

The lack of senior individuals sanctioned in the wake of the 2008 financial crisis and the Libor-rigging scandal showcased the severe inability of the regulators to hold senior managers to account. Although a handful of junior traders were penalized for altering Libor rates, the Upper Tribunal noted that these actions were ‘against a background of widespread manipulation of Libor...for which senior managers bear ultimate responsibility’.¹ As such, *The Independent*’s comment in 2018 that ‘banking sometimes looks like the mafia, in which those at the top are untouchables while the soldiers beneath them are thrown to the wolves’, highlighted that ten years after the financial crash, senior managers still slipped through the regulatory cracks.²

However, with the extension of the Senior Managers and Certification Regime (SMCR) to virtually all firms regulated by the UK Financial Conduct Authority (FCA) from December 2019, it looks like this is changing. The SMCR aims to strengthen the ability of regulators to hold the individual, not just the firm, to account with its wider goal the complete transformation of culture in financial services.

The SMCR fits an international regulatory trend that senior individuals should take responsibility for leading their firms. The recent rise in the number of UK cases holding senior managers to account suggests that the SMCR does provide the opportunity for a more effective framework.

¹ *Arif Hussein v The Financial Conduct Authority* [2018] UKUT 0186 (TCC) [40]

² James Moore, ‘FCA must act in wake of judge’s criticism’ *The Independent* (London, 21 June 2018)

However, this increase has not necessarily translated to harsher financial penalties with some individuals still criticizing the FCA as a ‘supine, toothless regulator.’³

The SMCR Framework

The SMCR is comprised of three components: the Senior Managers Regime (SMR), the Certification Regime and the Conduct Rules. For senior managers, the SMR and Conduct Rules are most significant. The SMR effectively replaces the Approved Persons Regime (APR) and requires that every senior manager has a ‘statement of responsibilities’ outlining specific areas of the business for which they are personally accountable. The Conduct Rules set a minimum standard of conduct for employees within the firm with senior managers subject to four rules in addition to the core five.⁴

Is it fair for senior managers to be held accountable?

The aftermath of the financial crash and the Libor scandal highlighted a tension between the unitary board as a fundamental UK company law principle, and a desire for individuals to bear responsibility for their misconduct. The Parliamentary Commission on Banking Standards noted that: ‘One of the most dismal features of the banking industry...was the striking limitation...of

³ Caroline Binham, ‘UK financial watchdog opens record number of cases’ *Financial Times* (London, 12 August 2018)

⁴ Financial Conduct Authority, ‘Extending the Senior Managers & Certification Regime to FCA Firms’ (*Policy Statement*, PS18/14, July 2018)

personal responsibility and accountability of the leaders...for the widespread failings and abuses over which they presided'.⁵ Ignorance and collective decision-making were offered as an excuse.⁶

Collective decision-making has long been a central tenet of UK company law. As such, the heightened emphasis on individual accountability in the SMCR was met with fears that it would trigger the end of the unitary board and a shortage of non-executive directors who would shift overseas or to less regulated industries.⁷

Yet, the SMCR is in line with a wider global shift towards individual accountability with similar regimes recently coming into effect in Hong Kong and Australia.⁸ As such, it appears there is an international sense that leaders should be held responsible for leading.⁹ If the boundaries of roles and responsibilities are clearly drawn, it is fair to expect senior managers to act within them. Andrew Bailey, the CEO of the FCA, has said that the key principle of the SMCR is to establish 'appropriate responsibility for the governance of firms.'¹⁰ The former CEO of Virgin Money

⁵ Quoted in Financial Conduct Authority, 'Transforming Culture in Financial Services' (*Discussion Paper*, DP18/2, March 2018) 42

⁶ Graham Roberts, 'Senior Managers & Certification Regime (SMCR): What about the Financial Services Register?' (*Parmenion*, 18 January 2018) <<https://www.parmenion.co.uk/stay-informed/senior-managers-certification-regime-what-about-the-financial-services-register>> accessed 14 April 2019

⁷ Giles Peel, 'Why the unitary board must be preserved' (*Governance + Compliance*, 27 August 2018) <<https://www.icsa.org.uk/knowledge/governance-and-compliance/features/why-the-unitary-board-must-be-preserved>> accessed 13 April 2019; Owen Walker, 'Senior managers fear being left on the hook under new rules' *Financial Times* (London, 26 March 2018)

⁸ KPMG, 'Individual accountability: global regulatory developments in financial services' (July 2018) 13

⁹ FCA, 'Video: banking leaders' experiences of adopting the SM&CR' (2019) <<https://www.fca.org.uk/firms/senior-managers-certification-regime>> accessed 12 April 2019

¹⁰ Deloitte, 'Senior managers regime: individual accountability and reasonable steps' (2016)

equally noted that the regime is about transparency, not tripping firms up.¹¹ Indeed, if s.172 of the Companies Act 2006 outlines a duty for *each* director to ‘promote the success of the company for the benefit of its members as a whole’, it is clear that the SMCR’s emphasis on making individual directors accountable for their role in collective decision-making is entirely in line with the principles of company law.¹²

Will the SMCR enact an effective system of accountability?

The SMCR aims to rectify the shortcomings of the APR. The APR was criticized for serving only as a regulatory barrier to individuals which lacked any teeth once this barrier was passed.¹³ The APR required individuals to be approved by the Financial Services Authority (FSA) to perform a ‘controlled function’. Critics argued that this test was too narrow, failing to regulate enough individuals in the industry, and that its front-loaded approach meant that when misconduct occurred it was unclear where responsibility lay for the specific breaches.¹⁴

The duty to provide ‘statements of responsibilities’ under the SMR provides a clearer allocation of personal responsibility. The SMCR also outlines continuing duties through the Conduct Rules. For example, SC3 outlines that senior managers must take reasonable steps to oversee the

¹¹ FCA, ‘Video’ (n. 10)

¹² Companies Act 2006, s 172(1)

¹³ Ian Kinghorn, ‘Reversing the burden: preventing malfeasance in the financial services industry by presuming fault’ 43 (2017) *The Journal of Corporation Law* 181, 181-2

¹⁴ *Ibid*

discharge of delegated responsibilities effectively.¹⁵ Although there is some uncertainty over what constitutes ‘reasonable steps’, this lack of clarity may push senior managers to critically reflect on the way they conduct business to evaluate whether it is up to proper standards.

Whether this framework is truly effective, however, depends on its enforcement. Jes Staley, the Barclays CEO and the first person to be fined under the SMCR, was charged £640,000 for attempting to uncover the identity of a whistleblower.¹⁶ Staley was found to have failed to act with due skill, care and diligence, but had not failed to act with integrity.¹⁷ Although this case centred on Staley’s personal conduct as opposed to his role as a senior manager, for many it set the tone for the new regime. Erika Kelton, a whistleblowing lawyer, commented: ‘If conducting a witch hunt...to track down a whistleblower does not convincingly demonstrate a failure to “act with integrity” and a lack of “fitness and propriety” to be a CEO of a global banking institution, then the FCA and PRA must articulate what it would take to violate those standards. Without such an explanation, the Senior Managers Regime will be utterly worthless.’¹⁸ Similarly, Dino Bossi,

¹⁵ FCA, ‘Extending the Senior Managers’ (n. 4)

¹⁶ Caroline Binham, ‘Whistleblowing complaints to UK regulator rise 24%’ *Financial Times* (London, 3 March 2019)

¹⁷ Barclays plc, ‘FCA and PRA conclude investigations into Jes Staley and Barclays’ (20 April 2018) <https://www.home.barclays/content/dam/home-barclays/documents/investor-relations/IRNewsPresentations/2018News/20180420_FCA_and_PRA_conclude_investigations.pdf> accessed 10 April 2019

¹⁸ Erika Kelton, ‘U.K. decision about Jes Staley in Barclays whistleblowing case is a disaster’ (*Forbes*, 7 May 2018) <<https://www.forbes.com/sites/erikakelton/2018/05/07/uk-decision-about-jes-staley-in-barclays-whistleblower-case-is-a-disaster/#5a349a73394c>> accessed 14 April 2019

the former head of whistleblowing policy at Barclays, noted: ‘This could be an example of where the regulator has bitten but it only has gums.’¹⁹

What the case does demonstrate, however, is a willingness to target the senior management of large corporations and hold them to account - even if the regulators didn’t go as far in the Staley case as some individuals hoped.²⁰ In the more recent case against Mohammed Prodhan, the CEO of Sonali Bank (UK), the FCA imposed a £76,000 fine for his failure to take reasonable steps to prevent money laundering.²¹ This suggests that the SMCR provides a framework of accountability for senior managers that the regulators are prepared to enforce. Indeed, since 1 April 2018, the FCA have opened a record number of cases with an increased focus on individual accountability for governance and culture breaches.²²

Conclusion

In conclusion, the SMCR provides a far fairer and more effective system for holding senior managers to account than the APR. However, concerns remain that despite this increase in cases,

¹⁹ ‘UK regulators criticised for fine on Barclays chief’ *Financial Times* (London, 20 April 2018)

²⁰ Jamie Symington, ‘SMCR – Waking up to individual accountability’ (February 2019) *International Financial Law Review*

²¹ Financial Conduct Authority, ‘Decision Notice’ (16 May 2018) 1-2

²² Binham, ‘UK financial watchdog’ (n. 3)

the fines aren't high enough, with financial penalties at a seven-year low, and the FCA's resources might not stretch far enough to enable cases to reach a timely outcome.²³

²³ *Ibid*