GENERAL REPORT

Concerning regulation and investigations in the banking industry concerning benchmark manipulation: Investigations by Financial Regulators and Competition Authorities in the Banking Industry – Libor, Forex, What Next?

Banking, Finance and Capital Markets Law Commission

Antitrust Commission

Commercial Fraud Commission

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1. Introduction

Since 2012 the banking industry is under previously unknown scrutiny by financial surveillance authorities, as well as competition authorities with regards to their business behavior. Numerous authorities around the world have investigated allegations in the context of Libor setting, Forex transactions, etc. in order to assess possible wrongdoing. The questionnaires and the session to be conducted during the Annual Congress assess the current status of these investigations and follow-on civil actions, as well as the impact on the business of the banking industry.

A total of 8 national reports have been submitted, namely: United Kingdom, France, Switzerland, Hungary, Japan, USA, Spain, Germany and the Netherlands.

2. Banking in the Crosshairs: Investigations by Financial Regulators and Competition Authorities in the Banking Industry – Libor, Forex, What Next?

2.1 In General

The Libor scandal involved a sequence of fraudulent activities related to the London Interbank Offered Rate (Libor). The Libor is an average interest rate based on submissions of interest rates by large financial institutions based in the City of London. At the beginning of 2008 it was discovered that certain financial institutions were dishonestly inflating or deflating their rates in order to benefit from trades and present to the market a stronger credit muscle.

The Forex scandal related to the collusion conducted over a decade by different financial institution in order to artificially manipulating the exchange rates operating in the foreign exchange market (Forex) for their benefit. Market regulators in several jurisdictions launched an investigation following some reports published in Bloomberg in June 2013 on colluding practices in order to set benchmark rates.

Both scandals triggered a series of reviews in our legal systems and pushed the regulator and supervising authorities to address the generated global doubt and concern with regards to the integrity of many benchmarks, which undermined the integrity of the financial system as well as the legal and commercial certainty, resulting in major losses for investors.

2.2 Aftermath measures

Following the Forex and Libor scandals, the authorities from the jurisdictions participating in this General Report proposed and adopted different measures to en-

sure the necessary integrity of the market and of its benchmarks, guaranteeing that they would not be distorted by any conflict of interest, that they would reflect economic reality and that they would be used correctly in order to better protect investors, reinforce confidence, address unregulated areas, and ensure that supervisors are granted adequate powers to fulfil their tasks.

At the time of the submission of the national reports, significant are the efforts conducted by the authorities of the United Kingdom, France and Japan.

The United Kingdom, being the jurisdiction more directly affected by the scandals launched in July 2012 the Wheatley Review, an independent review into the structure and governance of Libor and the corresponding criminal sanctions regime. Furthermore, changes to primary legislation The Financial Services Act 2012 (the "FS Act") extended the scope of the United Kingdom's financial services regulatory regime to cover certain activities relating to specified benchmarks, making it a criminal offence to knowingly or deliberately make false or misleading statements in relation to relevant benchmarks.

2.3 Monitoring of financial bodies

There is a great deviation among the analyzed jurisdictions with regards the number of supervising authorities controlling financial institutions. From as much as 7 in the United States (Securities and Exchange Commission, Department of Justice, Commodities Futures Trading Commission, Federal Reserve, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation Office of the Comptroller of the Currency), to 3 in the United Kingdom (FPC, PRA, FCA), to 2 in France (AMF, ACPR), Switzerland (FINMA, COMCO), the Netherlands (AFM, DMB) and Spain (CNMV, Banco España) to only 1 in the rest of jurisdictions: Hungary (National Bank of Hungary), Japan (FSA) and Germany (BaFin).

2.4 Implementation of MiFID II (Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments)

In 2011 the European Commission adopted a formal proposal for a "Directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council" (the, so-called “MiFID II Directive”).

Following some amendments introduced in 2012, in the aftermaths of the Libor and Forex Scandals, some stronger restrictions to strengthen restrictions on high-frequency trading and commodity price manipulation were introduced.

None of the EU jurisdictions analyzed has yet implemented the MiFID II Directive.

2.5 Inquiries on leading banks or institutions

The authorities from the analyzed jurisdiction conducted in some cases remarkable inquiries on leading banks or institutions in relation anti-trust practices with regards to essential financial information and/or the clearing system.

In this regard, although the Japanese anti-trust authority ("JFTC") did not take action on LIBOR/TIBOR scandals, the Japanese FSA did impose several sanctions to financial institutions (UBS Securities Japan Ltd., Tokyo branch, UBS AG, Citi Group Global Markets Japan, RBS Securities Japan Ltd and Rabobank Nederland, Tokyo branch) which included the suspension of TIBOR/LIBOR related derivative and the requirement to establish rules to prevent recurrence.

The Swiss authorities, on the other hand, investigated the two biggest banks (UBS AG and Credit Suisse Group AG), along with six more banks with regard to the manipulation of foreign exchange rates since March 2014. The investigation was, at the time of issuance of the national report, still pending. The authorities exanimated whether the banks had colluded with others to fix foreign exchange rates.

The authorities in the UK did not approached benchmark manipulation from an anti-trust perspective. Instead the FCA imposed fines for benchmark manipulation for breaches of the "FCA's Principles for Businesses".

With regards to the United States, "*as of December 2014, the Department of Justice ("DOJ") had charged eleven individuals and seven companies with illegally manipulating LIBOR. Several of these investigations have resulted in settlements reaching hundreds of millions of dollars. At least two individuals have entered pleas. Additionally, the Commodities Futures Trading Commission ("CFTC") has obtained over $1.87 billion from banks and brokers for alleged manipulative conduct with respect to LIBOR and other benchmark interest rates. In the past year, the United States authorities have entered into two noteworthy settlements. In July 2014, the DOJ entered into a deferred prosecution agreement ("DPA") with Lloyds Banking Group ("Lloyds"), in which Lloyds paid an $86 million penalty. Additionally, the CFTC entered into a settlement in which Lloyds paid $105 million in penalties. In May 2014, RP Martin settled with the CFTC for $1.2 million in penalties. Although these penalties are not as large as those paid by Barclay's Bank PLC in 2012, these sums indicate that United States authorities are continuing to vigorously prosecute alleged manipulators of LIBOR*."

In the Netherlands, Dutch Rabobank was the fifth financial institution that incurred a significant fine for attempting to rig the benchmark interest rate. 30 Rabobank employees were involved in "inappropriate conduct" in scam to manipulate the Libor and Euribor rates. Even though allegedly top management was neither involved nor aware of inappropriate conduct, the CEO of Rabobank announced that he would immediately resign as chairman of the Executive Board.

Finally, in Germany the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin, Federal Financial Supervisory Authority) launched several investigations against several banks, including Deutsche Bank AG, as well as their directors. The investigations are ongoing.

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2.6 Reinforced Governance

Several jurisdictions have introduced new requirements in order to reinforce governance and oversight and introducing measures sanctioning those responsible for LIBOR and other index manipulation.

In Switzerland, UBS AG voluntarily adopted a series of protocols and measures to prevent such practices in the future, including: review of submissions procedures, introduction of an overarching Benchmark Submissions Policy and dismissal of several employees. FINMA, acknowledged such measures but admonished UBS AG for severe violation of the organisational as well as the proper business conduct requirements under Swiss financial market laws. Additionally, FINMA imposed various supervisory measures aimed at further strengthening UBS AG's interest reference rate submission processes and ordered UBS AG to disgorge estimated profits resulting from Libor manipulations amounting to CHF 59 million to the Swiss Confederation.

Moreover, in connection with Forex, FINMA required UBS AG: to strengthen the compliance function as an independent control function, to limit the utilization of certain communication media and monitoring their utilization ("chats"); to prohibit certain employee transactions ("jamming", "front running", "partial fills", etc.), to mandate internal audit with various audits particularly with regard to compensation schemes and establishing a report on the findings and to strengthen the whistleblowing process. UBS AG was ordered to eject estimated profits resulting from Forex manipulations amounting to a total of CHF 134 million to the benefit of the Swiss Confederation (the highest amount ever confiscated by FINMA).

The United Kingdom has reinforced the governance and oversight of benchmark administrators and submitters and imposed sanctions for benchmark manipulation

2.7 Conflicts of Interest affecting Banks or other Financial Institutions

The jurisdictions analyzed have different ways to address the potential conflicts of interest affecting banks or other financial institutions and adopt different require-

ments to ensure that benchmarks reflect economic reality and that they are used correctly.

In France, the AMF constantly monitors all the professionals authorised to provide investment services, verifying the information filed and checks compliance with of financial intermediaries with the applicable regulations.

In Hungary conflict of interest rules mirror the measures foreseen in the relevant EU directives.

The Japanese FIEL provides for the so-called “honesty and fairness rules” applying to financial bodies, their officers and employees, which requires them to establish rules to avoid conflict of interests by applying Chinese walls and, in some cases, by requiring them to obtain specific consent from their clients.

Conflicts of interest in Swiss Law are addressed by civil law. Financial institutions are imposed a general obligation of loyalty towards the client. With regards to benchmark manipulation, in practice is quite difficult for a client to prove the damages caused by a market manipulation. Conflicts of interest are also dealt by supervisory law

Moreover, in the jurisdictions applying the The Market Abuse Directive (MAD) and the Market Abuse Regulation (MAR), such as the UK or Germany, benchmark submitters are required to "*maintain and operate effective organisational and administrative arrangements to enable it to identify and manage any conflicts of interest*" and to effectively conduct administrative measures in order to identify and deal with potential conflict of interests. Both, MAD and MAR, extend the scope of this prohibition to also include benchmarks which were previously not expressly covered by the rules against market manipulation. In Germany, compliance with the requirements imposed by these pieces of legislation is monitored regularly by the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin, Federal Financial Supervisory Authority) and may be verified through special audits in certain cases (in connection with the LIBOR scandal Deutsche Bank was subject this special audit).

Dutch Financial Supervision Law provides for a large array of legislative measures aimed to avoid potential conflicts of interest which monitor and check the appropriateness of the individuals operating in the market.

2.8 Whistle-blowers Protection

In almost all jurisdictions analysed measures to protect “whistle-blowers” are or either in place or being implemented, the legislative tools chosen by the different legislators being, nonetheless, significantly diverse.

For instance, French Law makes use of Labour Law in order to protect employees acting as whistle-blowers by offering full protection from dismissals or any harming effects related to their cooperation with the authorities. In contrast, Swiss labor law does not provide for a particular protection of whistleblowers. In fact, Swiss whistleblowers bear a clear risk to lose their employment. Even if when the termination of their employment agreement is deemed abusive, they will not be re-employed but only entitled to damages equivalent to up to six months of salary. Nonetheless, this has not prevented large companies, and in particular the bigger banks in Switzerland establish their own whistleblowing policies by, for instance, putting in place "whistleblowing hotlines" for employees to report inappropriate conduct without having to fear repressions. Moreover, FINMA specifically ordered UBS AG to strengthen the whistleblowing process as a consequence of the Forex manipulation case. Thus, protection of whistleblowers may even be considered as part of an adequate organization of a financial institution under supervisory law.

In Hungary, whistleblowers are protected and procedures are implemented in order to protect their identities, which are not to be disclosed. Moreover, like in many other jurisdictions were leniency polices have been implemented, the regulator and the competition office usually do not impose a fine (or impose a reduced one) to institutions cooperating with the authorities.

Japan accounts with a Whistleblower Protection Act which effectively protects whistleblowers, provided that such whistleblowing activity is done for justifiable purposes and in direct relation with a breach or likelihood of breach of listed statutes.

Under MAR, all administrators of regulated benchmarks are required to have an effective whistleblowing procedure in place which allows any person to notify them anonymously of actual or suspected manipulation. Accordingly, the British FCA has also published general whistleblowing guidelines, which include maintaining the anonymity of whistleblowers where and when possible. It is intended in the future that UK banks and other financial institutions will also be required to have specific measures in place to protect whistleblowers. The FCA released a Consultation Paper in February 2015 on the proposed changes to the FCA rules relating to whistleblowers and it is expected that these requirements will be implemented at a later date.

Moreover, the British Public Interest Disclosure Act 1988 gives legal protection to employees "*from dismissal or penalisation for disclosing serious concerns relating to the commission or suspected commission of a criminal offence by their employer*".

In the United States the so-called Dodd-Frank Wall Street Reform and Consumer Protection Act signed into federal law in 2010 incorporated securities whistle-blower incentives and protection provisions that incentivize employees and other potential whistleblowers to report directly to the Securities and Exchange Commission ("SEC") of suspected violations of the federal securities laws by public companies and/or their subsidiaries. Whistleblowers that voluntarily give the SEC "original information" regarding securities laws violations resulting in a "successful enforcement" can be rewarded from 10 to 30 percent of the total monetary sanctions, if the total sanctions exceed $1 million. Moreover, under the Dodd-Frank employers may not terminate or take other adverse action against a whistle-blower who reports violations to the SEC or who assists the SEC in an investigation based upon such information and are protected from retaliation.

In 2012, the Dutch government established an independent agency called the Whistleblower Advisory Point, advising and supporting both potential and actual whistleblowers, focusing on public sector and private sector misconducts affecting society as a whole.

In 2014 Germany launched a legislative initiative in order to improve transparency and provide protection for whistle-blowers.

2.9 Evaluation of Benchmarks

Suitable and appropriate evaluation of benchmarks is, again, conducted in a significant way in each analysed jurisdiction.

Under the Bristish benchmarks regime, benchmark administrators are required to have an oversight committee that scrutinises benchmark submissions and develops practice standards. As consequence of the LIBOR scandal, these general rules were expanded upon in ICE Benchmark Administration Limited's ("IBA") Code of Conduct for Contributing Banks. IBA is the benchmark administrator for LIBOR and its Code of Conduct has been accepted by FCA as the industry standard for administrators of benchmarks.

Moreover, firms which administer benchmarks are required to submit daily benchmark data to the FCA, as well as submitting quarterly aggregate statistics outlining the activity in the underlying market relevant to the specified benchmark.

In Germany, on the contrary, there are not yet measures in place to guarantee the appropriateness and accurateness of the benchmark calculations. Nonetheless, the

BaFin issued an action plan that is intended to make benchmarks safer and more reliable.

2.10 Measures to prevent Regulatory Complexity and/or Regulatory Arbitrage

None of the analysed jurisdictions has adopted specific measures in order to prevent market distortions of competition resulting from divergences between other national laws and/or to provide more legal certainty for market participants.

3. General Conclusion

Financial scandals such as the Libor and the Forex have shaken the confidence of investors and urged national legislators to cooperate and establish measures aimed to ensure the recovery of the trust on financial markets and its players. Several inquiries and investigations were launched in almost all of the concerned jurisdictions, leading to: (i) the enactment of new legislate aimed to reinforce governance and control of the market players; (ii) and the imposition of exemplary sanctions and fines.

Even though the need for a quick and far-reaching response has been unanimous among the analysed jurisdictions, the tools and measures adopted are strikingly different, considering the inter-connection of financial markets and in spite of the efforts made to harmonise and provide a global response, such as MiFID II. Divergences are found, among others: on the number and variety of supervising authorities in charge of monitoring financial bodies (from 7 to 1), on the way conflict of interests are dealt and prevented, on the manner benchmarks suitability and appropriateness is evaluated and, particularly, on the degree of protection offered to whistle-blowers.

Consequently, although the quickness of the response provided by regulators and supervising bodies is not to be discussed, the diversity and discrepancies on the responses provided has bred a clear risk of regulatory complexity and/or regulatory arbitrage.