International aspects of enforcement of financial law

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- The financial crisis and its causes
- Preventing the next crisis
- Sanctioning past behaviour
- Future enforcement trends
- Fundamental questions
The financial crisis (2009)
The financial crisis and its causes

• What caused the financial crisis?

• Causes on different levels
  - “Wall Street” | the financial world
  - “Main Street” | overleveraged individuals
  - Government | legislature, regulators

• Causes of different nature
  - Systemic factors (such as an ample supply of cheap finance)
  - Deregulation
  - Risk analysis, risk appetite
  - Behaviour, culture and conflict of interest
The financial crisis and its causes

- The Financial Crisis Inquiry Commission (2011) concluded:

  - the financial crisis was (...) caused by "widespread failures in financial regulation and supervision," "dramatic failures of corporate governance and risk management (...)“, "a combination of excessive borrowing, risky investments, and lack of transparency" by financial institutions, ill preparation and inconsistent action by government that "added to the uncertainty and panic," a "systemic breakdown in accountability and ethics," "collapsing mortgage-lending standards and the mortgage securitization pipeline," deregulation of over-the-counter derivatives, especially credit default swaps, and "the failures of credit rating agencies" to correctly price risk.
The financial crisis and its causes

• In other words,
  - many different causes,
  - different in nature,
  - many different parties.
Preventing the next crisis

• “Hard” changes
  - Systemic measures (too big to fail)
  - Capital requirements
  - Legal infrastructure
  - Supervision of hedge funds, rating agencies
  - Etc.
Preventing the next crisis

- “Soft” changes
  - Culture
  - Behaviour
  - Compliance
  - Risk
  - Integrity

- Press release AFM (22 April 2014)
  - Honesty and integrity the biggest challenges for the financial sector.
Sanctioning past behaviour

Why Isn't Wall Street in Jail?

Financial crooks brought down the world's economy — but the feds are doing more to protect them than to prosecute them


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Sanctioning past behaviour

• Michael Lewis: Authorities' Response To The Financial Crisis 'Bizarre'

• The judicial response to the financial crisis, especially the criminal and legal response, has been bizarre. Insider trading, theft of property from a corporation, these are easier for them to take on and wrap their minds around than what was actually the center of the financial crisis.”
## Sanctioning past behaviour

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
<th>Offence</th>
<th>Regulator</th>
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<tbody>
<tr>
<td>2012 HSBC</td>
<td>1,920</td>
<td>Money Laundering</td>
<td>DOJ</td>
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<td>2012 UBS</td>
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<td>Libor</td>
<td>FSA/DOJ</td>
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<td>2013 JP Morgan</td>
<td>1,020</td>
<td>Whale trading scandal</td>
<td>SEC/FCA et all</td>
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<td>Libor</td>
<td>FCA/CFTC</td>
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<td>2012 StanChart</td>
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<td>Sanctions</td>
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<td>2013 RBS</td>
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<td>2010 Goldman</td>
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<td>2009 C.Suisse</td>
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<td>Sanctions</td>
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Millions of US$; Reuters October 29, 2013

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**April 2014**

**International aspects of enforcement of financial law**
Sanctioning past behaviour

• Popular & political view remains
  - “They got away with it.”
  - “Penalties are a drop in the bucket.”
  - “They are not to be trusted.”
  - Etc.

• This fundamental distrust fuels current public debate and enforcement trends.
Enforcement trends

• (1) U.S. approach by European regulators
  - Higher fines imposed
  - (Relatively) High amounts for settlements (i.e. in the Libor cases)
  - Introduction of Deferred Prosecution Agreements in the UK
Enforcement trends

• (2) Focus on culture and individual behaviour
  
  - Emails in Libor cases
  - London Whale (JP Morgan)

11/15/2013 JPMorgan employee Javier Martin-Artajo (C), indicted by a U.S. grand jury in relation to the bank’s “London Whale” trading scandal, leaves Spain’s High Court in Madrid November 15, 2013. Martin-Artajo said he did not want to be extradited to the United States, a court source told Reuters. Spaniard Martin-Artajo, who handed himself in to Madrid police at the end of August after U.S. authorities issued a warrant for his arrest, had to formally declare whether he would agree to be extradited to face charges or not. REUTERS/Sergio Perez (SPAIN - Tags: CRIME LAW BUSINESS)
Enforcement trends

• (3) Greater legislative use of punitive measures

  - Parliamentary Commission on Banking Standards (2013)
    • Bankers deemed to be reckless could go to jail if their banks go bust and need state aid.

  - New EU market abuse regime
    • Obligation for member states to impose criminal sanctions (14 April 2014)
      - Vice-President Viviane Reding, the EU’s Justice Commissioner, and Internal Market and Services Commissioner Michel Barnier said: “The adoption sends a strong zero tolerance warning to those engaging in insider dealing and market manipulation. It demonstrates Europe’s commitment to protect the integrity of its financial markets and deter criminals who want to make money by deliberately manipulating information. Administrative authorities will now have greater powers to investigate market abuse and to impose fines of up to millions of euro, while those found guilty of market abuse will be deterred by the prospect of facing jail across the Union. We now need to pass from laws to action: Member States should swiftly implement these new rules so criminals have no place to hide in Europe.”
Fundamental questions for enforcement

• Systems, structures, procedures, internal controls
  - are important
  - and also (in most cases) clear

• Behaviour and culture are grey areas from a legal enforcement standpoint
  - Risk is good, but how much risk is reckless?
  - Profit is good, but banks also have a social function.
  - Reckless behaviour should be avoided, but when is it a crime?
  - Etc, etc.

• At some point we have to attempt to answer these hard but fundamental questions
Questions