

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

Barclays

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

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

Barclays was also fined US\$200m by the US Commodity Futures Trading Commission and US\$160m by the United States Department of Justice.

UBS

On 19 December 2012, the FSA fined UBS £160m for breaching Principles 3 and 5 of the PFB. The FSA found that:

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

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

RBS

On 6 February 2013, the FSA fined RBS £87.5m for breaching Principles 3 and 5 of its PFB. The FSA particularly highlighted the fact that:

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

The US Commodities Futures Trading Commission fined RBS US\$325m.² RBS was also fined US\$150m by the US Department of Justice.

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

UBS and Adoboli

On 14 September 2011, UBS became aware that substantial unauthorised trades had been carried out on its Exchange Traded Funds desk. It subsequently transpired that one of the junior traders, Kweku Adoboli, had amassed losses of US\$2.3bn. Mr Adoboli had concealed the losses by using fictitious offsetting trades, which appeared to be profitable.

On 20 November 2012, Mr Adoboli was convicted of two counts of fraud by abuse of position and sentenced to 7 years imprisonment. Five days later, the FSA fined UBS £29.7m for breaching Principles 2 and 3 of the PFB. In particular, the FSA found that:

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

high levels of interest. The FSA found that between August 2007 and February 2009 Cattles had engaged in market abuse. The company's 2007 Annual Report stated that only £0.9bn of Welcome Financial Services' approximately £3bn loan book was in arrears. If accounting standards had been properly applied the correct figure would have been £1.5bn.

- the Commodity Exchange Act Making Findings and Imposing Remedial Sanctions, CFTC Docket No 13-09, 19 December 2012.
- ¹⁰ FINMA Press Release, 'LIBOR: FINMA Concludes Proceedings against UBS and Orders Disgorgement of CHF 19 December 2012. Available at: www.fina.ch/e/aktuell/Pages/mm-ubs-libor-20121219.aspx
- ¹¹ FSA Final Notice to RBS plc, 6 February 2013. Available at: www.fsa.gov.uk/static/public/final/rbs.pdf
- ¹² In the Matter of UBS AG and UBS Securities Japan Co Ltd, *supra* 9.
- ¹³ US District Court District of Connecticut, *US v RBS plc Deferred Prosecution Agreement*. Available at: www.justice.gov/criminal/vns/docs/2013/02/2013-02-rbs-dpa.pdf; US Department of Justice (Criminal Division), *Agreement in Re UBS AG*, *supra* 8.
- ¹⁴ FSA Final Notice to UBS AG, 25 November 2012. Available at: www.fsa.gov.uk/static/public/final/ubs-ag.pdf
- ¹⁵ FSA Final Notice to UBS AG, 5 August 2009. Available at: www.fsa.gov.uk/pubs/final/ubs_ag.pdf
- ¹⁶ FSA Final Notice to Cattles plc, 28 March 2012. Available at: www.fsa.gov.uk/static/public/final/cattles-ltd.pdf
- ¹⁷ See *Salomon v Salomon* [1907] AC 22.
- ¹⁸ *Tesco Supermarkets v Naffin* [1979] AC 153, para 169.
- ¹⁹ See Treasury Report, *Fixing LIBOR: Some Preliminary Findings*. Available at: www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news/fsas-response-to-its-libor-report/
- ²⁰ *R v Rollin* [2009] EWCA Crim 1941.
- ²¹ FSA Annual Report 2011/12, 73. Available at: www.fsa.gov.uk/pubs/annual/ar11-12/ar11-12.pdf
- ²² *Ibid* 85, table 7.3.
- ²³ C Binham and E Hammond, 'Judge Calls for More Funding for the SFO', *Financial Times*, 24 May 2012. Available at: www.ft.com/cms/s/0/0512178e-a597-11e1-a77b-00144feabdc0.html#axzz2NLz2PnxE
- ²⁴ C Binham, 'SFO Strikes Funding Deal with Treasury', *Financial Times*, 18 January 2013. Available at: www.ft.com/cms/s/0/4cdede9e-6194-11e2-9545-00144feab49a.html#axzz2Qo8s9ZGq
- ²⁵ Recommendation No R (88) 18 of the Committee of Ministers to Member States concerning liability of enterprises having legal personality for offences committed in the exercise of their activities, adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers' Deputies, [https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetFwwhtml#a21Tf5rmittedD2204&Usa1ode\(ws/fsas-r\)20\(e\(acJ](https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetFwwhtml#a21Tf5rmittedD2204&Usa1ode(ws/fsas-r)20(e(acJ)