



## Review of the senior managers & certification regime

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### ARTICLE INFO

#### Keywords:

Senior managers and certification regime  
SM&CR  
Financial conduct authority  
HM Treasury  
Financial crime

### ABSTRACT

Following the 2022 Edinburgh Reforms, in which the Chancellor of the Exchequer announced a set of reforms designed to drive growth and competitiveness in the financial services sector, both HM Treasury and the Financial Conduct Authority (FCA) with the Prudential Regulation Authority initiated consultations to review the Senior Manager and Certification Regime (SM&CR). The aim of the review was to understand stakeholders' views on how well the SM&CR is functioning and to identify ways to improve the regime to help it work better for firms and regulators. The SM&CR is seen as an essential tool to strengthen the financial services market by ensuring that financial services professionals are individually accountable to their employers and to the regulators. This article examines how the SM&CR has been operating to date and critically analyses whether it is achieving its original aims. The impact of the SM&CR on the international competitiveness of the UK financial services sector is considered, with comparisons drawn with the United States. Ultimately, this article recommends a greater use by the FCA of its enforcement powers to sanction senior managers, to ensure the international competitiveness of the UK financial services sector and to deter financial crime.

### 1. Introduction

This article examines the way in which the Senior Managers and Certification Regime (SM&CR) has been operating since its introduction in 2016. The aims of the SM&CR will be examined, and an analysis carried out of the extent to which the regime has delivered against those aims. The article will move on to consider how the SM&CR fits into the government's avowed aim of increasing the competitiveness of the United Kingdom (UK) post-Brexit. This review of the SM&CR takes place against the backdrop of the Government's recent Call for Evidence, made by HM Treasury, in relation to the SM&CR, which it has stated is to deliver on its commitment to review the performance, effectiveness and scope of the regime expressed in the Edinburgh Reforms.<sup>1</sup> The Edinburgh Reforms set out the reforms the government has proposed in relation to the financial services sector, with the aim of driving growth and competitiveness in the sector to make the UK an

innovative and competitive financial services centre.<sup>2</sup> At the same time, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have also launched a joint discussion paper and consultation on the SM&CR.<sup>3</sup> The aim of the HM Treasury's call for evidence and the FCA and PRA's consultation on the SM&CR was to understand stakeholders' views on how well the SM&CR is functioning and to identify ways to improve the regime to help it work better for firms and regulators.<sup>4</sup> The SM&CR is seen as playing an essential role in strengthening the financial services market by ensuring that financial services professionals are individually accountable to their employers and to the regulators.<sup>5</sup> It is therefore timely and important to consider how well the SM&CR is delivering against its original aims and also whether the regime is helping or hindering the UK in its aim to be a competitive financial services industry. The conclusion will consider whether the regime should be retained, amended or used more effectively. Ultimately, the article recommends a greater use by the FCA of

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<sup>1</sup> HM Treasury, 'Financial Services: The Edinburgh Reforms' (9 December 2022) < <https://www.gov.uk/government/collections/financial-services-the-edinburgh-reforms> > accessed 5 June 2023.

<sup>2</sup> Ibid.

<sup>3</sup> Bank of England, 'DP1/23 – Review of the Senior Managers and Certification Regime (SM&CR)' (30 March 2023) < <https://www.bankofengland.co.uk/prudential-regulation/publication/2023/march/review-of-the-senior-managers-and-certification-regime> > accessed 5 June 2023.

<sup>4</sup> Ibid, 1.1.

<sup>5</sup> Ibid, 1.3, 1.4.

its enforcement powers to sanction senior managers, to ensure the international competitiveness of the UK financial services sector and to deter financial crime.

## 2. Background to the SM&CR

The introduction of the SM&CR in 2016 presented an ideal opportunity to address the problems associated with the conduct of senior managers of authorised institutions. Previous legislative, regulatory, civil and criminal law efforts to address misconduct by senior company officials have proven to be inadequate.<sup>6</sup> In particular, the common law ‘identification doctrine’ has made it almost impossible for prosecutors to secure successful prosecutions against larger companies.<sup>7</sup> This is due to the necessity for prosecutors to prove that a natural person, usually taken to mean a director, representing a corporation’s ‘directing mind and will’ possessed the necessary intent to commit the offence.<sup>8</sup> For large corporations with complex management structures, such as banks, this has proved particularly problematic in the attribution of liability to a company.<sup>9</sup> The SM&CR presented a way of addressing some of the shortcomings of the identification doctrine by making senior managers responsible for their actions. The SM&CR has two objectives: to encourage all staff within the financial services sector to take responsibility for their actions and to ensure authorised firms and employees can clearly illustrate where the responsibility lies.<sup>10</sup> Therefore, the SM&CR aims to encourage a culture of staff at all levels taking personal responsibility for their actions.<sup>11</sup> This makes the issue of identification much easier as responsibilities of senior managers will be clearly set out and, should something in their area of responsibility go wrong, they can be personally held accountable. For the SM&CR, firms must provide documentation to the FCA to show responsibilities of senior managers and their suitability for their jobs.<sup>12</sup> The certification regime is for those that are not senior managers but ‘whose role means it’s possible for them to cause significant harm to the firm or customers’.<sup>13</sup> A firm should not permit an employee to carry out certain functions unless it has issued them with a certificate to say that they are fit and proper for the specific function. The introduction of the SM&CR was heavily influenced by the recommendations of the Parliamentary Commission on Banking Standards (PCBS) that had been asked to investigate how standards could be improved following the

<sup>6</sup> See for example, N Ryder, *Financial Crisis and White Collar Crime: The Perfect Storm?* (Edward Elgar, 2014); E Herlin-Karnell, N Ryder, *Market Manipulation and Insider Trading – Regulatory Challenges in the United States of America, the European Union and the United Kingdom* (Hart, 2019); Law Commission, ‘Corporate Criminal Liability: An Options Paper’ (10 June 2022) < [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper\\_LC.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf) > accessed 5 June 2023.

<sup>7</sup> Law Commission, ‘Corporate Criminal Liability: An Options Paper’ (10 June 2022) < [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper\\_LC.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf) > para 3.91 accessed 8 September 2023.

<sup>8</sup> *Tesco Supermarket Limited v Natrass* [1972] AC 153 (HL).

<sup>9</sup> Law Commission, ‘Corporate Criminal Liability: An Options Paper’ (10 June 2022) < [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper\\_LC.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf) > para 3.79 accessed 8 September 2023.

<sup>10</sup> Financial Conduct Authority, ‘Senior Managers and Certification Regime’ (7 July 2015) < <https://www.fca.org.uk/firms/senior-managers-certification-regime> > accessed 5 June 2023.

<sup>11</sup> Financial Conduct Authority, ‘FCA Outlines Proposals to Extend the Senior Managers and Certification Regime to all Financial Services Firms’ (Press Release, July 2017) < <https://www.fca.org.uk/news/press-releases/fca-outlines-proposals-extend-senior-managers-certification-regime-all-firms> > accessed 5 June 2023.

<sup>12</sup> Financial Services (Banking Reform) Act 2013, Part 4, s.29.

<sup>13</sup> O Jackson, ‘Primer: The Senior Managers Certification Regime’ [2018] *International Financial Review* 1.

market manipulation scandals of LIBOR and FOREX.<sup>14</sup> The SM&CR provides that a corporation’s senior management is responsible for the policies, systems and controls that are designed to reduce the threat posed by financial crime. Therefore, the SM&CR places the obligation of the regulated corporations to limit the risk posed by financial crime on its senior management. The FCA stated that a proposed extension of the SM&CR in 2017 was “key to driving forward culture change in firms (.) this is about individuals not just institutions (.) the regime will also ensure that senior managers are accountable both for their own actions, and for the actions of staff in business areas they lead”.<sup>15</sup>

With the extension of the SM&CR in 2017 the FCA was attempting to improve the culture within firms and is clearly placing the burden on senior managers to limit the risk posed by financial crime. Such efforts are to be welcomed, yet the extension to make senior managers accountable for a firm’s financial crime obligations is far from innovative and the 2017 extension of the SM&CR merely duplicated the existing obligations under the FCA.<sup>16</sup> Nonetheless, financial crime related breaches of the SM&CR by senior managers would enable the FCA, and potentially prosecutors, to identify a corporation’s senior management who could meet requirements of the identification doctrine.<sup>17</sup> This form of combined financial regulatory and criminal law response to financial crime breaches by corporations can be classified as a ‘hybrid’ approach and it was designed to go some way to resolving the problems associated with the identification doctrine.<sup>18</sup> This article argues that the SM&CR, if used effectively, is an essential step in the UK’s efforts to tackle financial crime.

## 3. Is the SM&CR delivering against its original aims?

As stated in 1.2 above, the aim of the SM&CR is to ensure that those in senior positions take responsibility and are accountable for their conduct, actions and competence. For non-compliance with the SM&CR, the FCA will take enforcement action against senior managers that is effective and proportionate. However, whilst the FCA has issued financial penalties on individuals since the SM&CR’s introduction, the overall effectiveness and deterrence of the regime has been questioned. For example, a Freedom of Information request revealed that since the inception of the SM&CR there have been only 34 investigations with one successful enforcement action.<sup>19</sup> In 2018 the FCA and the PRA each imposed a £ 458,000 financial penalty on Staley, CEO of Barclays Bank, which was combined to a total of £ 642,430 after a 30% discount for early settlement. This followed Staley’s two attempts in 2016 to uncover the identity of an anonymous whistle-blower who had raised concerns regarding his hiring strategy.<sup>20</sup> The regulators found Staley had not declared his conflict of interest in the allegations, nor had he sufficiently let compliance take control of the matter.<sup>21</sup> By attempting

<sup>14</sup> Parliamentary Commission on Banking Standards, *Changing Banking for Good* (HL 2013–14, 27-II).

<sup>15</sup> Financial Conduct Authority, n 6 above.

<sup>16</sup> Financial Conduct Authority, ‘FCA Handbook’ (6 June 2023) < <https://www.handbook.fca.org.uk/> > accessed 6 June 2023, SYSC 6.3.8.

<sup>17</sup> *Tesco Supermarket Limited v Natrass* [1972] AC 153 (HL). See Law Commission *Corporate Criminal Liability in Regulatory Contexts* (Law Com. No. 195, 2010) para. 5.34.

<sup>18</sup> *Ibid.*

<sup>19</sup> Bovill, ‘Only 34 Investigations and One Enforcement Action after Four and a Half Years of SMCR’ (27 October 2020) < <https://www.bovill.com/only-34-investigations-and-one-enforcement-action-after-four-and-a-half-years-of-smcr/> > accessed 5 June 2023.

<sup>20</sup> Minter Ellison, ‘First Case Brought by the FCA and PRA under the SM&CR’ (Lexology, 18 May 2018) < <https://www.lexology.com/library/detail.aspx?g=88423b44-c1f8-4acf-94a9-7ec00c56ef0f> > accessed 5 June 2023.

<sup>21</sup> Financial Conduct Authority, ‘FCA and PRA Jointly Fine Mr James Staley, £642,430 and Announce Special Requirements Regarding Whistleblowing Systems and Controls at Barclays’ (2018) < <https://www.fca.org.uk/news/press-releases/fca-and-pra-jointly-fine-mr-james-staley-announce-special-requirements> > accessed 5 June 2023, 16.

to unmask a whistle-blower, Staley was found to have breached Individual Conduct Rule 2 (to act with due skill, care and diligence); however, he was not found to be in breach of Individual Conduct Rule 1 (to act with integrity) and had not lacked the fitness and propriety to continue in his role as CEO.<sup>22</sup> It is praiseworthy that a financial penalty was imposed upon Staley for his actions, but it must be acknowledged that the outcome in this instance seems insufficient considering the seriousness of Staley's actions and his position. Subsequently, Carlos Abarca was fined £ 116,600 for failing to comply with Senior Manager Conduct Rule 2, by neglecting to ensure that TSB adequately managed and supervised its outsourcing of its IT migration programme.<sup>23</sup> The financial penalty was reduced by 30% as part of a settlement discount and it was reduced to £ 81,620.<sup>24</sup> With a limited number of successful enforcement actions, whilst a step in the right direction to tackle corporate economic crime, a more proactive stance needs to be taken by the FCA to show the SM&CR can serve its purpose.

The FCA could draw insights from the approach to the enforcement of competition law adopted by the Competition and Markets Authority (CMA). As at 25 May 2023, the total number of director disqualifications secured by the CMA for illegal cartel behaviour was twenty-nine.<sup>25</sup> This total is from December 2016, when the CMA began actively using this power.<sup>26</sup> Under the Company Directors Disqualification Act 1986 (the CDDA), the CMA has the power to apply to the court to disqualify a director from holding company directorships, or performing certain roles in relation to a company for a specified period if a company of which he or she is a director has breached competition law. The CDDA also allows the CMA to accept a disqualification undertaking from a director, with the same legal effect as an order, instead of bringing proceedings.<sup>27</sup> This year alone, the CMA has disqualified four directors, demonstrating an impressive use of its powers, the outcome of which is likely to constitute a much stronger deterrent from committing crime than the FCA's limited enforcement action under the SM&CR.<sup>28</sup>

The FCA has extensive investigative and enforcement powers for breaches of the SM&CR including breaches of the Code of Conduct and breaches of The Fit and Proper Rules, set out in the FCA handbook.<sup>29</sup> The FCA has imposed financial penalties on authorised companies for financial crime related breaches as illustrated in the table below.<sup>30</sup>

Company	Year	Amount	Reason
Santander	8/12/2022	£ 107,793,300	Breaches of PRIN 3 related to the risk of financial crime.
BGC Brokers LP, GFI Securities Limited and GFI Brokers Limited	07/12/2022	£ 4775,200	Breaches of Principle 3 of the FCA's Principles for Businesses and Article 16(2) of the Market Abuse Regulation.
Gatehouse Bank plc	12/10/22	£ 1584,100	Breaches of the Money Laundering Regulations 2007.
Sigma Broking Limited	04/10/2022	£ 531,600	Breaches of SUP 17, SUP 15, PRIN 3 and Article 16 of MAR related to market abuse.
The TJM Partnership Limited	15/07/2022	£ 2038,700	Breaches of PRIN 2 and PRIN 3 related to the risk of financial crime.
Ghana International Bank Plc	23/06/2022	£ 5829,900	Breaches of the Money Laundering Regulations 2007.
JLT Specialty Limited	16/06/2022	£ 7881,700	Breaches of PRIN 3 related to anti-bribery and corruption and financial crime.
Barclays Bank plc	28/02/2022	£ 783,800	Breaches of PRIN 2 related to financial crime
HSBC Bank plc	17/12/2021	£ 63,946,800	Breaches of the Money Laundering Regulations 2007.
National Westminster Bank Plc	13/12/2021	£ 264,772,619.95	3 offences of failing to comply with the Money Laundering Regulations 2007.
Sunrise Brokers LLP	12/11/2021	£ 642,400	Breaches of PRIN 2 and PRIN 3 related to the risk of financial crime.
Credit Suisse International, Credit Suisse Securities (Europe) Ltd, and Credit Suisse AG	19/10/2021	£ 147,190,200	Breaches of Prin 2 and Prin 3 related to financial crime and anti-bribery and corruption failings.
Commerzbank AG	17/06/2020	£ 37,805,400	Breaches of PRIN 3 related to financial crime.
Standard Chartered Bank	09/04/2019	£ 102,163,200	Breaches of the Money Laundering Regulations 2007.
Canara Bank	06/06/2018	£ 896,100	Breaches of Principle 3 and SYSC related to financial crime.
Interactive Brokers (UK) Limited	25/01/2018	£ 1049,412	Breaches of PRIN 3 and SUP 15.10.2 R relating to poor market abuse controls and failure to report suspicious client transactions.
Tejoori Limited	14/12/2017	£ 70,000	Breaches of the Market Abuse Regulation.
Deutsche Bank AG	31/1/2017	£ 163,076,224	Breaches of PRIN 3 and SYSC related to culture/governance and financial crime.

<sup>22</sup> See Minster Ellison above, n 15.

<sup>23</sup> Bank of England, 'Final Notice' (13 April 2023) available from < <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/regulatory-action/final-notice-from-pra-to-former-tsb-bank-plc-cio.pdf> > accessed 5 June 2023.

<sup>24</sup> Ibid.

<sup>25</sup> Competition and Markets Authority, 'Demolition Company Director Disqualified for 7 years for Bid Rigging and Compensation Payments' (25 May 2023) < <https://www.gov.uk/government/news/demolition-company-director-disqualified-for-7-years-for-bid-rigging-and-compensation-payments#:~:text=Today's%20announcement%20brings%20the%20total,began%20actively%20using%20this%20power.> > accessed 5 June 2023.

<sup>26</sup> Ibid.

<sup>27</sup> Competition and Markets Authority, 'Supply of Construction Services: Director Disqualification' (23 May 2023) < <https://www.gov.uk/cma-cases/supply-of-construction-services-director-disqualification#:~:text=Under%20the%20Company%20Directors%20Disqualification,director%20has%20breached%20competition%20law.> > accessed 5 June 2023.

<sup>28</sup> Competition and Markets Authority, n 20 above.

<sup>29</sup> Financial Conduct Authority, n 11 above.

<sup>30</sup> All of these financial penalties can be accessed via the FCA fine tables. See, Financial Conduct Authority 'FCA Fines' (4 January 2023) < <https://www.fca.org.uk/news/news-stories/2022-fines> > accessed 6 June 2023.

Sonali Bank (UK) Limited	12/10/2016	£ 17,900	For breaches of APER 6 and PRIN 3 (knowingly concerned) related to financial crime and a lack of fitness/propriety in the retail bank sector.
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However, it is important to note that in none of these examples were any financial penalties imposed on any employee within the authorised firm. Nonetheless, the FCA has instigated a number of investigations into suspected breaches of the SM&CR against individuals.<sup>31</sup>

Cases Opened	2016	2017	2018	2019	2020	2021	2022	Total	Total Opened
Senior Manager	2	7	13	15	15	14	5	71	120
Non-SMF individuals	0	16	15	6	4	4	4	49	
Cases Closed	2016	2017	2018	2019	2020	2021	2022	Total	Total Closed
Senior Manager	0	0	5	2	11	3	3	24	57
Non-SMF individuals	0	0	5	9	14	5	0	33	

However, despite a high level of investigation by the FCA, there has been a steady decline in the number of fines imposed on individuals.<sup>32</sup>

Year	Number of Fines
2022/2023	0
2021/2022	3
2020/2021	2
2019/2020	3
2018/2019	8
2017/2018	10
2016/2017	9
2015/2016	17
2014/2015	20
2013/2014	28

The lack of enforcement action taken under the SM&CR is disappointing, as this will prevent the SM&CR from achieving its objective of encouraging financial services staff to take responsibility for their actions, and deter individuals from engaging in financial misconduct. It appears that the FCA continues to move away from its credible deterrence strategy, which had favoured imposing financial penalties on firms and individuals.<sup>33</sup> In May 2010, the FSA imposed a financial penalty on Alpari (UK) Ltd (£140,000) for failing to have in place adequate AML systems and controls. Additionally, the FSA imposed a financial penalty of £ 14,000 on its former MLRO, Sudipto Chattopadhyay, who had failed to broaden the firms AML compliance levels after its customers increased from 400 to over 11,000.<sup>34</sup> Another

example is the case involving Habib Bank AG Zurich. The FSA fined the company £ 525,000 and its MLRO, Syed Itrat Hussain £ 17,500 for a ‘failure to take reasonable care to establish and maintain adequate anti-money laundering systems and controls’.<sup>35</sup>

It is widely recognised that deterrence requires certainty (a strong prospect of enforcement action), celerity (a rapid enforcement response), and severity (a significant penalty attached to noncompliance).<sup>36</sup> At present, the lack of enforcement action means that there is little certainty or celerity in the SM&CR regime, and the reliance on financial penalties ensures a lack of severity in the punishments imposed, inhibiting deterrence and thus leaving individuals more likely to engage in misconduct. Indeed, in other areas of financial crime regulation, criminal penalties have been found to have a more significant impact on offenders than civil

penalties,<sup>37</sup> and provide increased perceptions of social justice among the wider public as a whole.<sup>38</sup> Moreover, severe sanctions are especially necessary to deter noncompliance where investigation is difficult or costly,<sup>39</sup> as in the financial services sector. Accordingly, higher levels of enforcement action are necessary to ensure that the SM&CR effectively delivers against its core objectives, including making it easier to hold individuals to account, and improving governance, behaviour and culture within firms.

#### 4. Are the core objectives of the SM&CR still relevant for the UK?

The previous discussion demonstrates that the objectives of the SM&CR were created in response to egregious financial scandals and are appropriate for the UK. However, while these objectives are appropriate, they will not be achieved without greater enforcement action by the FCA and PRA. In order to address this weakness, it is recommended that the former statutory objective of the FCA to reduce financial crime should be reintroduced. FSMA 2000 represents a bold and innovative attempt by the government to tackle financial crime. Under Section 6, the FSA had a statutory duty to reduce financial crime by ensuring that authorised institutions have appropriate systems and practices in place to protect themselves against financial crime.<sup>40</sup>

<sup>35</sup> Financial Services Authority, ‘FSA Fines Habib Bank AG Zurich £ 525,000 and Money Laundering Reporting Officer £ 17,500 for Anti-Money Laundering Control Failings’ (15 May 2012) < <http://www.fsa.gov.uk/library/communication/pr/2012/055.shtml> > accessed 6 June 2023.

<sup>36</sup> B Johnson, ‘Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer’ (MN House Research, January 2019) < <https://www.house.mn.gov/hrd/pubs/deterrence.pdf> > accessed 5 June 2023, 4.

<sup>37</sup> JA Dubin, ‘Criminal Investigation Enforcement Activities and Taxpayer Noncompliance’ (2004) < <https://www.irs.gov/pub/irs-soi/04dubin.pdf> > accessed 5 June 2023, 21; National Audit Office, HM Revenue & Customs: Tackling the Tax Gap (HC 2019–21 372-1) 41.

<sup>38</sup> See M Levi, ‘Serious Tax Fraud and Noncompliance’ (2010) 9(3) Criminology and Public Policy 493, 508; P Leighton, ‘Fairness Matters—More than Deterrence’ (2010) 9 Criminology & Public Policy 525, 529.

<sup>39</sup> See L Lederman, ‘The Interplay Between Norms and Enforcement in Tax Compliance’ (2003) 64(6) Ohio State Law Journal 1453, 1465; Andreoni, B Erard, J Feinstein, ‘Tax Compliance’ (1998) 36 J Econ Lit 818, 823; J Skinner, J Slemrod, ‘An Economic Perspective on Tax Evasion’ (1985) 38 Nat’l Tax J 345, 350.

<sup>40</sup> For a more detailed discussion see N Ryder, ‘The Financial Services Authority, the Reduction of Financial Crime and the Money Launderer – A Game of Cat and Mouse’ (2008) 67(3) CLJ 635.

<sup>31</sup> Financial Conduct Authority ‘Information on Enforcement Investigations Opened against Individuals (SMR) - May 2022’ (11 May 2022) < <https://www.fca.org.uk/freedom-information/information-enforcement-investigations-opened-against-individuals-smr-may-2022> > accessed 30 May 2023.

<sup>32</sup> A full list of the financial penalties imposed on individuals can be accessed via the FCA Fine table. See Financial Conduct Authority above, n 25.

<sup>33</sup> Financial Services Authority, ‘Delivering Credible Deterrence’ (Speech by Margaret Cole, Director of Enforcement, FSA, Annual Financial Crime Conference, 27 April 2009) < <http://www.fsa.gov.uk/library/communication/speeches/2009/0427.mc.shtml> > accessed 6 June 2023.

<sup>34</sup> Financial Services Authority, ‘FSA Fines Alpari and its Former Money Laundering Reporting Officer, Sudipto Chattopadhyay for Anti-Money Laundering Failings’ (5 May 2010) < <http://www.fsa.gov.uk/pages/library/communication/pr/2010/077.shtml> > accessed 6 June 2023.

## 5. What impact does the SM&CR have on the UK's international competitiveness?

This section of the article will argue two points: firstly, that the international competitiveness of the UK's financial services sector is dependent on tight and visible regulation of financial services to demonstrate the integrity of the market and to prevent financial crime. Secondly, the insufficient amount of enforcement action taken by regulators using the SM&CR, highlighted in section 1.3 above, needs to be remedied, to demonstrate that the regime has teeth and to make senior managers believe that they will be at risk if they breach the rules. At present, as demonstrated by the declining number of fines imposed on individuals, shown in the third table in section 1.3 above, the SM&CR appears to lack any deterrent effect for individuals who engage in financial misconduct.

As mentioned in section 1.2 above, the SM&CR was set up following recommendations made by the PCBS,<sup>41</sup> which was established in the aftermath of the 2012 LIBOR scandal and in the context of the general political and regulatory response to the 2008–9 global financial crisis.<sup>42</sup> There was a clear need to significantly improve the regulation of the financial services industry following these two seismic global crises.<sup>43</sup>

The PCBS concluded that there was a significant gap in individual accountability among senior individuals in the banking sector and recommended wholesale reform of the then Approved Persons regime. These conclusions were based on the lack of successful prosecutions of individuals, including directors and other senior managers of banks, following their involvement in the LIBOR benchmark rate fixing scandal and the 2008–9 financial crisis.<sup>44</sup> Other jurisdictions, such as the United States of America (US) did succeed in bringing successful individual prosecutions, so the need for an effective way to sanction senior managers who perpetrated or were not able to stop financial crime being committed on their watch, was clear to the PCBS.<sup>45</sup> The government largely accepted the PCBS's recommendations and through the Financial Services (Banking Reform) Act 2013 created the SM&CR.<sup>46</sup> There is a clear link between having a system which allows financial services regulators to enforce compliance with the laws and regulation governing the financial services sector and the international competitiveness of the UK's financial services markets. The SM&CR is intended to promote the safety and soundness of regulated financial services firms, reduce harm to consumers and strengthen market integrity by creating a system that enables firms and regulators to hold individuals to account, particularly senior managers.<sup>47</sup>

Overseas companies wishing to invest in the UK's financial services markets will only do so if there is visible and robust enforcement of the rules and regulations governing the financial services sector. The SM&CR places the obligation of regulated companies to follow policies, systems and controls designed to limit the risk of financial crime on the senior managers of those companies.<sup>48</sup> Investors need certainty and well-ordered, well-regulated financial markets to ensure their

investment is secure. Without robust and well-perceived regulation in the UK financial services markets, the UK will lose its international reputation and will cease to be competitive with the other financial services centres in the European Union, US and Singapore. The most successful and sustainable businesses tend to have more effective compliance arrangements, giving certainty to their trading partners, suppliers and customers.<sup>49</sup> Therefore, the successful operation and enforcement of the SM&CR is of extreme importance to the international competitiveness of the UK's financial services sector and must be maintained. Either too little or excessively harsh enforcement of the SM&CR by its regulators, the FCA and PRA, is likely to lead to the development of inappropriate culture that defeats the regulatory objectives of the SM&CR.<sup>50</sup>

However, there are points of concern to note about the way in which the SM&CR is being enforced, with many commentators highlighting that the regime's potential is being hampered by its application.<sup>51</sup> There is a lack of enforcement action taken by regulators using the SM&CR, with the FCA not taking any successful enforcement action against a senior manager in 2022 and only taking three enforcement actions against a senior manager in 2021. Only five enforcement investigations were opened by the FCA in 2022 against a senior manager, down from a total of fourteen such cases in 2021.<sup>52</sup> The other SM&CR regulator, the PRA, imposed its first ever fine for breach of the Senior Manager Conduct Rules under the SM&CR in April 2023.<sup>53</sup> This extremely low level of enforcement is likely to hamper the competitiveness of the UK financial services markets, by not providing a sufficient deterrent to unsound and unsafe financial conduct.

## 6. Recommendations for reform

As can be seen from the tables in section 1.3 above, the levels of sanctions imposed on both individuals and firms for breaches of the SM&CR in the UK are frequently low when compared to other jurisdictions. For example, the US, despite not having a similar regime to the SM&CR, has imposed higher sanctions on both companies and individuals.<sup>54</sup> It is therefore recommended that the regulators of the SM&CR regime, in order to comply with the proposed new secondary objective of the FCA and PRA in the Financial Services and Markets Bill of 'facilitating... the international competitiveness of the economy of the United Kingdom (including in particular the financial services sector), and its growth in the medium to long term'<sup>55</sup> should increase both the amount of enforcement actions taken against senior managers who are found to have been involved in financial misconduct and the level of fines imposed when financial misconduct has been established. By increasing the penalties imposed under the SM&CR the deterrent against committing financial misconduct will be increased, which in turn should lead to a strengthening of the integrity of the financial services sector, by reducing financial misconduct.

<sup>41</sup> Parliamentary Commission on Banking Standards, n 9 above.

<sup>42</sup> 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] 82(3) Journal of Criminal Law 245.

<sup>43</sup> E Hickman, 'Is the Senior Managers and Certification Regime Changing Banking for Good?' (2022) 85(6) MLR 1440.

<sup>44</sup> A Keller, A Kokkinis, 'The Senior Managers and Certification Regime in Financial Firms: An Organisational Culture Analysis' (2022) 22(1) Journal of Corporate Law Studies 299.

<sup>45</sup> See Ryder above, n 37.

<sup>46</sup> Financial Services (Banking Reform) Act 2013.

<sup>47</sup> C Hill, 'Review of the Senior Managers and Certification Regime' (Taylor Wessing, 3 April 2023) < <https://www.taylorwessing.com/en/insights-and-events/insights/2023/04/review-of-the-senior-managers-and-certification-regime> > accessed 5 June 2023.

<sup>48</sup> See Ryder above, n 37.

<sup>49</sup> M Raver, 'Who's Afraid of the FCA?' (RQC Group, 1 May 2023) < <https://rqcgroup.com/latest-insights/whos-afraid-of-the-fca/> > accessed 5 June 2023.

<sup>50</sup> A Keller, A Kokkinis, n 39 above.

<sup>51</sup> See Hickman above, n 38.

<sup>52</sup> Financial Conduct Authority, 'Information on Investigations Opened under the Senior Managers' Regime - June 2022' (22 June 2022) < <https://www.fca.org.uk/freedom-information/information-investigations-opened-under-senior-managers-regime-june-2022> > accessed 23 May 2023.

<sup>53</sup> D Dagostino, 'First Enforcement Action for Breach of UK Senior Manager Conduct Rules' (A&L Goodbody, 2 May 2023) < [https://www.algoodbody.com/files/uploads/news\\_insights\\_pub/First\\_Enforcement\\_Action\\_for\\_breach\\_of\\_UK\\_Senior\\_Manager\\_Conduct\\_Rules.pdf](https://www.algoodbody.com/files/uploads/news_insights_pub/First_Enforcement_Action_for_breach_of_UK_Senior_Manager_Conduct_Rules.pdf) > accessed 5 June 2023.

<sup>54</sup> See for example Ryder above, n 4 and Bourton, N Ryder, 'Corrupt Corporations and the Facilitation of Tax Crimes: A Review of the United Kingdom's Enforcement Mechanisms' (2023) 85(4) Law and Contemporary Problems 213.

<sup>55</sup> Financial Services and Markets Bill HL Bill (2022–23) 124, s.24.

## 7. Conclusion

This article has examined the origins and aims of the SM&CR, which was created in the aftermath of the 2007–2008 financial crisis and subsequent conduct scandals to ensure the individual accountability of financial services professionals to their employers and the regulators. The contribution of the SM&CR to the competitiveness of the UK's financial services industry has been examined, together with the importance of the SM&CR to the UK's financial services sector. Both strengths and weaknesses of the regime have been analysed, including a detailed examination of the enforcement measures taken by regulators against both financial firms and financial services professionals using the SM&CR since its inception. As stated above, the declining number of fines imposed on individual financial services professionals under the SM&CR in recent years is of particular concern and must be remedied to

create a credible deterrent effect against financial conduct committed by individuals. This article has concluded that the SM&CR is a valuable tool for financial services regulators, but that the regulators are not sufficiently using their powers to sanction senior managers for financial misconduct carried out on their watch. More rigorous and visible enforcement of the SM&CR is essential to ensure that market participants respect and follow the rules and to deter them from engaging in misconduct. Currently the enforcement of the SM&CR is not sufficient and this, above all else, needs to change to ensure the efficacy of the regime and the integrity of the financial services sector in future years.

### Declaration of Competing Interest

No competing interests to be declared.