’ (2024) <https://www.bankofengland.co.uk/news/2024/october/the-end-of-libor> accessed 9th October 2024.
[21] F. U. Chee and K. Ridley, ‘EU fines Barclays, Citi, JP Morgan, MUFG and RBS $1.2 billion for FX rigging’ *Reuters* (16 May 2019) <https://www.reuters.com/article/business/eu-fines-barclays-citi-jp-morgan-mufg-and-rbs-12-billion-for-fx-rigging-idUSKCN1SM0XJ/> accessed 9th October 2024
[22] Osborne Clarke, ‘MAD II and the Market Abuse Regulation: What you need to know about the upcoming changes to the UK’s market abuse regime’ (2015) <https://www.osborneclarke.com/insights/mad-ii-and-the-market-abuse-regulation-what-you-need-to-know-about-the-upcoming-changes-to-the-uks-market-abuse-regime> accessed 9th October 2024.
[23] Ibid.

FX Global Code (FXGC) was created which provides 'a set of principles of good practice for foreign exchange market participants'.[24] The Code includes 6 key areas; ethics, governance, execution, information sharing, confirmation and settlement and risk management and compliance.[25] These key areas aim to ensure that market participants are guided towards 'ethical, responsible and transparent practices in the FX market'.[26] The EU took a wider approach by emphasising on competition law and introducing EU-wide regulation to govern the financial markets.

Both the UK and the EU have made significant changes in their regulatory frameworks, with changes made in the EU impliedly applying to the UK as changes as well. The important aspect of the changes is the understanding the significance of the FX and LIBOR scandals, as a greater issue within market abuse practices. The EU's competition law enforcement did not affect the banks' competitiveness by handing out larger fines.[27] This highlights a potential lesson for the UK; such as imposing larger fines to deter reoffending and foster a shift in commercial culture. Affordable fines are sometimes seen as merely an acceptable cost of doing business by financial institutions.[28] Therefore, larger fines could minimise the issue of reoffending and present financial institutions in the UK and in other jurisdictions to consider the damage to be made to them due to an unaffordable fine. A prominent example of market abuse

[24] European Central Bank, 'Changes to the FX Global Code' (2022) <https://www.ecb.europa.eu/paym/groups/pdf/omg/2023/231130/item_5_FX_Global_Code.pdf> accessed 9th October 2024.
[25] Euro Finance, 'Understanding the FX Global Code of Conduct: A comprehensive guide' (2022) <https://www.eurofinance.com/news/understanding-the-fx-global-code-of-conduct-a-comprehensive-guide/> accessed 17th October 2024.
[26] Ibid.
[27] D. Johnson, 'Can competition law aid the United Kingdom in its fight against financial crime?' (2023) 2 JEC 100025.
[28] C. Bath and K. Edgar, 'Time is Money: The Role of the Financial Services Industry in Reducing Re-Offending' (*Think Piece*, 5 April 2011) <https://www.cii.co.uk/media/1546369/TP54_Bath-Edgar_Reforming_Offenders_28Apr2011.pdf> accessed 7th November 2024.

reoffender is Barclay's plc, which got the highest financial penalties in 2015 from the FCA, at £284,432,000 for the bank's failure to 'adequately control its FX business is particularly serious in light of its potential impact on the systemically important spot FX market.[29] Barclay's plc, seven years later, received another fine from the FCA regarding market abuse, this time as a final notice on the FCA's Principles for Businesses (PRIN) 'related to financial crime in the corporate banking sector' for £783,800.[30] The second fine is that it is related to Barclays' failure to disclose certain arrangements that were agreed with Qatari entities which formed part of the banks' capital raisings that were announced on 25 June 2008 and 31 October 2008.[31] These disclosures were deemed to be important given the timing of the financial crisis in October 2008, and there was 'no legitimate reason or excuse for failing to disclose these matters'.[32] The case of Barclay's confirms that larger fines delay the occurrence of reoffending, however, it also shows the impact that the 2008 financial crisis is making almost 15 years later, as well as the failure in maintaining robust systems for oversight.

Corporate liability for economic crime – is the current approach appropriate?

The corporate criminal liability framework in the UKhas evolved encompassing various doctrines and legislative frameworks designed to address and mitigate misconduct by

[29] Financial Conduct Authority, 'FCA fines Barclays £284,432,00 for forex failings' (2015) <https://www.fca.org.uk/news/press-releases/fca-fines-barclays-£284432000-forex-failings> accessed 8th November 2024.
[30] Financial Conduct Authority, 'FCA published Decision Notives for Barclays plc and Barclays Bank plc (togather "Barclays")' (2022) <https://www.fca.org.uk/news/press-releases/fca-publishes-decision-notices-barclays-plc-and-barclays-bank-plc> accessed 8th November 2024.
[31] Ibid.
[32] K. Makortoff, 'Barclays could be fined £50m for failing to disclose 2008 Qatari deal' BBC News (21 October 2022) <https://www.theguardian.com/business/2022/oct/21/barclays-could-be-fined-50m-for-failing-to-disclose-2008-qatari-deal> accessed 8th November 2024.

corporate entities. This section discusses the key components of this framework: the common law foundations of corporate criminal liability, the development of the failure to prevent doctrine, the role of Deferred Prosecution Agreements (DPAs) which were introduced through the Crime and Courts Act 2013, and the effectiveness of financial penalties.[33] Whilst these aspects of the corporate criminal liability framework will be analysed in this section, their appropriateness towards the minimisation of corporate crime will be discussed, and recommendations will be provided when appropriate.

Corporate criminal liability in the UK is governed by common law, which underpins a legal notion that a company is a separate 'legal' person. The principle of companies having a separate legal personality comes from the case of *Salomon v A Salomon & Co Ltd* where it was said 'the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are', thus creating the legal fiction of 'corporate veil'.[34] The courts in the UK have only agreed to 'pierce' the corporate veil in specific occasions, with the main criterion being that the company is 'merely a façade'.[35] The corporate veil was pierced is *Prest v Petrodel Resources Ltd*, which resulted in the created of the 'Prest test'.[36] The circumstances that the corporate veil was pierced in *Prest* created precedene to other cases under two conditions. Firstly, where the beneficial owner is under a legal liability or obligation and/or is subject to an existing restriction and secondly, if the beneficiary has deliberately evaded the obligation, liability or restriction, or deliberately frustrated

[33] Crime and Courts Act 2013, Sch 17.
[34] [1897] AC 22 [30-31].
[35] Ibid.
[36] [2013] UKSC 34.

enforcement by using a limited company under their control.[37] The Prest test has been used in the case of *Borough Council*, where the veil was not pierced to reveal the true owners of SPV companies going into liquidation.[38] On appealed, 'serious doubt upon the viability of schemes currently seeking to take advantage of the exemption from business rates by leasing a property to an SPV and then either winding-up the SPV or allowing it to be struck-off'.[39] The appeal clarified the position of the law and it does not make SPV companies to be used in a malicious way in an obvious way.

Responsibility for corporate misconduct is governed through the identification principle which was firstly brought up in the case of *Tesco Supermarkets Ltd v Nattrass*.[40] In the case of *Tesco*, the fact that an employee being the manager of a single store could not be held criminally liable for a corporate body operating a nationwide supermarket chain was closely examined.[41] For a company to be found guilty of a criminal offence, criminal intend must also be identified from the same person who has the directing mind of a company as well as the self-determination of the company. For this reason, a single manager could not be held liable for having criminal intentions over such a large corporation as Tesco.[42] The common law attribution of criminal responsibility to non-natural persons, following *SFO v Barclays*, was narrowed to a point that it is near impossible to achieve, especially where the criminal activity in question is fraud.[43] Here, it was alleged that, following the 2007 global financial crisis, Barclays raised over £11bn in capital investment from a Qatari state-owned body. The SFO purported that the terms offered by Barclays to the Qatari investor were different from the terms that were

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[37] D. Baker, 'The Corporate Veil: An Overview and Update from Recent Cases' (*Moore Barlow Lawyers*, 8 March 2020) <https://www.moorebarlow.com/blog/the-corporate-veil-an-overview-and-update-from-recent-cases/> accessed 11th November 2024.
[38] *Rossendale Borough Council v Hurstwood Properties Ltd* [2019] EWCA Cov 364.
[39] D. Tench and others, 'Case Comment: Hurstwood Properties (A) Ltd v Rossendale Borough Council and another [2021] UKSC 16' (*UK Supreme Court Blog*, 26 May 2021) <https://ukscblog.com/case-comment-hurstwood-properties-a-ltd-and-others-v-rossendale-borough-council-and-another-2021-uksc-16/#:~:text=This%20long%2Dawaited%20decision%20casts,it%20to%20be%20struck%2Doff> accessed 11th November 2024.
[40] [1972] AC 153.
[41] Ibid.
[42] C. Wells, 'Corporate Criminal Liability: A Ten-Year Review' (2014) 12 Criminal Law Review 849-878.
[43] [2018] EWHC 3055 (QB).

contained in the public prospectus. The SFO charged Barclays and four senior executives at Barclays with conspiracy to commit fraud[44] and unlawful financial assistance.[45] Davis LJ stated:

> [T]hat the individuals had some degree of autonomy is not enough. It had to be shown, if criminal culpability was capable of being attributed to Barclays, that they had entire autonomy to do the deal in question.[46]

The court rejected the argument presented by the SFO that the senior executives were the directing mind and will of the company, although they occupied senior roles, including that of Executive Chairman of Investment Banking and Investment Management in the Middle East and North Africa, Chief Executive of Barclays Wealth and investment Management and European Head of Financial Institutions Group.[47] The court concluded that they did not have the authority of the company to conclude relevant agreements.[48] Thus, the ruling set a very high threshold for prosecutors to meet, whilst allowing companies to essentially evade corporate criminal liability by simply evidencing that the 'Board' retains ultimate control.[49] The decision in *SFO v Barclays* has been described as a "watershed moment" for the attribution of corporate criminal liability [50] and that it "appears to be an impossibly high bar to achieve anything".[51] The case of *SFO v Barclays* highlighted the limitations created by the case of *Tesco* in attributing liability.

With larger corporations proving to create bigger difficulties towards prosecution, smaller corporations are left at a more vulnerable place since 'the smaller the corporation, the more likely it will be that guilty knowledge can be attributed to the

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[44] Fraud Act (2006), s.2.
[45] Companies Act (1985), s.151.
[46] *Ibid*., [122]
[47] Serious Fraud Office, 'Barclays PLC and Qatar Holding LLC' (SFO, 17 May 2021), <https://www.sfo.gov.uk/cases/barclays-qatar-holding/> accessed 3 February 2024.
[48] See above, n 43.
[49] Spector H, 'SFO v Barclays: Elusive corporate criminal liability in the UK' (*Red Lion Chambers,* 3 December 2020) < https://redlionchambers.co.uk/sfo-v-barclays-elusive-corporate-criminal-liability-in-the-uk/> accessed 3 February 2024.
[50] Rappo, P. 'Corporate Criminal Liability: the death knell' (2021) The Company Lawyer, 42(2), 51-53, at 53
[51] Spector, H. 'SFO v Barclays: elusive corporate liability in the UK' (2020) Arch Rev, 10, 6-10, at 7.

controlling officer and therefore to the company itself'.[52] This test has created a limitation on prosecutors in bringing criminal prosecutions to larger companies, with one of the previous directors of the SFO noting that the identification doctrine is a 'standard from the 1800s, when Mom and Pop ran companies. That's not at all reflective of today's world'.[53] The identification doctrine has been scrutinised by academics and there have been recent changes to the way it is applied, enforced through UK legislation.[54] As a result of scrutiny, there have been some amendments made to legislation addressing the issues posed by the identification doctrine.

The Economic Crime and Corporate Transparency Act 2023 has introduced amendments to the identification doctrine for economic crimes carried out by certain bodies.[55] Here, 'senior manager' is defined as the person who acts 'within the actual or apparent scope of their authority commits a relevant offence after this section comes into force, the organisation is also guilty of the offence'.[56] The definition of senior manager has been drawn from the Corporate Manslaughter and Corporate Homicide Act 2007, with the change of the offence being related to the corporate body, therefore, making the assignment of responsibility given their roles within the company clearer.[57] Alongside the identification doctrine, there is a series of 'failure to prevent' offences,

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[52] Crown Prosecution Service, 'Corporate Prosecutions' (2021) <https://www.cps.gov.uk/legal-guidance/corporate-prosecutions> accessed 17th November 2024.
[53] N. Barnard, 'Redefining responsibility: the evolution of corporate criminal liability in the UK' (*Corker Binning*, 21 November 2023) <https://corkerbinning.com/redefining-responsibility-the-evolution-of-corporate-criminal-liability-in-the-uk/#:~:text=In%20fraud%20cases%20I've,all%20reflective%20of%20today's%20world.> accessed 18th November 2024.
[54] S. Bourton and others, 'Corporate Criminal Liability and the Identification Doctrine – A Critical Reflection' (2023) <https://uwe-repository.worktribe.com/OutputFile/10607029> accessed 17th November 2024; N. Ryder and others, 'Eat, sleep and repeat?' Corporate Criminal Liability and Extension of the Failure to Prevent Model' (2024) Journal of Business Law <https://orca.cardiff.ac.uk/id/eprint/166462/> accessed 17th November 2024.
[55] Economic Crime and Corporate Transparency Act 2023, s.196-198.
[56] Ibid, s.196.
[57] Corporate Manslaughter and Corporate Homicide Act 2007.

which aim to contribute towards an improved corporate culture and mostly concern senior managers for ensuring compliance with the regulation surrounding the offences. Initially, failure to prevent offences were introduced in the UK via the Bribery Act 2010, with the offence being failure to prevent bribery.[58] The only successful defence for failure to prevent offences is having 'adequate procedures' as per the Act that the offence has been originally enforced in.[59] Since the original failure to prevent bribery offence, there have been additional offences aiming to tackle economic crime including the failure to prevent the facilitation of tax evasion and failure to prevent fraud. The additional two offences were introduced in the Criminal Finances Act 2007 and the Economic Crime and Corporate Transparency Act 2023.[60] These offences have been introduced with the aim of strengthening the UK's corporate criminal liability framework. The offences' effectiveness will be further discussed and analysed to provide recommendations for the improvement of the framework and the possible creation of similar offences regarding market abuse and market manipulation.

The failure to prevent bribery offence has been criticised for the low number of prosecutions and fines imposed using the offence regarding bribery.[61] DPAs have been used in the UK as an alternative to prosecution for corporations that have been found liable to offences relating to economic crime. Until May 2024, there have only been a total of 13 DPAs imposed, with 12 being issued by the SFO and 1 of them

[58] Bribery Act 2010, s.7.
[59] Bribery Act 2010, s.7(2).
[60] Criminal Finances Act 2007, s.45-46; Economic Crime and Corporate Transparency Act 2023, s.199-210.
[61] V. Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10-Year Review' (2018) J.C.L., Vol. 82, Issue 1, p.1; 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), The Journal of Criminal Law, Vol.82(3) [258].

being issued by the Crown Prosecution Service (CPS).[62] There have been a total of 4 DPAs for failure to prevent bribery since the offence got introduced in 2010. The low number of DPAs since they have been implemented creates concerns for the success of the framework and the way that it aims to treat wrong regarding economic crime.[63] Besides these concerns and the questions over the success of failure to prevent offences, a new failure to prevent fraud offence has been introduced in March 2024, with guidance on its implementation published in November 2024.[64] It is still early to make an observation on how effective the failure to prevent fraud offence is, however, given the other two offences, it can be seen that the likelihood of the UK government imposing a DPA on companies committing the offence is low.

DPAs are not the only mechanism that the UK Government relies on when it comes to corporate criminal liability whilst financial penalties imposed by the FCA are also used. Financial penalties are imposed 'to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches, and demonstrating generally the benefits of compliant behaviour'.[65] Additionally, the FCA would consider the full criteria for each case before determining to act with a financial

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[62] Macfarlanes, 'Individual DPAs – a comment in passing or a new tool for HMRC?' (2024) <https://www.macfarlanes.com/what-we-think/102eli5/individual-dpas-a-comment-in-passing-or-a-new-tool-for-hmrc-102j7v5/> accessed 20th November 2024.

[63] Serious Fraud Office, 'Corporate Criminal Liability, AI and DPAs' (2018) <https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/> accessed 21st November 2024; Q. Bu, 'The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The Impact on Global-Anti Bribery Compliance' (2021) 22 European Business Organisation Law Review 173-201.

[64] UK Government, 'Economic Crime and Corporate Transparency Act 2023: Guidance to organisations on the offence of failure to prevent fraud' (2024) <https://www.gov.uk/government/publications/offence-of-failure-to-prevent-fraud-introduced-by-eccta/economic-crime-and-corporate-transparency-act-2023-guidance-to-organisations-on-the-offence-of-failure-to-prevent-fraud-accessible-version> accessed 21st November 2024.

[65] Financial Conduct Authority, 'The Decision Procedure and Penalties manual: Chapter 6: Penalties' (2024) <https://www.handbook.fca.org.uk/handbook/DEPP/6.pdf> accessed 21st November 2024.

penalty or a public censure as per Chapter 6 of the FCA Handbook.[66] Relevant factors include the 'nature, seriousness and impact of the suspected breach', the person's conduct after the breach, compliance history and disciplinary records, FCA guidance and previous action taken by the FCA and Financial Services Authority (FSA).[67] These criteria could be used for the offences of market abuse and market manipulation as well, since they are not limiting for a specific economic crime. Financial penalties have been discussed above regarding market abuse offences, and the way that financial penalties are used need to be revisited to avoid reoffending as already discussed.

Regarding market manipulation, the legislation is clear regarding a potential 'unlimited fine' and/or imprisonment up to 10 years, along with other sanctions as per the UK Market Abuse Regulation (MAR).[68] Offences regarding market abuse are insider trading, unlawful disclosure of inside information, improper use of inside information, transaction manipulation, device manipulation, misleading dissemination and market distortion.[69] The UK MAR presents 'an arsenal of market abuse penalties' in order to 'maintain market integrity and transparency'; however, the most commonly used penalty is financial penalties.[70] The first time that the FCA fined an individual under the UK MAR was in December 2020 since coming into effect in the UK in July 2016. Four years later, the FCA fined Corrado Abbattista formerly a portfolio manager, partner and Chief Investment Officer at Fenician Capital Management LLP for £100,000.[71] The fine

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[66] Ibid.
[67] Ibid.
[68] Financial Services and Markets Act 2000; Market Abuse Exit Regulations 2019; Financial Conduct Authority, 'Market Abuse' (2016) <https://www.fca.org.uk/markets/market-abuse> accessed 22nd November 2024.
[69] Complylog, 'Market Abuse Penalties Under MAR + 5 Case Studies' (*Complylog*, 13 August 2020) <https://blog.complylog.com/market-abuse-penalties> accessed 22nd November 2024.
[70] Ibid.
[71] Financial Conduct Authority, 'FCA fines and prohibits hedge fund Chief Investment Officer for market abuse' (2020) <https://www.fca.org.uk/news/press-releases/fca-fines-and-prohibits-hedge-fund-chief-

was regarding the placement of misleading orders for Contracts for Difference (CFDs) which were not intended to be executed. On the opposite side of the order book, smaller orders were places with an intention for those to be executed, carrying out false misrepresentation to the market with an intention to buy and/or sell, when his true intentions were the opposite.[72] This activity was carried out in 2017 and Abbattista eventually got fined in 2020 for his activity relating to false misrepresentation for CFDs, which was considered as a serious breach by the FCA.

The FCA has attempted to strengthen market integrity to minimise the occurrence of market abuse will be considered in the following section to provide further recommendations for improvement. Market abuse in the UK has been a topic of conversation, especially following the LIBOR scandal, the role of the UK in the global financial markets and the complexity that technological advancements pose on new forms of market abuse.[73] It is important to consider technological changes, since they contribute to different forms of market abuse being carried out. In the next section, recommendations will be considered to complement the methods already used by the FCA and the UK government in relation to the original EU MAR regulations.

Recommendations

investment-officer-market-abuse> accessed 21st November 2024; Debevoise & Plimpton, 'UK Financial Conduct Authority Imposes First Market Manipulation Penalty Under Market Abuse Regulation' (2021) <https://www.debevoise.com/insights/publications/2021/01/uk-financial-conduct-authority-imposes> accessed 21st November 2024.

[72] Ibid.

[73] Centre des Professions Financieres, 'New Technologies and Market Abuses: Outdated Legal Frameworks, Short-Falling Reforms and New Proposals' (2024) <https://professionsfinancieres.com/sites/default/files/docsupload/u213/M%20Stephane%20DANIEL.pdf> accessed 25th November 2024.

Throughout this chapter, the role of the FCA and the UK Government has been taken into consideration for the approaches taken towards the corporate criminal liability framework in the UK and consequently, the overall approach taken by the UK for economic crimes, including market abuse. Recommendations relating to the approaches taken by the FCA and the failure to prevent model used by the UK will be considered along with any relevant academic opinions published on the topic already.

The FCA in 2023/2024 saw an upward trend in the use of intervention powers and criminal prosecution powers.[74] Enhancements made in the way that the FCA proceeds with new cases provide a form of safeguarding of market integrity in numerous forms. Firstly, there is enhanced deterrence both around longer prison sentences for insider dealing, and through the new enforcement strategy employed by the FCA.[75] Secondly, the FCA employed systems that identify patterns real-time, with an aim 'to explore how advanced solutions leveraging artificial intelligence (AI) and machine learning (ML) could help detect evolving forms of market abuse'.[76] Thirdly, the FCA encourages compliance through incentives to implement better systems for oversight and reporting in advance any oversight to avoid financial penalties.[77] These measures taken by the FCA aim to strengthen market integrity and minimise the occurrences of market abuse. Staying in the loop for technology advancement and new ways of economic crime

[74] Hogan Lovells, 'UK: Trends in FCA enforcement activity 203/24 and what lies ahead' (2024) <https://www.hoganlovells.com/en/publications/uk-trends-in-fca-enforcement-activity-202324-and-what-lies-ahead> accessed 25th November 2024.
[75] Financial Services Act 2021, s.31; Financial Conduct Authority, 'Evolving our enforcement approach to protect and grow our markets' (2024) <https://www.fca.org.uk/news/speeches/evolving-enforcement-approach-protect-grow-markets> accessed 25th November 2024.
[76] Financial Conduct Authority, 'Market Abuse Surveillance TechSprint' (2024) <https://www.fca.org.uk/firms/techsprints/market-abuse-surveillance-techsprint> accessed 25th November 2024.
[77] Financial Conduct Authority, 'Aiming for calm seas in our market reforms' (2024) <https://www.fca.org.uk/news/speeches/aiming-calm-seas-our-market-reforms> accessed 25th November 2024.

deterrence is essential to ensure that the most updated methods of market abuse can be prevented.

To ensure prevention and emphasise on the improvement of corporate culture around market abuse could also be the introduction of a failure to prevent market abuse offence. This recommendation has been mentioned by academics in the past, however, it has never been fulfilled by the UK Government.[78] The UK Government did not formally consider a failure to prevent market abuse offence; however, with the failure to prevent fraud offence coming into force on the 1st October 2025, the potential of including another failure to prevent offence regarding market abuse could increase prosecution numbers, in line with the ambitions for the failure to prevent fraud offence.[79] The innovative aspect of failure to prevent fraud which aims to change the prosecution rates, is due to the application of strict liability, and the offence's aim to 'prevent an "associated person" from committing a set of specified fraud offences'.[80] If the same form of strict liability was applied to a potential failure to prevent market abuse offence, then individuals within a corporation aiming to disturb market integrity in any way that the current legislation sets out, then it would be easier for that individual to be prosecuted under the relevant failure to prevent offence.

Along with the expansion of the failure to prevent framework, it is important to reconsider the imposition of financial penalties. As already argued, financial penalties need to be reassessed and become stricter, to avoid the phenomenon of fine

[78] C. Hogg, K. Jones and N. Swift, 'Failure to Prevent Market Abuse: A Potential New Corporate Criminal Offence?' (2020) 41(4) Business Law Review, 212-125.
[79] J. Benson and others, 'New 'Failure To Prevent Fraud' Offence Expected To Come Into Force in the UK Shortly' (*Skadden*, 12 September 2024) <https://www.skadden.com/insights/publications/2024/09/new-failure-to-prevent-fraud-offence> accessed 25th November 2024.
[80] Ibid.

affordability and reoffending.[81] Moreover, a study has also been carried out regarding the relation of imprisonment and its effects, with the results showing that 'a prison sentence reduces the likelihood that a defendant's colleagues commit financial crimes in the future'.[82] The solution suggested is not to imprison everyone that commits a financial crime, but to ensure that the penalty is significant enough to provide a motivation for change. This could be achieved by the imposition of significant fines that both individuals and corporations would consider damaging and would rather prioritise remediation and oversight rather than opting in for the financial penalty as an 'easy way out'.

Conclusion

The contribution of the EU MAR to the UK MAR has been a solid foundation in ascertaining a framework towards market abuse. Although market abuse can be addressed by financial fines, legal lawsuits, and regulatory control, there are still significant obstacles in completely discouraging insider trading and manipulative activities.

A change towards encouraging a compliance culture within corporations is indicated by the development of concepts such as failure to prevent offences and the growing use of DPAs. A contemporary approach to managing systemic risks is reflected in these methods, which place an emphasis on accountability and urge businesses to implement reasonable procedures. However, there are also concerns about whether

[81] A. Doig and M. Levi, *Frauds and Financial Crimes: National Strategic Responses* (Routledge, 2021).
[82] K. Huttunen, 'Financial Crime and Punishment' (2022) 15 Pridobljeno, 2022.

financial penalties are enough to reduce reoffending on their own or if they just end up being a necessary expense for big organisations.