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The FSA, "credible deterrence", and criminal enforcement – a "haphazard pursuit"?

1. Introduction

> [...] [w]e intend to be bolder and more resolute about proceeding with market abuse and insider dealing cases so that we can actually bring about a change in the culture of the City [...] (Cole, 2008).

> It is not for us to say whether any particular agency, along with the offences created to support its regulatory activities, are unnecessary. However, it is important to point out that the offences created to support the activities of regulatory agencies are often rarely used [...] (Law Commission, 2010, para. 1.25).

It is widely acknowledged that the aftermath of the global financial crisis – termed by former Prime Minister Gordon Brown in 2010 as the "first crisis of globalisation" (Brown, 2010) – is set to put in place a new regulatory landscape[1]. In furtherance of this, new "regulatory conversations" are occurring both at national level within many individual nation states – both within the much troubled Eurozone and outwith; and also beyond this on Pan-European and international platforms. Much of this "spotlight" is on banking specifically within financial sector activity. This is so on account of continuing concerns about regulating so-called systemically important financial institutions (SIFIs)[2] – where ongoing anxiety is being tracked by a number of exposures of impropriety[3]. More generally, and for a long time into the future, the crisis is likely to be associated with its systematic exposure of "unethical" behaviour (O'Brien, 2012, pp. 178-179). Widely perceived as the failure of light-touch regulation and risk assessment (Tomasic, 2011, p. 7)[4], for some the financial crisis is also likely to mark a turning point for responding to "financial crime" (Tomasic, 2011, p. 7). This is so on account of exposure of conduct occurring during the crisis which is being regarded as potentially criminal behaviour, and which will ensure that the crisis is also likely to carry longstanding associations with the revelation of "massive financial fraud" (Tomasic, 2011, p. 7). The latter suggestion forms a central plank for the hypothesis of the "haphazard pursuit of financial crime" (Tomasic, 2011, p. 7).

This paper explores some domestic dimensions of the hypothesis of the "haphazard pursuit of financial crime". This was proposed by Tomasic (2011, p. 8) as a lament on the lack of development of "criminal sanctions applicable to corporate financial misconduct", and the concomitant under-utilisation of such sanctions in the context of financial failure. For this paper this construct has been appropriated to consider the pursuit of financial crime by the UK regulator put in place in 2000, the Financial Services Authority (hereafter referenced as the FSA, or the Authority). In acknowledging that the financial crisis has already revealed a considerable amount of financial crime (Tomasic, 2011, pp. 7-8), and that such exposures are likely to continue for a time yet, it considers the hypothesis of "haphazard pursuit of financial crime" as one for exploring more generally criminal enforcement work carried out by the Authority. The FSA is of course being disbanded on account of changes introduced in the Financial Services Act 2012, and its replacement with the Financial Conduct Authority (FCA) is imminent on account of the "twin peaks" regime introduced by the 2012 Act[5]. The article is in any case most interested in the FSA's financial crime enforcement activities, flowing from its statutory remit as the body which until the financial crisis enjoyed jurisdiction over "virtually everything financial in the UK" (Omoyele, 2006, p. 194). This requires paying attention to FSA enforcement beyond its responses to activity directly and indeed causally related to the crisis. In taking these more specific and also more generalised perspectives on the crisis together, the article seeks to cast light on the scope of the challenges being faced by the incoming FCA in respect of criminal enforcement in the post-financial crisis regulatory environment.

Centrally the article explores key dimensions of the FSA's functions as a criminal prosecutor, and key characteristics of its policy formation relating to this, and its experiences as such. In taking a lead from outgoing Chief Executive Hector Sants' explanations of the scope of the FSA's criminal prosecutorial functions, the role actually played by the FSA in relation to financial crime needs to be discerned from what is actually possible to bring within the rubric of financial crime. From the types of financial crime potentially of interest for the FSA, the article looks specifically at financial market misconduct offences. This means that this application of Tomasic's hypothesis is much narrower than Tomasic's (2011, p. 8) own association of financial crime with "criminal sanctions applicable to corporate financial misconduct". Here it is suggested that analysing the FSA's approach to offences commonly found grouped under the rubric of "market abuse" through the lens of the "haphazard pursuit of financial crime" is an extremely valuable way of understanding a number of key themes which are apparent in Tomasic's reflections on the under-utilisation of criminal enforcement. These include centrally the nature and function of regulators, and the "external" forces which influence their policies and actions, and especially the pressure to be effectual and yet not "heavy [handed] and intrusive" (Tomasic, 2011, p. 8). This also embraces the nature and significance of criminal enforcement within English legal culture, and the intellectual and pragmatic difficulties its direction towards financial crime has traditionally encountered. Many of these considerations are to be found captured in Tomasic's proposition that "White collar [...] crimes have long been part of markets and are among the most difficult crimes for the legal system to deal with, let alone control" (Tomasic, 2011, p. 7).

Straddling these key considerations, this discussion considers the significance that has been attached by the FSA to criminal enforcement as part of its key ethos and philosophy of "credible deterrence". These are interesting issues and ones that are worthwhile exploring in the light of long-standing concerns about the pursuit of responding to financial crime emanating from scholars and practitioners alike, and ones which – as will be explained – are very much to the fore as part of the regulatory aftermath of the global financial crisis. There are three further considerations discussed in this article which are likely to influence responses to financial crime at this crucial juncture for future regulation of UK financial markets. The first is that, as previously noted, the FSA itself is due to be disbanded and its functions separated into two different regulatory bodies, with the aforementioned FCA (rather than the PRA[6]) set to undertake FSA functions relating to financial crime[7]. From this there are important questions concerning how the attention which is currently being paid to financial crime by the FSA could forecast how the FCA approach might be fashioned from its proposed remit. Very generally, key policy literature is giving some signpostings of the FCA's envisioned functions and approach, and from this, this discussion considers the challenges which might by faced by the FCA. This includes reference to the considerable pressure currently being placed on government departments to move away from utilising criminal enforcement.

This particular development is explored using the Law Commission's (2010). A number of key recommendations have already been implemented in the *Criminal Offences Gateway Guidance* published by Ministry of Justice (2011), and attention is paid to the possible significance of this exercise for FCA enforcement. Whilst FSA criminal enforcement of market abuse would not be regarded by the Law Commission (2010, para. 1.15) as the use of "low level criminal penalties" for "minor offences", from its key recommendation that government departments should generally place greater emphasis on civil penalties which are as effective, there are potentially some implications for the pursuit of financial crime within English legal culture. From this, the need to consider some of the key parameters of the Law Commission exercise is especially evident on account of a third factor: new pronouncements on the value of criminal enforcement from Europe, especially in relation to market abuse.

2. The "haphazard pursuit of financial crime": the financial crisis, and criminal enforcement beyond the crisis

The exposures which will be responsible for the associations of the global financial crisis with "massive financial fraud" actually started to happen as early as 2008, in the USA, in the case of investment giant Bear Sterns. At this time it was suggested that the prosecution of two key executives for their role in the securitization of sub-prime mortgage assets was destined, as far as (in that instance, the USA) authorities were concerned, to become a test for the "[...] ability to make successful prosecutions of highly complex financial transactions" (Thomas, 2008). In the event, in the USA the Bear Sterns criminal trial did collapse, and enforcement credibility was also tainted by the controversial settlement of the civil suit for fraud against Goldman Sachs for its conduct relating to sub-prime mortgage securities. In the UK at one point it looked possible that criminal charges might be brought in respect of investment activity being conducted by Lehman Bros prior to its collapse, on account of revelation that the firm was able to conceal $50 bn of debts from regulators despite auditing checks. A report ordered by the court overseeing bankruptcy proceedings submitted that Lehman's top management and auditor Ernst & Young used "accounting gimmicks" to hide troubled assets whilst also criticising "magic circle" law firm Linklaters for "signing off" on what was happening (Inman, 2010). Notwithstanding this powerful criticism that "[t]oo much is being concealed" and insistence that what is needed is a "fresh approach that gives a more realistic picture of bank finances and not one that disguises risky practices" (Inman, 2010), criminal charges arising from misconduct during the crisis remain elusive, save from the conviction of UBS trader Kweku Adoboli in November 2012. Equally, the fines imposed during late 2012 on Barclays and UBS for their misconduct in respect of Libor, and the HSBC settlement relating to money laundering activities undertaken by the institution do not appear to have influenced a movement towards criminal enforcement, notwithstanding rhetoric generated by these exposures suggesting differently. Indeed, once again, attempts to engage at all in criminal enforcement can be seen in the USA rather than the UK, as evident from ongoing Department of Justice criminal investigations of numerous Barclays senior executives linked to the UK and US regulatory investigations into Libor[8].

Such occurrences alone could provide persuasive *prima facie* support for the proposition of "haphazard pursuit of financial crime" characterising UK enforcement. Furthermore, such a narrative appears to be strongly supported by perceptions in some quarters that financial sector activity is "fundamentally [...] criminogenic" (Friedrichs, 2012, p. 6). Friedrichs' (2011) suggestion that the culture and collective practices of the financial system that spawned the crisis promoted "harmful conduct that either is in violation of the criminal law or ought to be" is a powerful one, and one which enjoys a lengthy tradition within criminology (Sutherland, 1940, 1945, 1949). But there is also a substantial body of evidence suggesting that this castigation of conduct within high finance, and actually financial sector activity more broadly, does already underpin and inform much FSA thinking on responding to financial market misconduct, and that it did so for some considerable time predating the crisis. It also appears to be a central tenet of the Authority's own regard for importance of criminal enforcement in improving market behaviour in order to fulfil its statutory objectives[9]. Here, it is very significant that the FSA has experienced perceptions of poor track-record for prosecuting market misconduct, notwithstanding its longstanding and demonstrable cultural commitment to using criminal enforcement in the pursuit of its philosophy of "credible deterrence". From examining the significance of "credible deterrence" for the Authority it becomes clear that it cuts across the Authority's enforcement machinery, and spans the Authority's activity in imposing financial penalties, cancelling firms' permissions, and subjecting individuals to prohibitions. Equally, there has been a notable increased focus on criminal enforcement for financial crime specifically from c. 2005 onwards. Moreover, this was for the FSA both conscious and something it has been keen to publicise. At the heart of this lies understanding what is meant by "credible deterrence", and considering how this is connected with FSA use of criminal enforcement in response to financial crime. It also requires appreciating why the middle years of the decade to 2010 became such a significant reference point for this strategy.

FSA enforcement practice and culture: identifying "credible deterrence" and locating the regulator's pursuit of financial crime

As suggested above, "credible deterrence" is a reference point for much of the Authority's work in fulfilling its statutory functions as the UK financial services regulator. The Authority's Business Plan for 2012-2013 references the continuing pursuit of "credible deterrence" as one of its priorities for this timeframe (FSA, 2012-2013, pp. 47, 52). This document identifies it as the regulator's key enforcement philosophy which supports fulfilment of its statutory objectives, and also informs the delivery of commitments made using its resources effectively and efficiently (FSA, 2012-2013, p. 63)[10]. Its status as a conscious philosophy or ethos of the Authority is thus clear, and its continuing significance as the enforcement functions of the FSA become those of the FCA is evident from a number of speeches from incoming head Martin Wheatley. Wheatley (2012a) suggested that the FCA would build on the direction taken by the FSA in recent years, but the new body's remit would also require FCA staff to embrace a "new set of values in their work and thinking" required to protect consumers, promote competition and ensure market integrity. However, this was couched in the CEO Designate's simultaneous insistence that building on the FSA's direction would involve retaining "our policy of credible deterrence, pursuing enforcement cases to punish wrongdoing" (Wheatley, 2012a).

In the context of financial crime specifically, the continuing significance of "credible deterrence" can be seen deeply embedded in the speeches of current head of Enforcement and Financial Crime Tracey McDermott, as it can in those of her predecessor Margaret Cole. Much more is said about the Margaret Cole era shortly, but in terms of marking future directions, in July 2012 Ms McDermott insisted that credible deterrence was "here to stay" (McDermott, 2012b). In explaining that enforcement was not the only tool within the regulatory framework, she insisted equally that it was a central part of the regulator's public profile, playing a vital role in seeking to change behaviour by establishing that there are "real and meaningful consequences for those [...] who do not play by the rules" (McDermott, 2012b).

In making this statement on the importance of enforcement within the regulatory regime, Ms McDermott identified firms and individuals as being subject to it. In turn, this helps to clarify that the activities of the regulator – the current FSA and the incoming FCA – are cast from its remit of meeting its statutory objectives. Originally located within s. 2 of the FSMA 2000, these objectives were significantly altered as part of a suite of reforms to the Authority's functions courtesy of the Financial Services Act 2010[11], and once again by provisions of the Financial Services Act 2012. The 2012 Act now references the FCA's objectives as ones connected with consumer protection, competition, and integrity. Historically, responses to market abuse have had strongest nexus with the regulatory objective of "reduction of financial crime". In contrast, the need to absent activity termed as market abuse can now be found within the "integrity" objective under the new s.61D Financial Services Act 2012, located alongside the importance of financial markets being orderly and transparent. This is in a manner which now separates "market abuse" from "financial crime" more generally, and thereby changes their historical association.

In terms of understanding the historical associations between "credible deterrence", financial crime and market abuse, more now must be said about how the Authority has regarded "credible deterrence" as an approach to regulation across the scope of its enforcement activities beyond market abuse. This can be seen in the reference made to it as underpinning the Authority's approach to breaches of transaction reporting requirements in FSAs (2012-2013, p. 38)[12]. The Business Plan does not actually define "credible deterrence" but its meaning can be discerned contextually from several references within it, and from other key FSA publications. Thus, in terms of ascertaining its significance, as Sants (2009) explained, it was formally adopted as a philosophy by the Authority in 2008 in its quest to promote confidence in high levels of "market quality" within UK financial markets. From the FSA documentation the pervasive influence of "credible deterrence" for the FSA is manifest, but the article will utilise it more narrowly. Indeed, the article's interest in using it as a mechanism for exploring the hypothesis of "haphazard pursuit of financial crime" in Britain requires explaining how "credible deterrence" can be seen manifested specifically in the regulator's criminal enforcement activity. This requires understanding of the types of financial crime that the FSA does actually pursue. It also requires determining what is actually meant by the philosophy of "credible deterrence", in terms of how it seeks to achieve market quality, as now manifested in s. 61D of the 2012 Act. These key considerations can be ascertained from examining numerous FSA documents, and ones which relate to the incoming FCA.

Identifying and illuminating "credible deterrence" – discerning FSA/FCA philosophy

References to "credible deterrence" in FSAs (2012-2013) are many and manifold, and explain that the pursuit of "credible deterrence" involves "robustly deploying our civil and criminal prosecution" which is an approach which "will be taken forward by [...] subsequently the FCA" (FSA, 2012-2013, p. 8). This document also references the Authority's "credible deterrence" agenda as one enjoying considerable success and as one to be deployed in the pursuit of "standard-setting" (FSA, 2012-2013, pp. 25-26, 48, 53). It also specifically references it as a strategic response to financial crime. Whilst these illustrations help to scope the significance of "credible deterrence" for the Authority, they do little to illuminate how this philosophy actually works to achieve its objectives. The clearest illumination of this arguably comes from publications from the then Enforcement Division, during Margaret Cole's time at its helm, on account that it was Ms Cole who "led the FSAs drive to deliver its credible deterrence strategy" (Sants, 2012).

In 2009, and shortly after its formal adoption by the FSA, the then Director of Enforcement explained the nature of "credible deterrence" as it has been developed as a key philosophy and ethos for the Authority. For Cole (2009), "credible deterrence" is all about:

[...] delivering outcomes that make a real difference to consumers and to markets. It means delivering results that make people sit up and pay attention. It's about making people realise that they can suffer meaningful consequences if they break the law and if they don't improve their standards of behaviour.

Indeed, "credible deterrence" is a key ingredient for "reforming actual behaviour", and in that regard, Cole (2009) insisted its rationale of "making people frightened of the FSA" is a means to the end of changing behaviour "so that markets are clean, fair, and orderly and so that retail consumers get a fair deal". This chimes in very strongly with current messages from what is now the Enforcement and Financial Crime division within the FSA, headed by Tracey McDermott, who as noted, insists that there are "real and meaningful consequences for those [...] who do not play by the rules". And in explaining how the Authority actually directs this philosophy and ethos towards financial crime, heads of Enforcement past and present have emphasised how strongly anchored the pursuit of financial crime is to the Regulator's statutory objectives. As suggested, historically "misconduct in, or misuse of information relating to, a financial market" was part of the "reduction of financial crime" objective set out in s. 2(2) of the FSMA 2000, as provided in s. 6(3), alongside offences (in contravention of UK law) of fraud or dishonesty, or handling the proceeds of crime.

This is the regime under which the FSA operated for much of its existence from inception, and this particular aspect of FSA function was left unchanged by the Financial Services Act 2010 (FSA Announcement, 2010). In turn focusing on the FSMA 2000 framework enables this paper to focus solely on "market misconduct" within the wider legal scope of financial crime. The article thus confines its interest in investigating the hypothesis of the "haphazard pursuit" of financial crime to the FSA's pursuit of market misconduct, through the significance attached to criminal enforcement of it by the philosophy of "credible deterrence". The challenges presented by financial market misconduct, commonly conceptualised as "market abuse" for achieving financial markets which are clean and transparent, are widely documented throughout FSA publications, such as in McDermott's (2012b) recent commitment to build on recent successes in protecting the integrity of financial markets using criminal and non-criminal enforcement where "market participants are seeking to gain an advantage by failing to play by the rules". References to the debilitating effects of "market misconduct" can also be found in external reflections on the regulator's enforcement machinery, such as the publicity generated by the short-selling scandal affecting HBOS in March 2008 which led to calls for strengthening of the Authority's criminal powers on account of then Chancellor Alistair Darling's message of intolerance for the quite deliberate manipulation of financial markets for "personal gain and with the potential to destabilise the financial system" (Elliott, 2008).

3. Credible deterrence and criminal enforcement post-financial crisis: explaining the nature and significance of "market abuse" for regulators

Activities found within the rubric of "market abuse" are widely referenced in FSA documentation as ones which interfere with "confidence in the cleanliness of our markets" (Cole, 2010), and which as a matter of legal definition amount to "market manipulation" and "insider dealing". These individual terms can be found explained along with their connection with the term "market abuse" accordingly as:

Insider dealing consists of a person trading in financial instruments when in possession of price-sensitive inside information in relation to those instruments. Market manipulation occurs when a person artificially manipulates the prices of financial instruments through practices such as the spreading of false information or rumours and conducting trades in related instruments. Together these practices are known as market abuse (European Justice Ministers, European Commission, 2012b).

The rationales underpinning the effective control of market abuse are well known, clustering the need to ensure the efficient allocation of capital, effective price discovery, and "investor egalitarianism" (Ashe and Counsell, 1993; Rider and Alexander, 2009) whilst the practical significance of such offences for financial crime enforcement by the FSA can be seen from the Authority's publications. Specifically this is evident from the insistence from key post holders past and present that the regulator focuses on some activities readily brought within the rubric of financial crime but not all. As Sants (2009) stressed, the Authority was not a mainstream prosecutor of financial crime, and instead it sought to concentrate its focus on "market-related offences and issues relating to other unauthorised activities such as boiler rooms"[13]. More recent publications from the Enforcement and Financial Crime division are also stressing mortgage fraud and bribery, but nevertheless, as Sants (2009) insisted, the Authority was not a central part of the "financial crime and fraud enforcement architecture in the UK". This is because its interest in financial crime has always arisen from its statutory mandate, meaning it was not going to be an agency responsible for "prosecuting financial fraud in its conventional sense" (Sants, 2009).

In stressing that the Authority's function lies in "policing the wholesale as well as the retail markets [...] [and to] [...] take action where misconduct threatens confidence in them or undermines their integrity" (McDermott, 2012b), Tracey McDermott's recent remarks echo closely those of Hector Sants. And both help to distinguish the FSA (and the incoming FCA) from other prosecutors of financial crime, centrally the Serious Fraud Office, the Central Fraud Division of the Crown Prosecution Service, and the Serious and Organised Crime Agency (Widlake, 1995). In relation to what the FSA actually does, and in the course of identifying continuities between FSA and FCA approaches, McDermott (2012a) has insisted the new agency would, in common with the FSA, be following a three-pronged attack on financial crime: "to keep crooks out of finance; to encourage industry to strengthen its defences; and to educate and warn customers about the danger they might face". In this regard she insisted that the focus of energies would be protecting consumers as potential victims and preventing firms being used as locations for financial crimes, whilst leaving it to firms to guard against being victims of financial crimes themselves. The import of the Authority's statutory objectives is always clear, whether or not this is actually expressed. Thus, the Authority's concern with mortgage fraud alongside share fraud is very much about protecting consumers, whilst the Authority's interest in bribery is not difficult to locate in its strategy of ensuring the firms are aware of the scope of criminal activity and are thus informed about how to protect their business transactions, and their environs more generally, from becoming locations for financial crime.

The documentation dating from the FSA's inception leaves no doubt that the regime for responding to the "market related offences" (Sants, 2009) of market manipulation and insider dealing forms a central plank in the Authority's regulatory architecture for ensuring the safety and integrity of the UK financial system, with more recent publications stressing how this will be continued by the FCA. At the heart of FSA activity lay a number of offences located within the FSMA 2000 and beyond it in Part V of the Criminal Justice Act 1993, where in the latter case, s. 402 of the FSMA 2000 empowered the regulator to act as a criminal prosecutor. Offences actually located within the FSMA 2000 spanned both criminal liability for market abuse under s. 397, and non-criminal offences of market manipulation and insider dealing located within s. 118 as amended by the implementation of the Market Abuse Directive (MAD) 2003 into domestic law by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005.

The introduction of the "new" civil/administrative pathway within s. 118 in 2000 marked a very different emphasis for financial market regulation in Britain, with traditional approaches focusing on criminal enforcement, notwithstanding the difficulties associated with this. In this regard, "companion" criminal market abuse offences which were located in s. 397 of the FSMA 2000 (now themselves formally repealed by, and restated and extended in the 2012 legislation)[14] were re-enanctments of those under s. 47 of the predecessor legislation, the Financial Services Act 1985. In relation to insider dealing, this was criminalised in English law initially in 1980 with the current regime to be found in the Criminal Justice Act 1993. Whilst the 1980s was a critical point in time for identifying financial market misconduct as criminal conduct, the deployment of the criminal law in this context has a much longer history dating back to the nineteenth century. Interestingly, there was actually very considerable determination to direct criminal responses towards financial misconduct in Victorian Britain on account of awareness that the business of the city was not necessarily "built on the strictest standards of personal morality" (Lobban, 1996, p. 327; Wilson, 2012, p. 372). But there was also considerable awareness of the difficulties associated with criminal enforcement which are readily identifiable today, including the sentiment against making "things crimes which are not crimes in themselves", as expressed by Sir George Jessel MR in 1877 (Wilson, 2012, p. 342)[15]. More recently, longstanding concerns about the criminal pathway can be found experienced and expressed by prosecutors, policymakers and academic commentators alike, where anxieties about efficacy and even appropriateness have become forged into a consensus that:

> No jurisdiction has had a great deal of success in utilising the criminal law in combating sophisticated abusive activity on its capital markets. The standards and procedures of the traditional criminal justice system, which are necessary to ensure general civil and human liberties, present almost insurmountable barriers to the effective prosecution of economic crime. While some systems have managed to achieve a degree of success, this has often been at considerable expense and it remains debatable whether public confidence has in fact been reinforced. Indeed, there is an argument that by drawing attention to such abuses, unless the legal system is able to produce a spectacular result – which may have little to do with the relative justice of the matter, confidence will have been undermined (Rider, 1995, p. 13).

In this regard, the policy of the MAD 2003 was centrally to enhance responses to market misconduct by moving away from criminal enforcement, on account of this being perceived as costly and ineffectual, and providing alternatives with civil/administrative mechanisms. The effectiveness of the policy within the UK can be seen in the FSA's enthusiasm for non-criminal enforcement of market abuse pursued during the first half of the decade. This was a time when then Enforcement Director Margaret Cole insisted that the Authority "focused its efforts on road testing the civil regime" (Cole, 2010). That approach would change thereafter, and explicitly so in furtherance of "credible deterrence". As explained shortly, it is very significant that this change of focus occurred sometime prior to the financial crisis. But for present purposes, in terms of linking the more general and inherent hazards of financial market activity with concerns about activities during the financial crisis and in its aftermath, and also suggestion that "the financial crisis has been something of a turning point in the regulatory response to financial crime around the world" (Tomasic, 2011, at 7), two extremely important developments have occurred at European level.

The shape of things to come: European developments and domestic change

For any study of the legal architecture of responses to market abuse, proposals for a "Regulation on Insider Dealing and Market Manipulation" and "Directive on Criminal Sanctions for Insider Dealing and Market Manipulation" published in European Commission (2011d) are signature developments. For this analysis they are a key reference point for reflecting on the value of criminal enforcement for the pursuit of "credible deterrence" and in turn for considering how likely it is that the pursuit of financial crime post-crisis will be less "haphazard". In a press release for the proposed Regulation from the European Commission (2011b) entitled "Getting tough on insider dealing and market manipulation", Commissioner for Internal Market and Services, Michael Barnier insisted that "Market abuse is not a victimless offence. By distorting market prices, insider dealing and market manipulation undermine investor confidence and market integrity" (European Commission, 2011b). In this regard, and in response to such concerns, the press release embodies the European Commission's determination to extend the European legislative framework and also toughen the powers and sanctions available to regulators. This press release explained that the legislative regime is set to extend to new trading platforms, and also reinforce regulators' investigative powers (relating to the discovery of suspicious activity, and the protection of whistleblowers); facilitate tougher administrative sanctions, and even to create a (civil) offence of "attempted market manipulation"[16]. In the parallel development of adopting proposals for a "Directive on Criminal Sanctions for Market Abuse" the European Commission is signalling clearly that financial markets need to be "more sound and transparent" (European Commission, 2011a), and this requires Member States to "impose criminal sanctions for inciting, aiding and abetting market abuse, as well as for attempts to commit such offences", alongside offences of actual insider dealing and market abuse (European Commission, 2011a). Here the Directive itself, and references made to it by the Regulation and the surrounding policy discourses, are not merely signalling strengthening and reinforcement of the regime under the MAD 2003. What is being advocated is actually a very significant change in orientation of responses to market abuse.

This message on the importance of strengthening the market abuse regime and doing so using criminal enforcement has intensified still further in the wake of the Libor exposures from June 2012, resulting in amendments being made both to the Regulation and also the Directive proposed initially in 2011. This is so on account of the Commission's concern that whilst a regulator is likely to experience difficulties in showing a causal relationship between the manipulation of "benchmarks" such as Libor (and Euribor), "any actual or attempted manipulations can [...] have a serious impact on market confidence and could result in significant losses to investors or distort the real economy" (European Commission, 2012a). In remarking that the proposed changes introduced in 2011 did not expressly cover such financial market "benchmarks", the policy documentation insisted it was vital to ensure that a stringent legal framework exists for competent authorities to respond to such misconduct. The European Commission accepted that administrative sanctions could assist competent authorities in taking all steps necessary to prevent such behaviour and to direct responses to it, but it was equally resolute that the manipulation of benchmarks must be subject to criminal sanctions in order to "ensure the effective enforcement of EU policy on market integrity" (European Commission, 2012a).

Proposals emerging as a result of this in July 2012 have added to amendments originally proposed in 2011 the prohibition of a natural or legal person from "transmitting false or misleading information, providing false or misleading inputs, or any action which manipulated the calculation of a benchmark including the manipulation of benchmarks' ideologies" (European Commission, 2012a). As far as the substance of the initiative itself is concerned, the publicity for the amendments confirms that "benchmarks" used to price financial instruments will fall subject to the proposed new legislation governing market abuse. In turn, a benchmark is identified as "any commercial index or published figure calculated by the application of a formula to the value of one or more underlying assets or prices", with "underlying assets or prices", including ones relating to equities (such as the FTSE 100 index) bonds and commodities as well as interest rates such as Libor underpinning the scandal that precipitated the amendments (European Commission, 2012a).

Credible deterrence – domestic pioneering and influence beyond UK enforcement?

In publicising the 2012 amendments the European Commission insisted that the "regulatory steps" should include "criminal sanctions" (European Commission, 2012a). But prior to, this initial proposals for the Directive set out in 2011, requiring Member States to introduce inchoate offences carrying criminal liability, pointed to these proposals as a reflection of a wider initiative of moving "Towards an EU criminal policy – Ensuring the effective implementation of EU policies through criminal law" (European Commission, 2011a). In a press release on 7 December 2012 Europe's Justice Ministers announced agreement of the Commission's proposals on criminal sanctions (European Commission, 2012b). In illuminating the essence of criminalising the manipulation of benchmarks in order to prevent significant losses to customers and investors and distortion of the real economy as part of a package of offences relating to "market abuse", the Justice Ministers did not demure from the initial insistence that Member States must ensure criminal sanctions imposed in respect of them are "effective, proportionate and dissuasive" (European Commission, 2011a).

As the new legislation's journey towards adoption unfolds, it is clear that even prior to the Libor amendments the proposals from 2011 were not simply signalling an extension and strengthening of European policy, but actually seeking to achieve this in a particular way. As far as domestic law is concerned, these particular initiatives are likely to become a key reference point for the current regulatory debate concerning "more Europe or less" (Turner, 2012)[17], as the crisis within the Eurozone shows little sign of subsiding, even if it is not continuing to intensify at the pace experienced during 2011 and 2012. Indeed, in respect of benchmarks, the new offence of making misleading statements relating to benchmarks under s. 91 Financial Services Act 2012 obviously has been shaped by domestic influences such as the Libor "scandal" itself and the Wheatley Review commissioned in its wake, and not obviously so by the European developments[18]. But in examining these proposals at face value, they are entirely consistent with European rhetoric on the essence of a stringent regime for responding to market abuse. The December 2012 press release unsurprisingly alludes to the Justice Ministers' confidence that the proposals will be adopted swiftly in order to demonstrate the serious commitment behind "fighting market abuse and [...] protecting the integrity of our markets in the interests of our citizens" (European Commission, 2012b). But in its core message, that criminal sanctions lie at the heart of reinforcing that market abuse is not a "victimless offence", and represent a "strong signal" that it will not be tolerated, the current proposals contrast sharply with the MAD 2003. Indeed, acknowledgement by the MAD 2003 (by virtue of Article 14) of a Member State's right to impose criminal sanctions provided a somewhat grudging preamble to the requirement for administrative sanctions. This was Pan European level recognition of the perceived shortcomings of using criminal responses in cases of market misconduct. Such perceptions have long subsisted in the UK, embodied in concerns that crime widely-perceived as "victimless" becomes "convictionless" crime (Ashe and Counsell, 1993, p. 91).

It is through this emphasis on criminal sanctions that these current initiatives mark a significant departure from the methodology and approach of the MAD 2003. In exploring this, it is extremely noteworthy that in reiterating this current migration towards criminal enforcement identified in 2011, the 2012 amendments actually express the importance of criminal enforcement for a stringent legal framework in order to achieve (with emphasis added) a *"credible deterrent"* to such behaviour (European Commission, 2012a). This is extremely noteworthy because rhetorically it aligns the EU position on criminal enforcement with that of the UK Authority. And it is the case that the FSA does regard criminal enforcement as a centrepiece of its enforcement machinery for responding to financial market misconduct. However, this regard for criminal enforcement was manifest at the time that "credible deterrence" became embedded into the Authority's culture. Indeed, it will stressed shortly that this commitment to criminal enforcement occurred even prior to the formal adoption of "credible deterrence" as the Authority's philosophy and ethos. And at this time, rather a different message about criminal enforcement was being conveyed from Brussels, courtesy of the MAD 2003's emphasis on non-criminal mechanisms for enforcement.

4. The end of an era? Criminal enforcement during the MAD 2003 years

The proposed legislation first set out in 2011 which is now journeying towards adoption will amount to quite a significant shift in emphasis at European level from the MAD 2003, embodying changing perceptions of the value of criminal enforcement in the fight against market abuse. A decade ago the regulatory topography looked quite different. The "migration" of European capital markets law into UK securities law ensured these provisions were thus strongly grounded in European ideas of market confidence and integrity and consumer protection, pursued through informed decision-making. This provided the basis for the non-criminal market misconduct offences within the FSMA 2000 regime, facilitating enforcement that is civil/administrative in orientation and accompanied by financial penalty, believed by many to be the most effective and appropriate response for market misconduct (Ashe and Counsell, 1993). This represented a very significant departure from the UK's cultural preference for applying criminal law in this regard, and heralded an opportunity to redeem such activities from being "convictionless crime".

This regime was of course strengthened by the MAD 2003's explicit inclusion of insider dealing within the purview of prohibited activity underpinned by non-criminal enforcement, but even prior to this FSA tribunal jurisprudence and policy writings emerging from these earliest years show the Authority's significant enthusiasm for the non-criminal mechanisms. However, it is also clear that even by the time the MAD 2003 was implemented in 2005 that the FSA was regarding criminal enforcement as a very significant element of its enforcement machinery, and in August of that year publicity for the conviction of Rigby, Bailey and Rowley under s. 397 documented this as its "first criminal market abuse case" (FSA Press Notice, 2005). Although the FSA has repeatedly stressed that "Market abuse is difficult to detect, investigate and prosecute" (FSA, 2008b), by 2007 the Authority had started to focus on using its powers to prosecute market abuse and insider dealing as criminal offences.

This change in emphasis occurred at a time when the Authority was demonstrating a pattern of very effective and successful use of the "new" civil enforcement pathway provided for the first time by the FSMA 2000. And this "shift in [...] strategy" was as calculated as it was notable (Cole, 2010). Indeed, as Cole (2010) reflected, notwithstanding that the rationale for non-criminal enforcement was significantly underpinned by the "notoriously difficult" experiences of criminal enforcement, seeking prosecutions was a "conscious decision" taken in order to "demonstrate the strength of our commitment to credible deterrence". This reflection also acknowledged that the Authority appreciated this would be a costly endeavour, both in terms of pecuniary cost and human resource investment, tying in this regulator's perspective with academic debate on the "symbolic as well as pragmatic" nature of enforcement (Levi, 1999, p. 160), both in terms of the regulated community and of the wider perceived legitimacy of the regulator itself. And during 2008 whilst actually in post as Enforcement Director, Ms Cole confirmed the Authority's "firm commitment" to bringing criminal actions to "support our objective of achieving clean and orderly markets through credible deterrence", and also that FSA (2008a) staffing with criminal expertise was increased by 150 per cent.

5. A future with more criminal enforcement (whether this is with "more Europe" or "less Europe")

The EU proposals relating to market abuse from 2011, as amended in 2012, have a clear rationale in strengthening harmonisation of capital markets law across Member States, in this particular respect through the toughening of sanctions applicable to market abuse. In this regard, the initial publicity from the European Commission from 2011 stresses the importance of Europe-wide adaptation to a new "market reality", as well as the risk to the real economy from a market enforcement regime which is not sufficiently stringent in the light of such market realities. From this, and certainly from the 2012 amendments arising from Libor manipulation, the rootings of the new approaches in the financial crisis are much in evidence. This is entirely consistent with Tomasic's suggestion that the crisis is likely to represent a turning point in the pursuit of financial crime.

This general hypothesis of the crisis as a turning point for heightened focus on enforcement of financial crime can be found elsewhere in the UK. It can be seen for example manifested in the determination of new SFO Director Green (2012) QC to ensure that his organisation operates at the "top of its game" and is recognised as the UK's leading prosecutor for serious economic crime. It is also likely that the market abuse-fighting activities of the FSA were never an intended target of the Law Commission's (2010, para. 1.1) work on promoting the "introduction of rationality and principle into the structure of the criminal law, especially when it is employed against business enterprises" embodied in its Consultation Paper on *Criminal Liability in Criminal Contexts*. This instruction given to the Law Commission in 2009 was itself a reflection of concern that criminal law has been too quickly resorted to by parliament and regulators, leading to the inappropriate criminalisation of conduct (Law Commission, 2010, the general import of para. A7). The Consultation Paper recommended retreat away from the use of criminal enforcement of "relatively minor regulatory breaches" by government departments (Law Commission, 2010, para. D.15), and following a period of consultation, key recommendations were implemented in *Criminal Offences Gateway Guidance* published by Ministry of Justice (2011).

The FSA's enforcement activities were referenced by Law Commission (2010, para. A.39) Consultation Paper in order to highlight generally the benefits of greater use of administrative sanctions. It was noted that such an approach would allow "criminal prosecutions and court time to be reserved for the most serious offences". This reflected the philosophical position that:

[...] criminal law should be employed only when engagement in the prohibited conduct in question warrants official censure, because it involves a harm-related moral failing, not just a breach of a rule or simple departure from a standard (Law Commission, 2010, para. 4.6).

This informed the central recommendation that the legitimate creation of criminal offences to support a regulatory strategy should be underpinned by the longstanding argument that "criminal offences should be created to deter and punish only serious forms of wrongdoing". The Law Commission (2010, para. 1.14) illuminated "serious wrongdoing" as that which "involves principally deliberate, knowing, reckless or dishonest wrongdoing".

The Consultation Paper did consider the FSA's administrative regime, including that relating to market abuse, in its discussion of the advantages and disadvantages associated with non-criminal enforcement pathways, and what is required to make such effective (Law Commission, 2010, paras A20-A30). But there is no indication of criticism for the FSA's pursuit of criminal enforcement alongside this, or in the light of research suggesting that "it is not optimal to rely on criminal conviction as being the principal [...] route for the enforcement of regulatory provisions"; and indeed it was maintained that "[...] criminal law can have a valuable role to play in a regulatory regime" (Law Commission, 2010, para. A22). However, there was no allusion to Law Commission awareness that, as recently confirmed by the FSA's Head of Wholesale Enforcement Jamie Syminton, there had been a fall in the number of civil actions for market abuse brought since 2010, with this being causally connected to an increase in the Authority's pursuit of the "criminal route" (Syminton, 2012). There will be FCA pursuits – such as reporting requirements and compliance monitoring, etc. – which could be deemed to amount to breaches "of a rule or simple departure from a standard" (Law Commission, 2010, para. 4.6) rather than to "serious wrongdoing", and where the FCA may in due course be steered towards particular modes of enforcement rather than others, but this is unlikely to transpire for its market abuse enforcement regime.

The Consultation Paper did also reference FSA enforcement of market abuse to make a distinct point about how so-called "administrative regimes" might interface with criminal regimes and attendant liability. Concern about this can be seen in its remark that no "purportedly civil penalty or administrative regime is ever completely safe from classification in Strasbourg as a criminal offence" (Law Commission, 2010, para. 3.31). It was thus "unclear whether an insider dealing case dealt with through market abuse proceedings [...] would be validly treated as a civil case", and this could be very:

> [...] damaging for a regime which seeks to treat all financial penalty regimes as part of a single "administrative offence" regime, because the integrity of the entire system may be cast into doubt by the striking down of any one set of penalties within its ambit (Law Commission, 2010, para. 3.31).

This latter point is a very interesting one, and one which will no doubt occupy those interested in "overlap issues" arising in enforcement. These arise where regimes for civil and criminal enforcement are not "hermetically sealed"[19] from one another, for example, where regulators are saddled with the practical implications of civil processes and criminal proceedings subsisting in "sufficiently close" proximity for Article 6 considerations to arise, as considered in Strasbourg jurisprudence such as *Engel v. The Netherlands (No 1)*[20] and *Ringvold v. Norway*[21], and in the context of asset recovery in the Supreme Court decision in *Gale & another v. SOCA*[22]. Such concerns are beyond the scope of this article, and equally it is not necessary to dwell here on what the Law Commission (2010, para. 4.22) might make of the regulator's determination to increase criminal enforcement, given ongoing concerns about whether:

> [...] the nature and degree of unacceptable risk posed by conduct together point towards a need for the deterrent and retributive effect of a criminal sanction, as opposed to a civil penalty.

Trajectory and timeline: embedding "credible deterrence" pursued through criminal enforcement in UK regulatory culture

For present purposes there is no doubt that the FCA intends to continue the FSA's approach in this regard, and also that this course of action has received important endorsement in the current EU proposals for strengthening criminal enforcement. And in appreciating the significance of FSA pursuit of criminal enforcement in the pursuit of "credible deterrence" it is the case that this predates the EU "about face" by some considerable time. This FSA (2008a) trajectory is documented formally in the Consultation Paper *Decision Procedure and Penalties Manual and Enforcement Guide Review 2008* and FSA Code of Market Conduct (MAR 1) (2012), as well as in the numerous FSA speeches discussed. Furthermore, several speeches from Margaret Cole's Enforcement Division show how FSA commitment to criminal enforcement predated even the financial crisis. Indeed, in the earliest days of the crisis Cole (2007a) remarked that although the FSA benefitted from a wide range of "rule making, investigative and enforcement powers" that in practice pursuing cases administratively through its specialist Tribunal had "[...] not proved significantly less onerous than seeking to prosecute" (Cole, 2007b). These speeches also alluded to the reduced deterrent value of non-criminal approaches some considerable time before the European Commission (2011b) reflected that "the sanctions currently available to regulators often lack a deterrent effect".

The FSA is very mindful of the complexities of conducting investigations and framing prosecutions around the resourcefulness of offenders to conceal their behaviour; the difficulties of "jury presentation"; and manageability as far as costs and court time are concerned, which it cites as factors informing its commitment to make full use of its regulatory as well as criminal powers (Cole, 2010). Indeed, in January 2013 the FSA was keen to publicise that its decision to fine Canadian based Swift Trade £8M had been upheld on appeal to the Upper Tribunal, which had described the firm's activity as "as serious a case of market abuse [...] that might be imagined" (FSA Press Notice, 2013). However, Cole (2010) pointed to Court of Appeal dismissal of Christopher McQuiod's appeal against sentence (following his conviction for insider dealing in 2009) as important endorsement of the superiority of criminal enforcement for "cheating" of this nature. And several current post holders are keen to stress that a number of successful criminal convictions were secured during 2011 and 2012 (FSA Press Notices, 2012a, b). For this analysis, it is very significant that Cole(2010)insisted that the Authority had established a "strong track record as a heavyweight criminal prosecutor". It is thus apparent that criminal enforcement was not only deeply embedded in FSA consciousness at that time, butthiscommitmenttoitsuseinpreferencetothecivilpathwaycanbetracedbackseveral years. This occurred during the heyday of the MAD 2003's penchant for non-criminal mechanisms, and was thus was firmly in place prior to the financial crisis.

In making these observations, this paper does not dissent from the view that the financial crisis will most likely be a turning point for the enforcement of financial crime. It agrees entirely with Tomasic in this regard, and concurs fully with him that, for the reasons identified by him enforcement of financial crime is likely to be more extensive and more systematic than at any time prior to this, and thereby likely to become less "haphazard". But it is stressed equally that FSA responses to market abuse show that the Authority was committed to a rather extended pursuit of financial crime using criminal enforcement prior to the financial crisis. This was a time where policy ideology – both domestic and beyond – was more ambivalent towards criminal enforcement, and political attitudes towards white collar crime although evident were less manifest. In one respect, the Fraud Act 2006 and a number of infrastructural developments supporting the "fight against fraud" (Kirk and Woodcock, 1996, p. 4) – such as the National Fraud Authority – date from this pre-crisis era, and testify to there being considerable political support for responding to socially injurious activities which lacked "the immediate moral outrage of a violent crime against a person" (Cole, 2007b)[23]. However, as Tomasic has noted correctly, this was also the time of high political preference for light-touch regulation and considerable cross-party support for ensuring the UK would be regarded as a "business friendly" financial centre on the world stage (Tomasic, 2011, p. 8)

6. Conclusion

In this context it is submitted that the FSA's pursuit of financial crime – as demonstrated through its pursuit of market abuse – throughout its existence has been determined and actually extensive. But its very specific remit, grounded in the proper functioning and integrity of the UK financial system, ensured it was never destined to become the UK's foremost prosecutor for serious economic crime. Beyond this, its activities have operated in a setting of external structural haphazardness, with this latter state of affairs arising from political pressures demanding effectiveness but also discouraging regulators from being "heavy [handed] and intrusive". Tomasic also correctly alludes to the long-standing political and wider societal "ambivalence" concerning the harmful nature of white collar crime (Aubert, 1952, p. 266). Notwithstanding that the FSA has insisted (and specifically so in relation to responding to market abuse) that its risk-based approach to enforcement has always been "proportionate and sensible", and dismissed suggestion that its activities amounted to "light touch" regulation (Cole, 2007b), such factors have informed the popular misconceptions of "under enforcement" behind Hector Sants' insistence that the FSA was not a "mainstream prosecutor" of financial fraud.

The Authority's awareness of the (mis)conceptions alluded to by its CEO is also evident from its pronouncements of its "achievements" relating to financial crime, ubiquitously through its speeches throughout its life. This also comes through strongly from the FSA's emphasis on the significance of media as an educative tool for heightening perceptions of financial crime, when it also frequently references media perceptions of its inaction in this regard (Sants', 2009; Cole's, 2010). That popular misconceptions about financial crimes themselves and their enforcement clearly concern regulators greatly is evident from McDermott's (2012a) remark that that within the broad sweep of financial crime, tackling market abuse "is not just about money – it is about the impact that crime has on the lives of ordinary people [...]", and from Syminton's (2012) insistence that the financial crisis had been responsible for publicising widely that "standards of conduct and behaviour in the world of financial services can affect all of us" in his presentation on financial market abuse.

The EU is currently taking up the mantle of strengthening the market abuse regime, and the FCA has repeatedly voiced its commitment to continuing the hard-line enforcement approach of the FSA. This is at the same time as signalling important new directions in its organisational culture. The FCA has set out its stall for being more “forward looking, and judgement led [...] more proactive, more direct, and be more prepared to intervene and intervene earlier” (Syminton, 2012), in its pursuit as a conduct regulator “focused on improving behaviour and raising standards to protect the integrity of markets [...] and to ensure consumers get a fair deal” (McDermott, 2012a). It will be interesting to see how this perceived culture change for the FCA is analysed as the new body beds into its challenging role. More immediately, as it starts to work through the implications of fighting all financial crime within its remit post-crisis, and not only market abuse, the experiences of its predecessor suggest this new body will also actively be fighting criticism for allowing too many occurrences of unlawful conduct to remain unprosecuted, and even undiscovered (Barnes, 2011, p. 189). If the FCA continues to seek to develop a robust and transparent, as opposed to haphazard, approach to enforcing breaches of the market abuse regime, surely it should receive our considerable support.

Notes

1. The determination of regulators to ensure this, and also acknowledgment of scepticism relating to it can be seen in Haldane’s (2012) speech delivered at Friends’ House, London, 26 October.
2. And indeed G-SIFIs – or globally active, systemically important, financial institutions: see Financial Stability Board (2011).
3. This includes the very highly profiled Libor fixing scandal which broke in June 2012, and is discussed at various points herein.
4. See also King’s (2012), “BBC Radio 4 Today Programme Lecture”.
5. See Sants’ (2012) speech at the British Bankers’ Association briefing. The FCA and Prudential Regulation Authority (PRA) are set to come into being in early 2013.
6. The PRA will be part of the Bank of England and have the general objective of promoting the safety and soundness of regulated firms: see Bank of England “Preparing for the PRA”, 27 January 2012.
7. As documented in a number of recent speeches from key FSA/FCA personnel such as head of Enforcement and Financial Crime Tracey McDermott and FCA Chief Executive Designate Martin Wheatley.
8. Indeed, on 24 January 2013, in the context of an ongoing test case in the English Commercial Court brought by private parties against Barclays Bank, the High Court refused a request from the US Department of Justice to retain anonymity for executives under investigation in the USA, so as not to prejudice these criminal investigations.
9. This is alluded to throughout the text’s discussion on the importance of enforcement, and also the issues which should determine the particular character of enforcement.
10. See also the press release (FSA Corporate Documents, 2012) accompanying the publication of the 2012-2013 Business Plan which identifies “delivering market confidence and credible deterrence” as one of the Authority’s key focal points for its last year of business in its current form, prior to being split into the FCA and PRA during 2013.
11. See FSA documentation relating to the impact of the legislation upon the Authority’s regulatory objectives.
12. See also “FSA proposes bigger fines to achieve credible deterrence”, 6 July 2009, especially remarks from Margaret Cole. This announcement references the proposed new framework applying to individuals and firms in “market abuse and non-market abuse cases”, with examples of the latter drawn from misconduct in the sales of financial products to consumers.
13. As discussed briefly in the main text, heightening concern about mortgage fraud and PPI mis-selling, and also the passage of the Bribery Act 2010 have more recently informed the scope of the FSA’s interest in financial crime enforcement.
14. The new offences are located in ss. 89-91. S. 89 creates a criminal offence relating to misleading statements which largely restates the effect of section 397(2) of FSMA 2000, whilst criminal liability under s. 90 relates to any act or course of conduct creating a false or misleading impression as to market price or value, replicating the 397(3) FSMA offence and also extending it through criminalising knowledge or recklessness as

to whether a gain could be made or loss avoided through the false or misleading impression created. There is also a new offence relating to false or misleading impression relating to "benchmarks" under s. 91, which is considered further briefly in the main text.
15. In the *Report from the Select Committee on the Companies Acts, 1862 and 1867*, PP 1877 VIII 419 (House of Commons of Great Britain, 1877, para. 2174).
16. For this particular substantive development (European Commission, 2011d, para. 3.4.1.4).
17. See also responses from a number of key post-holders including Lord Turner to the question asked by Oliver Lodge during the FSA's Annual Public Meeting 2011.
18. See the Written Ministerial Statement on *The Wheatley Review of LIBOR* (Wheatley, 2012b) from Financial Secretary to the Treasury Greg Clark MP, 17 October 2012.
19. *Gale & another v. Serious Organised Crime Agency* [2011] UKSC 49; per Lord Dyson, at para. 121.
20. (1976) 1 EHRR 647.
21. Case 34964/97 (2003) ECHR 77.
22. See also the reflections on *Gale* in *SOCA v. Hymans & Ors* [2011] EWHC 3332 (QB) [2012] LLR FC (3), 199 (Wilson, 2012).
23. Whilst insider dealing provides a specific focus for some speeches, all stress the serious nature of all types of market abuse as a rationale for strong criminal enforcement.

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