Power Without Responsibility

The state of senior executive accountability for economic crime in the UK today

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Abbreviations and acronyms

AML	Anti-money laundering
BIS	Bank for International Settlements
CDU	Competition Disqualification Undertaking
CMA	Competition and Markets Authority
CPS	Crown Prosecution Service
DMCC	Digital Markets, Competition and Consumers Bill
DOJ	US Department of Justice
DPA	Deferred Prosecution Agreement
FCA	Financial Conduct Authority
FRC	Financial Reporting Council
HMRC	HM Revenue & Customs
IMF	International Monetary Fund
MLR	Money Laundering Regulations
MLRO	Money laundering reporting officer
NAO	National Audit Office
OECD	Organisation for Economic Co-operation and Development
POCA	Proceeds of Crime Act 2002
PRA	Prudential Regulation Authority
SEC	US Securities and Exchange Commission
SFO	Serious Fraud Office
SM&CR	Senior Managers and Certification Regime
SME	Small and Medium-sized Enterprises

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Power Without Responsibility

The state of senior executive accountability for economic crime in the UK today

The UK has a serious accountability gap when it comes to senior executives. Those at the helm of large firms that engage in economic crime, financial wrongdoing or regulatory breaches rarely face any consequence at all.

This is bad for UK business and it is bad for the people of Britain

This is bad for UK business and it is bad for the people of Britain. It leads to poorer corporate governance standards, and greater risks that the huge costs of corporate failure and misconduct are borne by ordinary people. It is also unfair: directors in the smaller business sector face the vast brunt of prosecutorial and regulatory action.

The government has recently introduced measures to toughen up the UK's corporate liability laws, particularly for large firms, but has taken no corresponding action to ensure senior executives of those firms face greater accountability for corporate economic crime. Without this individual accountability, corporate fines risk becoming a cost of doing business, and deterrence against corporate crime is weakened.

In fact, the UK appears to be heading down the path of ever weaker senior executive accountability.

During 2023 the government has opened reviews into whether current measures to hold senior managers to account should be reformed and has dropped proposed corporate governance reforms altogether. This is leaving the UK dangerously out of step with the US, which has gone in the opposite direction, and toughened up corporate governance standards in recent years.

Tackling the accountability gap in relation to senior executives is crucial for long-term sustainable and equitable economic growth

Tackling the accountability gap in relation to senior executives is crucial for long-term sustainable and equitable economic growth in the UK, and for the integrity and stability of our financial system.

Our report looks at the UK record on tackling senior executive accountability, how the US is doing this better on many of these fronts, and what lessons we can learn. We come up with nine concrete measures the government can take to get to grips with the growing risks of impunity for those who run Britain's largest firms.

Overall Findings

Our research looked at four different forms of accountability for senior executives in relation to economic crime in the UK: prosecution, regulatory action, disqualification, and removal of directors' benefits.

While each of these accountability mechanisms can be effective in their own right, those at the stronger end of accountability such as prosecution and robust regulatory action are more likely to provide, where appropriate, long-term deterrence and incentives for good corporate governance. Those at the weaker end of accountability, such as removal of directors' benefits are often best used in conjunction with stronger accountability mechanisms particularly in egregious cases.

We found that:

1. **All the top bodies responsible for prosecuting serious economic and financial crime are struggling to land prosecutions against senior executives in large firms:**

   a. Since 2013, only 13% of the Serious Fraud Office (SFO)'s individual convictions have involved senior executives in large firms despite over 60% of SFO cases involving wrongdoing associated with large firms.

   b. Since 2013, just 6% of the Financial Conduct Authority (FCA)'s individual convictions have involved senior executives in large firms.

   c. HM Revenue & Customs does not report on the number of prosecutions it undertakes into serious and complex cases, while the number of its prosecutions, including into enablers of tax crime, has dropped across the board.

   d. The Competition and Markets Authority (CMA) has failed to prosecute any senior executives in large firms following 11 prosecutions, and appears to be deprioritising prosecution altogether.

   e. None of these agencies have specific prosecution strategies or guidance that focuses on individual accountability.

2. Where corporate fines are imposed – whether through prosecution, settlement or regulatory action – it is extremely rare to have any corresponding individual enforcement action:

a. The SFO has achieved just one conviction of a senior executive of a large firm (on minor charges) following eight corporate convictions, and a conviction of one individual for taking bribes following 12 Deferred Prosecution Agreements.

b. The FCA has imposed individual fines in just 13% of cases where it imposed corporate fines between 2013 and 2022.

c. The FCA took just one regulatory action against an individual in response to £777 million worth of fines imposed on 17 banks for money laundering failures. This is despite failures continuing after the Senior Managers and Certification Regime (SM&CR) came into effect in seven of these cases.

3. Directors in Small and Medium-Sized Enterprises (SMEs) have become 'low-hanging fruit' for prosecutors and regulators and are far more likely to face conviction, regulatory fines and bans than senior executives in large firms, at the same time that large firms are likely to face lower corporate fines relative to turnover than SMEs:

a. Three times more directors of SMEs are convicted following SFO prosecutions than senior executives in large firms.

b. Five times more individual fines are imposed by the FCA on directors of SMEs than senior executives in large firms.

c. 90% of published prohibitions (or bans) against directors in the financial sector imposed by the FCA went to those in the SME sector.

d. The largest firms investigated by the SFO faced fines of 0.2-1% of average turnover, compared to 3-9% of average turnover for the smallest firms..

4. Overall, the FCA's use of regulatory fines and prohibition orders against individuals has declined over the past decade despite the introduction of the 2016 Senior Managers and Certification Regime (SM&CR), and there has been little enforcement of the SM&CR itself:

a. The number of prohibition orders (or bans) by the FCA against individuals has shrunk by 62% since 2013.

b. The FCA issued half as many individual fines in 2022 than it did in 2013, and the average value of those fines (with two notable exceptions) has fallen by 32%.

c. Just six financial penalties have been issued under the SM&CR by the Prudential Regulation Authority (PRA) and FCA, one of which was overturned, one is being appealed, and another was not enforced in exchange for compensation.

d. Just two financial penalties have been issued solely by the FCA (both for non-financial conduct and one of which is being appealed) following 70 investigations since 2016.

e. Just 6% of investigations under the SM&CR by the FCA have resulted in any enforcement action since its introduction in 2016.

5. There has been encouraging use of director disqualification by the Competition and Markets Authority (CMA) and the Insolvency Service against directors in large firms, in competition and bankruptcy cases, but it is heavily reliant on voluntary undertakings and rarely accompanied by attempts to recover funds:

a. The CMA has imposed 26 disqualifications since 2019 after it introduced a new strategy, compared to just three before that, and nearly half (16 out of 29) worked for large firms.

b. The rate of the Insolvency Service's disqualifications has slowed, and prosecution of directors declined overall (despite a spike resulting from Covid-19 prosecutions).

c. The Insolvency Service achieved significant orders against former senior executives of Carillion, which is a positive step forward, but it took five years and has not yet been accompanied by efforts to recover funds from those executives.

d. 96% of the CMA's disqualifications and an average of 84% of the Insolvency Service's disqualifications are based on voluntary undertakings, with a crucial court decision pending in the case of the CMA likely to affect how it uses disqualifications going forward.

e. The Insolvency Service has sought compensation orders against disqualified directors just three times since 2015.

6. The UK's regime to recoup directors' benefits (malus and clawback) following corporate misconduct is weak and poorly enforced, and is generally only invoked when there is public outcry:

a. There is uneven implementation of malus and clawback outside of financial services, and little if any public supervisory enforcement even within the financial services for failure to impose clawback.

b. According to a 2022 industry survey, clawback provisions have been invoked on average just 1.3 times a year between 2014 and 2022.

c. Just one of the five large firms that received the biggest criminal penalties following SFO investigations imposed any clawback on directors.

d. Despite a lowering of the total bonus pool as a result of the fine imposed on NatWest following its money laundering prosecution in 2021, the CEO's overall remuneration package rose 19%.

7. Recent government and regulator announcements are pulling the UK in the opposite direction from the US, which has much stronger enforcement against directors and is expanding malus and clawback in light of evidence about its positive impact on corporate governance and business growth:

a. The UK has recently dropped proposals to set minimum conditions for malus and clawback while financial regulators are consulting on removing any such requirements for smaller banks.

b. The removal of clawback requirements for smaller banks would appear to leave many fintech challenger banks out of scope despite the International Monetary Fund (IMF) warning of real risks from this sector to financial stability.

c. The US by contrast is introducing mandatory clawback provisions, greater incentives for firms to clawback director remuneration where criminal investigations are underway, and robustly enforces strong powers by regulators to impose clawback.

Recommendations

1. The government should undertake a full review of the legislative and enforcement barriers to holding senior executives to account for economic crime.

2. The Attorney General should form a Corporate Crime Advisory Group with prosecutorial bodies and relevant regulatory bodies to develop principles for individual accountability across the economic crime landscape.

3. The government should work with prosecuting bodies and the judiciary to review how cooperating witnesses and whistleblower compensation could enhance enforcement against senior managers for corporate criminality.

4. The FCA and the PRA should conduct and publish a full review of the roadblocks to regulatory enforcement of the Senior Managers and Certification Regime (SM&CR), and of their broader regulatory tools, including the impact of Directors and Officers Liability insurance.

5. The FCA should ensure it has far more consistent and transparent data about its enforcement, particularly of the SM&CR, and should develop principles on individual accountability for its corporate regulatory enforcement.

6. The National Audit Office (NAO) should conduct a review of whether the CMA and Insolvency Service are using director disqualification effectively and speedily, whether the agencies are resourced sufficiently to make the most use of this tool, and whether they have complementary prosecution strategies alongside effective ways to seek compensation from directors.

7. Serious consideration should be given to granting the SFO similar director disqualification powers to the CMA for economic crime.

8. The government and the Financial Reporting Council (FRC) should undertake a review of the risks to financial stability, the integrity of markets, and public confidence in the business sector arising from the UK's lack of robust powers and enforcement to require malus and clawback, with a view to reinvigorating corporate governance reform.

9. The SFO and FCA should be given stronger powers to impose and incentivise clawback on directors of firms involved in corporate misconduct.

Key Statistics

I. Prosecution

1 – the number of convictions obtained by the SFO following 12 Deferred Prosecution Agreements in which firms paid £1.7 billion in financial penalties.

13% of SFO individual convictions involve senior executives in large firms.

Directors of Small and Medium-sized Enterprises (SMEs) are **three times more likely to face conviction** by the SFO than senior executives in large firms.

The largest firms investigated by the SFO face fines of **0.2-1%** of average turnover, compared to **3-9%** of average turnover for the smallest firms.

6% of FCA individual convictions involve senior executives in large firms.

0 – the number of investigations initiated into senior NatWest managers by the FCA following its only major criminal money laundering prosecution.

0 - number of convictions of senior executives of large firms for cartel offences by the CMA.

II. Regulatory action

£2.3 million – the value of FCA fines issued to senior executives in large firms, compared to **£102.3 million** issued to directors of SMEs.

8% of FCA prohibition orders which are made public are against senior executives in large firms.

Directors of SMEs receive **five times more fines** from the FCA than senior executives in large firms.

6% of FCA investigations under the Senior Managers and Certification Regime (SM&CR) had resulted in any enforcement action by March 2022.

87% of corporate fines imposed by the FCA resulted in no individuals being fined between 2013-2022.

1 – the number of individuals facing any enforcement action after corporate money laundering fines against 17 banks.

Key Statistics

III. Director disqualification

26 – number of disqualification orders obtained by the CMA after a new strategy in 2019 compared to just three before that.

55% of directors disqualified as a result of orders sought by the CMA since 2016 worked for large firms.

3 – the number of compensation orders sought by the Insolvency Service against directors since 2015.

IV. Executive remuneration and clawback

1.3 – the average times clawback provisions were invoked a year between 2014 and 2022 by firms on the FTSE All-Share Index.

1 out of 5 of the largest firms fined following SFO enforcement action imposed any clawback on directors.

19% - the amount CEO of NatWest's remuneration increased in the year NatWest faced a criminal money laundering penalty despite clawback being applied.

Introduction

Introduction

If you are a senior executive of a large firm[1] in the UK, you face almost zero chance of being prosecuted for economic crime by any of the main regulators or prosecutors responsible for enforcing these offences.

You also face very limited chances of any regulatory enforcement action, whether a fine or prohibition order, by the main and largest financial crime regulator, the Financial Conduct Authority. Even under the regime introduced to hold senior managers to account, the Senior Managers and Certification Regime, there is a very low prospect that you will face enforcement action.

You may face a slightly increased chance of being disqualified as a director, if you engage in anti-competitive or cartel behaviour. But as the recent Carillion case shows, outside of competition law, any action against you is likely to be rare, take many years and will not result in you having to pay any money back.

While theoretically your firm might have procedures in place to withdraw your remuneration package, in practice this will be rare as the grounds for doing so are often narrow, and usually only occur if there is a huge public outcry.

Meanwhile, directors in small and medium-sized business bear the brunt of prosecution and regulatory efforts.

This situation is deeply unfair – and it is also bad for corporate governance in the UK. Good corporate governance rests on effective accountability mechanisms and there is compelling evidence that strong corporate governance results in firms outperforming those with weak governance.[2]

Finally, it is bad for public trust in the large corporate sector. Those in charge of firms that engage in corporate wrongdoing, or which cause huge harm to the public, should face consequences for what happened on their watch. Otherwise, the public are left to conclude that those at the top of the corporate hierarchy live by different rules than the rest of us.

Tackling this accountability gap is crucial for the UK's long-term sustainable growth and for the integrity of our financial system. But recent government initiatives appear to be taking us in the opposite direction and risk sacrificing the long-term stability of our economy and its ability to deter dirty money on the altar of 'competitiveness.'

The UK's Senior Executive Accountability Gap

More than a decade ago, a special Parliamentary Commission set up to consider the lessons of the 2008 financial crash, called for far greater individual responsibility for the banking failures that led to it.

"Top bankers dodged accountability for failings on their watch," the Parliamentary Commission on Banking Standards wrote.[3] The Commission noted that the public *"are rightly appalled by the small number of cases in which highly paid senior bankers have been disciplined for the costly mistakes they have allowed to occur on their watch."*[4]

That view remains widespread. Gordon Brown, who was Prime Minister at the time of the crisis, said in 2022, *"there should have been prosecutions…"*[5] As he explained in his book, *"if bankers who act fraudulently are not put in jail with their bonuses returned, assets confiscated and banned from future practice, we will only give a green light to similar risk-laden behaviour in new forms."*[6]

The UK has a senior executive accountability problem across the board when it comes to corporate misconduct, **not just in banking**.

The Post Office Horizon IT scandal, which erupted into a full public outcry in early 2024, is a case in point. There have been multiple calls for senior executives at the company to face investigation, criminal prosecution, and removal of remuneration after private prosecutions by the company against over 700 sub post-masters for theft were found to be a major miscarriage of justice.[7]

In 2022, the Chair of the Environment Agency called for *"prison sentences for Chief Executives and Board members whose companies are responsible for the most serious incidents [of pollution] and … company directors being struck off so they cannot simply delete illegal environmental damage from their CV and move on to their next role."*[8]

Her comments came in light of repeated failure by large water companies to meet targets to address the release of sewage into UK waterways.

Within the context of economic crime, meanwhile, chief executives and directors have faced few meaningful consequences following major global bribery schemes by BAE Systems, Rolls-Royce and Airbus in the aerospace and defence sector, money laundering scandals involving banks such as Credit Suisse, Goldman Sachs and NatWest, or suspected fraud and serious mismanagement in public contracting relating to Serco and G4S.

From job losses and public spending cuts that result from bailouts, to the looting of public funds in poorer countries, these kinds of corporate wrongdoing impose a huge social and economic cost on us all.

UK at a crossroads

The UK is now at a critical juncture in terms of senior executive accountability. Its enforcement record on holding senior executives to account has been poor over the past decade.

The government has introduced new 'failure to prevent offences' for bribery and fraud, and two facilitation of criminal tax evasion offences (in the UK and abroad) since 2010, and in 2023 legislated for a major reform of the underlying rules for holding corporations to account.[9] But as the number of corporate offences have grown, there has been little corresponding focus on ensuring that the legislation for holding senior executives to account is fit for purpose. Without further targeted reforms, it is unlikely that the new corporate offences will be accompanied by an upswing in senior executive accountability.

At the same time, rather than addressing the UK's weak enforcement record on tackling senior executives, the government is making a series of wider moves that risk taking the UK in the opposite direction.

As part of the government's Edinburgh Reforms announced in December 2022, it is seeking widespread reforms to make the UK *"the world's most innovative and competitive global financial centre."*[10] These include:

1. Exploring whether to reform the accountability regime for senior managers established in response to the financial crash – the SM&CR – on the grounds that it should not undermine the UK's competitiveness.[11]
2. Rowing back on proposals to improve corporate governance standards in the UK, which would have included stronger rules to withhold or recover directors' pay and bonuses (known as malus and clawback) in cases of corporate misconduct.[12]
3. Consultations by regulators on removing requirements to withhold or recover directors' pay and bonuses for smaller banks and investment firms operating in the UK financial sector,[13] to help the UK *"retain its position as a leading international financial centre."*[14]

A risky business

The potential combination of a light-touch regulatory approach with an existing low-enforcement environment risks recreating conditions for a financial crisis down the line, as well as increased flows of illicit finance.

It is widely accepted that the 2008 financial crisis was largely caused by excessive risk-taking coupled with laissez-faire regulation.[15] Banking deregulation and light-touch regulation, exacerbated by under-resourced law enforcement agencies and limited enforcement activity, have also been central to the UK's role as a hub for dirty money. As the Intelligence and Security Committee's 2020 report on Russia noted *"the promotion of a light and limited touch to regulation"* was one of the factors making the UK a *"particularly favourable destination for Russian oligarchs and their money."*[16]

The IMF has recommended the UK government ensure that regulatory reforms, particularly to the senior managers regime, do not undermine the UK's financial stability and market integrity.[17] It has also recommended that the UK should tackle money laundering more effectively by ensuring *"full resort"* to enforcement *"particularly criminal penalties against corporations and senior managing officials."*[18]

Why senior executive accountability matters

Mechanisms for holding senior executives of large firms to account for corporate misconduct are essential to encourage the right kind of economic growth by:

- ensuring high standards of conduct in the UK's corporate and financial world,
- attracting the right kind of capital and inward investment, and
- preventing corporate misconduct that leaves the British public bearing the cost of the fall out.

But they also play a broader role in deterring corporate crime, ensuring equity both within and between firms of different sizes, and bolstering public confidence in the corporate sector and the rule of law.

A: Deterrence – ensuring that corporate fines are not just a cost of doing business

Between 2009 and 2020, regulators globally (but primarily in North America and Europe) imposed $561 billion of fines on firms for corporate misconduct[19] – with $56.1 billion for money laundering alone between 2009-2022.[20] However, there is increasing and widespread concern that these fines are:

- becoming a cost of doing business,
- failing to spur reform and good corporate governance,
- leading to increasing rates of corporate recidivism, and
- most crucially, decreasing in deterrent value.

Global research from compliance specialists Comply Advantage in 2022 found serious *"enforcement fatigue"* in firms with 79% of senior managers and compliance officials prepared to risk violating anti-money laundering rules and risk a fine *"all the time"* – up from 61% in 2020.[21]

Evidence from the US, where corporate crime enforcement has the strongest and longest track-record, has consistently shown that both fines and individual liability are needed for optimal deterrence for corporate crime.

Several recent academic overviews on corporate crime deterrence found that corporate fines on their own only appear to work in the short-term and when they are very high.[22] One of these – a major academic study on US corporate crime enforcement in 2021 – found that after a decade of corporate fines imposed by prosecutors and regulators, corporate misconduct in the US is on the rise, as well as corporate recidivism particularly among large firms. The report argues that *"enforcers are unlikely to achieve optimal deterrence using fines alone."*[23]

A need for a mix of higher criminal penalties for firms alongside better accountability for senior managers also comes out strongly from surveys of corporate actors and compliance specialists. Comply Advantage's 2022 survey for instance found that 38% of senior executives and compliance staff believe that greater personal liability for senior managers is essential, with 40% also believing heftier fines are needed to make anti-money laundering laws and regulations really bite.[24]

B: Equity – between and within firms

> *"As a matter of equity and as a matter of deterrence, it is important to punish high-ranking executives who create environments that facilitate criminal behaviour."*
> — Lund and Sarin[25]

Large firms benefit from an enforcement approach that yields more lenient corporate fines relative to their size compared to smaller firms, despite the fact that corporate misconduct by large actors is likely to cause greater social harm. This is because it is rarely politically feasible to fine a large firm in a manner that is commensurate with the harm caused. Research in 2020 found that large public firms in the US face fines that are 80 times less than those faced by smaller firms as a percentage of assets, revenue and market capitalisation.[26]

Meanwhile, where individuals have been prosecuted in the US alongside corporate fines, they have tended to be either lower-level officials in large organisations, or directors of small organisations.[27] Few academic commentators regard going after low to mid-level employees as an effective deterrent.

C: Public confidence

Public opinion also strongly favours accountability of senior executives. A recent academic study in the US on the importance of public opinion for the legitimacy of corporate crime enforcement found that the public largely supports the use of corporate fines where significant senior individuals also face criminal prosecution.[28]

Senior executive accountability after the financial crisis

Following the financial crash, very few countries, with the exception of Iceland and Spain, successfully prosecuted bank executives. According to research by the Financial Times – which focused solely on prosecutions for conduct relating to the crisis itself rather than related misconduct such as rate-rigging and rogue trading – of the 47 bankers jailed in the decade after the crash, 27 were in Iceland, 11 in Spain and seven in Ireland.[29] While Spain convicted one chair of a bank, Iceland convicted nine CEOs and chairs of banks.

In the UK, prosecutions of senior executives for financial crisis related misconduct have been very rare. The one exception has been the case of Barclays, which was the first time a CEO of a bank has ever been prosecuted in the UK.[30] Barclays was charged with fraud in relation to secret commission payments made to Qatar's sovereign wealth fund during the financial crisis.

Throwing out the charges against the CEO, John Varley, in the middle of the trial, however, the judge said Varley could not be liable for the alleged fraud because the prosecution could not show he had acted dishonestly, and the conduct in question had been done by the bank itself.[31]

The SFO argued this would allow directors *"to insulate themselves from liability."* [32] More junior staff were then prosecuted but all were acquitted.[33]

Another case where senior executives avoided any accountability in the UK was in the financial crisis related rate-rigging cases. The SFO charged 13 individuals in October 2019 – all traders – in relation to LIBOR.[34] During their trials, traders frequently cited in their defence the fact that the rigging was encouraged by their bosses.[35] Of those prosecuted, one pleaded guilty, four were convicted and seven were acquitted by juries.

Most of these rate-rigging convictions of more junior staff are now in jeopardy after a US court overturned similar convictions in 2022,[36] and a successful appeal in the UK by one of the traders, Tom Hayes, on grounds of miscarriage of justice, which granted him another chance to challenge his conviction in court.[37]

Why is senior executive accountability so hard to achieve

Despite widespread agreement that holding senior executives to account for corporate misconduct is critical to deterrence, there are significant barriers to doing so.

A 2023 report by the Bank for International Settlements (BIS) on senior executive accountability in the wake of the financial crisis found that there were several reasons for why so few countries were able to hold senior executives to account. These included:

- *"**the dispersion of responsibility** of senior executives in large firms where decisions are taken at various levels of the firm;"* and
- the fact that *"prudential authorities viewed the board of directors and senior management as collective bodies and **senior executives could take cover under collective decision-making**."* [38]

Corporate cultures can often protect senior executives who are frequently removed from engagement in operational details.[39] Prosecutors have likewise complained that the paper trail dries up the higher up the organisation they investigate which means it is easier to prosecute those lower down the organisation, where the trail starts.

Another factor which may make prosecutions of directors difficult is the fact that legal costs to defend themselves against charges will often be covered either by the firm itself or by Directors' and Officers' Liability insurance. Such policies may incentivise directors not to plead guilty[40] and to fight to the bitter end.

And finally, there are far greater incentives for individuals to heavily contest charges or defend themselves against investigations compared with corporations, the greatest of which is avoiding a jail sentence. Meanwhile, while large firms may want to have investigations resolved speedily for reputation management purposes, an individual executive's reputation relies on them seeking to prove their innocence.

I.
Prosecution

I. Prosecution

Criminal prosecution is clearly the strongest form of accountability and sends the message that no-one is beyond the law.

The section looks at how successful the agencies responsible for investigating and prosecuting corporate misconduct are in convicting bosses of firms. This includes:

- the Serious Fraud Office (SFO), responsible for serious and complex cases of fraud, bribery and corruption;
- the Financial Conduct Authority (FCA), responsible for money laundering, mis-selling, fraud, insider dealing and market abuse;
- HM Revenue & Customs (HMRC) responsible for tax offences and money laundering; and
- the Competition and Markets Authority (CMA), responsible for cartel offences.

The nature of the cases all these agencies take on means that they police the largest corporate bodies in the country.

Key findings on prosecution

1. The Serious Fraud Office is struggling to land prosecutions against senior executives in large firms. We found that:

- Three times more directors working in the SME sector are convicted following SFO prosecutions than senior executives working in large firms.[41]
- Only 13% of individual SFO convictions involved senior executives in large firms.[42]
- There is a higher chance of an individual being prosecuted following a corporate conviction than a Deferred Prosecution Agreement, with just one conviction after 12 Deferred Prosecution Agreements compared to 14 convictions after eight corporate convictions.[43]
- However, corporate convictions don't necessarily increase senior executive accountability, with just one senior executive from a large firm convicted after a corporate conviction, and none after a Deferred Prosecution Agreement.[44]
- While senior executives of larger firms face little prospect of prosecution by the SFO, their firms face lower fines as a percentage of annual turnover than smaller firms. The largest firms paid 0.2-1% of average annual turnover in corporate fines, while the smallest firms paid 3-9%.[45] This results in even lower deterrence against corporate misconduct for large firms.

2. The majority of Financial Conduct Authority criminal enforcement action is taken against 'low hanging fruit.' We found that:

- Just 19% of the FCA's criminal convictions between 2013/14 and 2022/23 involved individuals employed by large firms.[46]

- Just 6% of its criminal convictions in this timeframe involved senior executives in large firms.[47]
- No individuals were charged following the only corporate criminal conviction for money laundering the FCA has brought – against NatWest – in December 2021, when the bank faced a criminal fine of £264.8 million.[48]

3. HMRC fails to keep data on whether its prosecutions for tax-related offences and money laundering cover directors of firms. We found that:

- HMRC has removed targets to bring prosecutions for serious and complex cases and does not report on the number brought.[49]
- HMRC prosecutions have dropped across the board, including those of 'professional enablers' of tax crime.[50]
- A key test of whether HMRC is serious about tackling directors of firms will be whether it prosecutes directors following its first Deferred Prosecution Agreement for bribery in the Entain case.[51]

The Competition and Markets Authority appears to have de-prioritised criminal cartel prosecutions. We found that:

- The CMA's last conviction of a director in relation to a cartel offence was in 2017.[52]
- The CMA has failed to prosecute any senior executives of large firms, after five convictions following 11 prosecutions.[53]
- There have been no prosecutions of the 'hardcore' cartel offence following the 2020 memorandum of understanding between the CMA and the SFO and it is not clear who is responsible for criminal prosecution of CMA powers.[54]

The Serious Fraud Office's recent record on prosecuting directors of firms

In recent years the SFO has faced serious and repeated criticism for its failure to land prosecutions against directors in corporate crime cases. The collapse of prosecutions against individuals has led to two independent reviews of the SFO,[55] repeated calls for the SFO to be dismantled,[56] and has had a direct impact on the agency's reputation and its ability to deliver its mandate.

These collapsed cases are likely to have resulted in fewer firms being willing to come forward to self-report corporate crimes as well as undermining the deterrent value of corporate crime laws.

This section looks at the SFO's track record of prosecuting individuals, the reasons for lack of prosecutions in relation to the use of Deferred Prosecution Agreements (DPA) – a form of settlement between the prosecutor and a firm suspected of wrongdoing – and whether there is a difference between individual prosecutions depending on whether the SFO pursues a conviction or a DPA.

Who does the SFO prosecute?

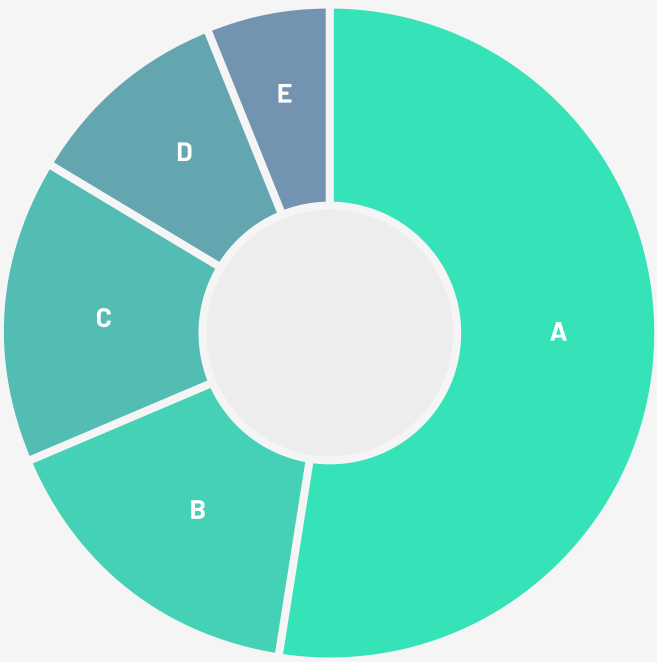
The SFO's mission to pursue the most serious or complex cases of fraud, bribery and corruption means that it investigates and prosecutes directors working across the corporate sector particularly in large firms and multinationals.

After analysing information on 88 convictions the SFO obtained against individuals between February 2013 and February 2023,[57] we found that:

1. Half of SFO prosecutions involve directors of firms

In 52% of cases, the SFO successfully convicted directors of firms with board-level responsibilities, or individuals exercising control over firms.[58]

We found some confusion from press statements put out by the SFO however, which frequently refer to prosecutions against *"senior executives"* when in fact those convicted are often less senior, mid-level managers, or responsible for divisions or geographic regions. This included Petrofac[59] and Unaoil[60] – both high profile foreign bribery prosecutions in the oil and gas sector.



Firm roles of the 88 individuals convicted by the SFO (2013-2023)

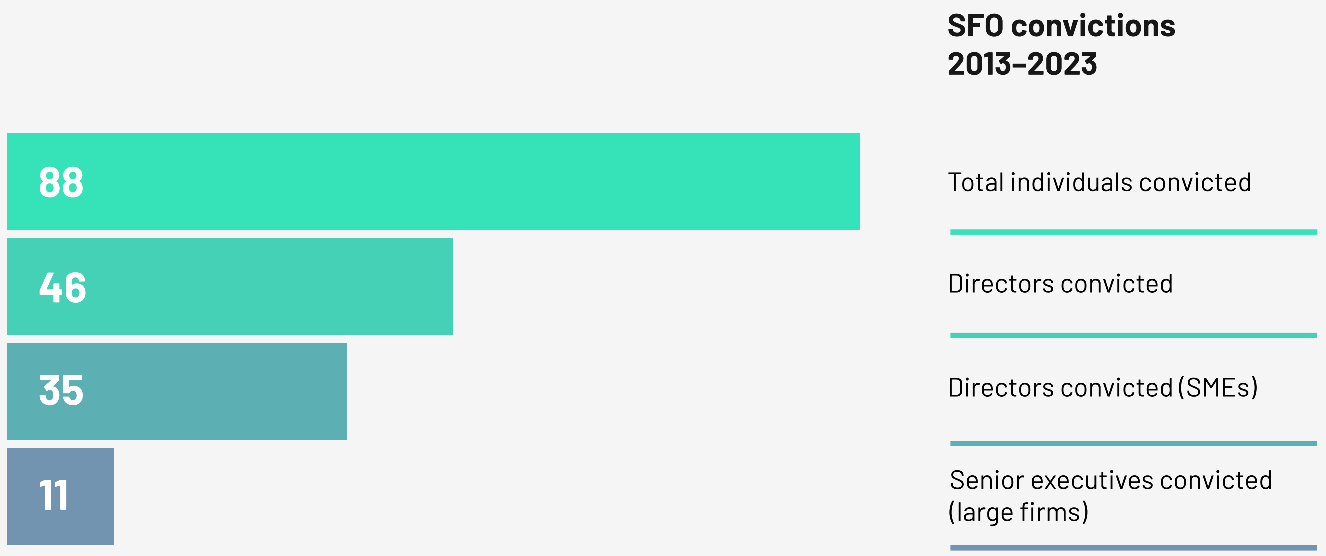
- A **52%** – directors in firms
- B **16%** – employees in operations, logistics, business development, sales and recruitment
- C **15%** – regional or divisional managers
- D **10%** – traders
- E **6%** – not related to a firm

2. Directors in small firms are more likely to be convicted

Of the 46 most senior directors, business owners and partners of firms convicted by the SFO between 2013-2023 there is a clear tendency toward individuals employed in small and medium-sized firms:[61]

- 28 of the board-level directors, owners and partners of firms convicted were connected to small firms;[62]
- seven of those convicted worked for medium-sized firms;[63]
- In contrast, just 11 of those convicted (13%) were employed by large firms or major investment funds.[64]

As a result, three times more directors working for SMEs are convicted as a result of SFO prosecutions than senior executives working for large firms.



The curse of the Deferred Prosecution Agreement?

There has been considerable public commentary about the inability of the SFO to land individual prosecutions following the use of DPAs.

The agency has negotiated 12 DPAs since 2014, when the tool was introduced,[65] resulting in £1.7 billion in financial penalties (including fines, disgorgement of profits, payment of the SFO's investigation costs and compensation). 17 individuals have been charged in relation to the conduct for which the firms were fined, 12 of whom were directors.[66]

The SFO, however, obtained just one conviction following a DPA – a project manager who pleaded guilty in May 2022 to receiving bribes.[67]

There are different factors for why so few individuals have faced successful prosecution for major misconduct admitted to by firms under a DPA, which are as follows:

1. Failure to charge

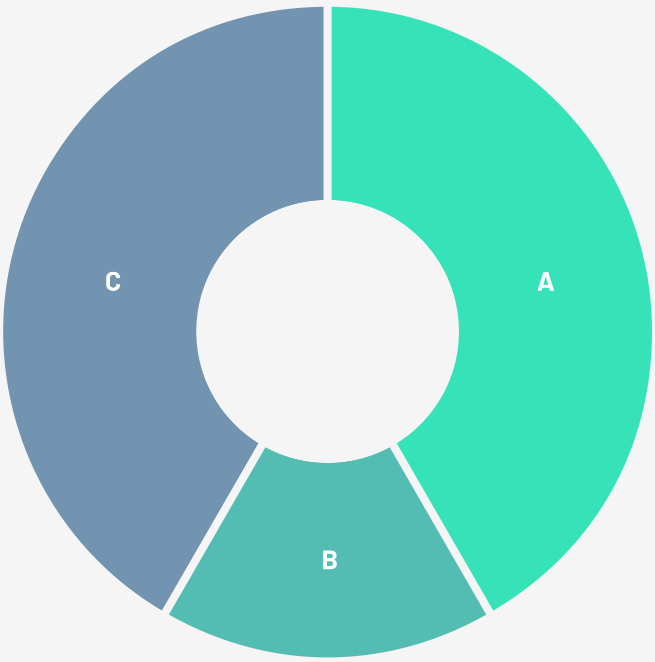
In five cases, the SFO brought no charges against individuals at all. These cases included the five biggest firms that faced foreign bribery related charges and included: aerospace giants Airbus and Rolls-Royce; Standard Bank (one of Africa's biggest lenders); multinational oil and gas consulting firm Amec Foster Wheeler; and Airline Services Ltd.

2. Failure to convince the jury or a judge

In a further five cases, involving 11 individuals – eight of whom were directors – the SFO failed to convince a jury or in one case (Tesco), the judge, that there was a case to answer. This included prosecutions against directors at smaller firms, Sarclad and Güralp, charged with foreign bribery related offences, and directors of a subsidiary of a major real estate firm charged with bribery in the construction industry in the UK.

3. Failures on disclosure

In two cases, the SFO brought charges against five individuals, but the prosecutions collapsed due to disclosure failures. These are perhaps the highest profile of the failed prosecutions, despite representing the smallest number of cases, and include prosecutions against senior managers and executives at two of the UK's biggest outsourcing firms, Serco and G4S, for fraud and false accounting in relation to government contracts.



DPA-related prosecutions

A **5 DPAs resulted in no charges against individuals:**

- Standard Bank (2015)
- Rolls-Royce (2017)
- Airbus (2020)
- Airline Services Ltd (2020)
- Amec Foster Wheeler (2021)

B **2 DPA-related prosecutions collapsed due to disclosure failings:**

- Serco (2 senior executives, 2021)
- G4S (2 senior executives, 1 senior manager, 2023)

C **5 DPA-related prosecutions collapsed after the SFO failed to convince the jury (or judge in the case of Tesco):**

- Tesco (3 senior executives, 2018)
- Sarclad Ltd (1 director, 2 managers, 2019)
- Güralp Systems Ltd (2 directors, 1 senior manager, 2019)
- Bluu Solutions Ltd / Tetris (2 senior executives and a former employee, 2023)

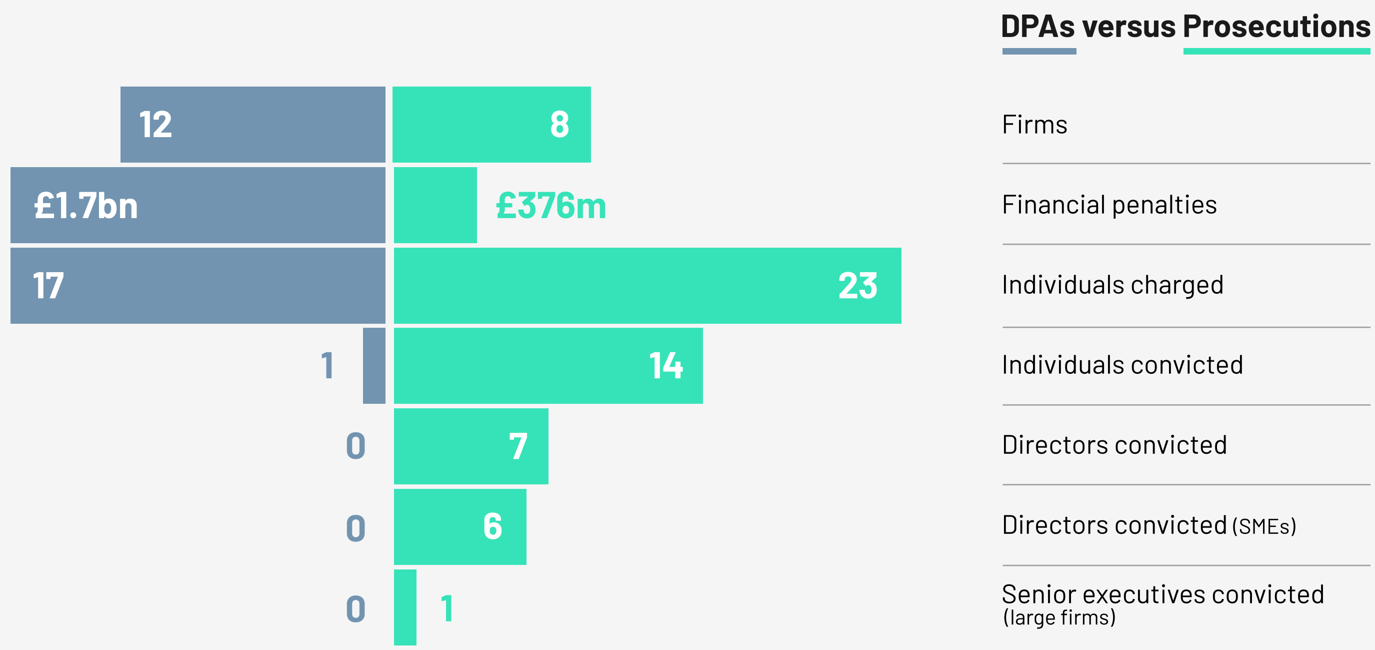
Does prosecuting firms make a difference?

We found that there is some evidence that individuals are more likely to be prosecuted following a corporate conviction than a DPA although this did not mean more senior executives in large firms face a significantly greater risk of prosecution. Directors of smaller firms and middle managers in larger firms are more likely to be in the dock.

14 individuals have been convicted following 23 prosecutions that resulted from eight corporate convictions, in which firms either pleaded guilty or were convicted after contesting charges. These corporate convictions resulted in £428 million in financial penalties.[68]

While half of those convicted (seven) held director level positions, only one was from a large firm, and the rest from medium-sized firms.[69] The one senior executive convicted from a large firm was convicted of a minor charge of destroying documents to frustrate the SFO's investigation rather than the main offence.[70]

The increased level of individual convictions following a corporate conviction is likely to be because prosecuting authorities will have higher levels of evidence with which to prosecute individuals following a corporate conviction than with DPAs, which can be negotiated on a lower burden of proof before a full criminal investigation is concluded.



The SFO faces a crucial test of whether it can bring home prosecutions of directors of firms following mining giant Glencore's UK subsidiary guilty plea in June 2022. Glencore admitted to paying $29 million to win oil contracts in Africa, and paid £280.9 million in financial penalties.[71]

The SFO is currently deciding whether to charge up to 11 employees of Glencore in relation to the bribery scheme, and has said it will make this decision by July 2024.[72]

Scapegoating the middle managers for corporate crime? The case of Petrofac

A highly illustrative case of how senior executives evade accountability for corporate crime and leave lower-level managers on the hook is that of Petrofac.

Following an SFO investigation, in October 2021, the oil and gas firm Petrofac pleaded guilty to failing to prevent former senior executives from using agents to pay £32 million in bribes to win £2.6 billion worth of contracts in the Middle East, and paid £77 million in financial penalties.[73]

However, only the firm's former Global Head of Sales, David Lufkin, who pleaded guilty to bribery, was convicted. This was despite the fact that Lufkin acted as a cooperating witness for the SFO – providing the evidence base for the corporate conviction.[74]

The judge acknowledged in his sentencing remarks that Lufkin was *"working on the instructions of those senior to you, and that they were in positions where complaint or refusal to comply would have been difficult, and would have exposed you to risks to your livelihood."* The judge also acknowledged that it was undoubtedly the case that *"Petrofac would not have pleaded guilty… had you not provided the detailed cooperation you did."* [75]

Although Lufkin received a suspended sentence, neither of the two former senior executives whose bribery the firm failed to prevent alongside Lufkin, have yet been charged, nor have any senior executives faced any consequence for their role in overseeing those who engaged in this bribery. There has been no update on the investigation against individuals for two years.[76]

Lufkin also faced a confiscation order of £140,000 following his conviction. The SFO successfully recovered £600,000 from bank accounts belonging to a former fixer for the firm, now deceased.[77]

Are corporate fines high enough to achieve deterrence?

Given that academic research has highlighted that higher fines are crucial alongside individual accountability for deterring corporate crime,[78] our research also examined disparities in fining of small and large firms.

We found that under both DPAs and convictions, there is evidence that the largest corporates with annual multi-billion pound revenues are fined proportionally less than firms with lower turnovers.

The two largest firms convicted by the SFO, Glencore and Petrofac, paid fines worth just 0.4% and 1% respectively of the average annual turnover in the five years before the fine.[79] By comparison the two firms with the lowest turnovers convicted by the SFO, FH Bertling and Smith and Ouzman, paid fines worth 4.1% and 9.5% of their average annual turnover in the five years before the fine.[80]

Similarly with DPAs, the two firms with the largest turnovers, Tesco and Airbus, paid fines worth just 0.2% and 0.6% respectively of the average annual turnover in the five years before the fine.[81] With the exception of the firm with the lowest turnover which received no fine at all (Güralp), the two firms with the lowest turnovers who got DPAs, Sarclad and Bluu/Tetris, paid fines worth 2.8% and 5.1% respectively of the average annual turnover in the five years before the fine.[82]

As a result, the firms with the largest turnovers investigated by the SFO face the lowest chance of a director facing any conviction, and pay the lowest fines as a percentage of average turnover.

The Financial Conduct Authority's recent record on prosecuting directors of firms

The FCA polices the UK's financial markets, and has powers under the Financial Services and Markets Act 2000 to prosecute individual criminal offences in England, Wales and Northern Ireland including insider dealing and market abuse. In 2007, it also gained powers to prosecute money laundering under the Money Laundering Regulations 2007.[83]

As the FCA can also take a variety of regulatory actions, criminal prosecutions represent a very small part of the actions it takes against financial crime. Between 2013/14 and 2020/21, on average just 4.6% of the outcomes of its enforcement activity were criminal.[84]

The FCA has a philosophy of 'credible deterrence' when it comes to financial crime. In a speech in 2013, then head of Enforcement and Financial Crime, Tracy McDermott, told a conference that *"in order to achieve credible deterrence, senior managers must be held to account."*[85] Since 2013, there have been multiple references by the FCA to the fact that *"credible deterrence"* involves *"robustly deploying our civil and criminal prosecution."*[86]

However, it is clear that the FCA has over the past decade *"appeared to prefer to take action against misconduct in the areas for which it has responsibility through its civil regulatory regime"* rather than using criminal enforcement.[87] Regulatory routes are always likely to be quicker and easier to achieve than the criminal route.

The FCA's latest three-year strategy document (2022-2025) states that the FCA *"prosecute[s] money laundering and fraud within our remit, pursuing both firms we regulate and firms who are not properly authorised."*[88] It makes no mention however of having a prosecution strategy for individuals or of the balance between criminal and civil enforcement it will seek to achieve.

Who does the FCA prosecute?

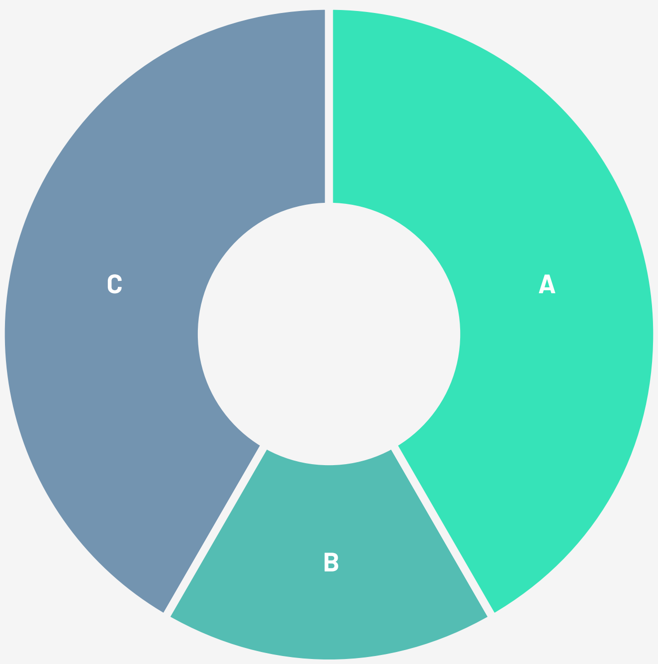
FCA rates of prosecution against individuals are low. Despite opening between around 100 and 300 criminal investigations a year for financial crime over the past decade, successful prosecutions against individuals have been in the single digits every year. As a result, just 2.3% of criminal investigations resulted in individual convictions on average over this period.[89]

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Number of criminal investigations opened into individuals[90]	19	79	117	90	82	66	33	50	49	8
	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23
Individual convictions[91]	5	7	8	6	6	8	2	0	6	1

After analysing information on 54 individuals convicted and sentenced following a prosecution brought by the FCA over a 10-year period between 2013/14 and 2022/23,[92] we found that:

1. **The majority of FCA convictions are against individuals employed by small firms, or against individuals not authorised by the FCA.**

57% of convictions the FCA obtained were against individuals formerly employed by small firms, with a further 24% of convictions related to individuals who were not authorised by the FCA, were sole traders, were engaged in activities such as forex trading, or were not associated with a firm.[93]



Firm sizes of individuals convicted by the FCA (2013/14 – 2022/23)

A **57%** – formerly employed by small firms

B **24%** – non-authorised, sole traders, forex traders, or not associated with a firm

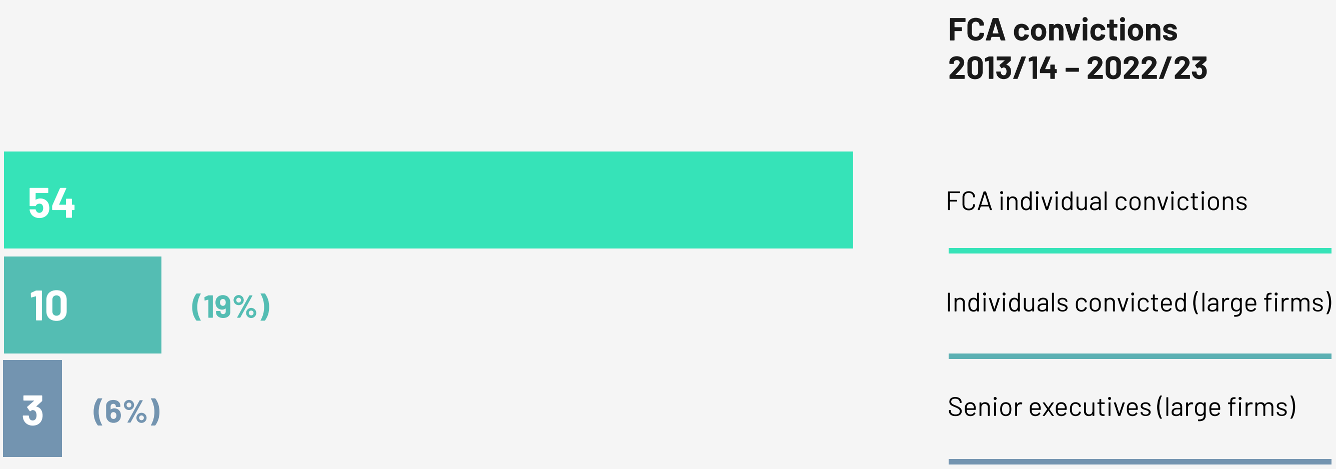
C **19%** – formerly employed by large firms

In only 19% of cases were convictions obtained against individuals working for large firms which included 10 individuals.[94] Seven of these 10 individuals held junior to mid-level positions such as business analysts, compliance officers, equities traders and portfolio strategists.[95]

2. The FCA secures very few convictions against senior executives working in large firms

Between 2013/14 and 2022/23 only 6% of FCA convictions were obtained against senior executives in large firms:

- In 2015 the former Group Treasurer and Head of Tax at Morrison Supermarkets plc pleaded guilty to insider trading and was sentenced to 12 months' imprisonment.[96]
- In 2022 the former Redcentric plc CFO and its finance director pleaded guilty to charges of making false statements contrary to Section 89(1) of the Financial Services Act 2012.[97] The firm's chief executive officer was acquitted in the same trial.[98]



NatWest – no individual accountability following major anti-money laundering failings

In a landmark case, in December 2021, the FCA secured its first ever criminal conviction against a firm when NatWest was convicted of three money laundering offences for failing to prevent its accounts from being used for money laundering purposes.[99] NatWest was fined £264.7 million by the judge after it pleaded guilty.

NatWest was convicted of receiving £365 million (£264 million in cash) from Fowler Oldfield, a jewellery business based in Bradford, into one of its bank accounts between 2012 and 2016 without adequately scrutinising the transactions.[100]

Despite the *"particularly egregious failures"* in this case, which included repeated internal warnings relating to money laundering being ignored,[101] the FCA did not bring any criminal or regulatory action against any NatWest employees.

In a letter sent to the chair of the Treasury Select Committee in December 2021, the FCA's chief executive Nikhil Rathi told the Committee that *"the role of individuals was carefully considered throughout the investigation."*[102]

He pointed to the challenges of prosecuting individual employees under the Money Laundering Regulations which included:

- demonstrating that NatWest's officers (as opposed to more junior employees) had requisite knowledge of the failures, or were personally negligent in bringing them about;
- *"insufficient evidence to establish individual liability given the distribution and allocation of system knowledge and responsibilities for AML functions to support a case against any officer;"*
- the conduct at issue occurring prior to the introduction of the SM&CR in March 2016, complicating the FCA's ability to identify whether NatWest senior managers breached code of conduct rules.

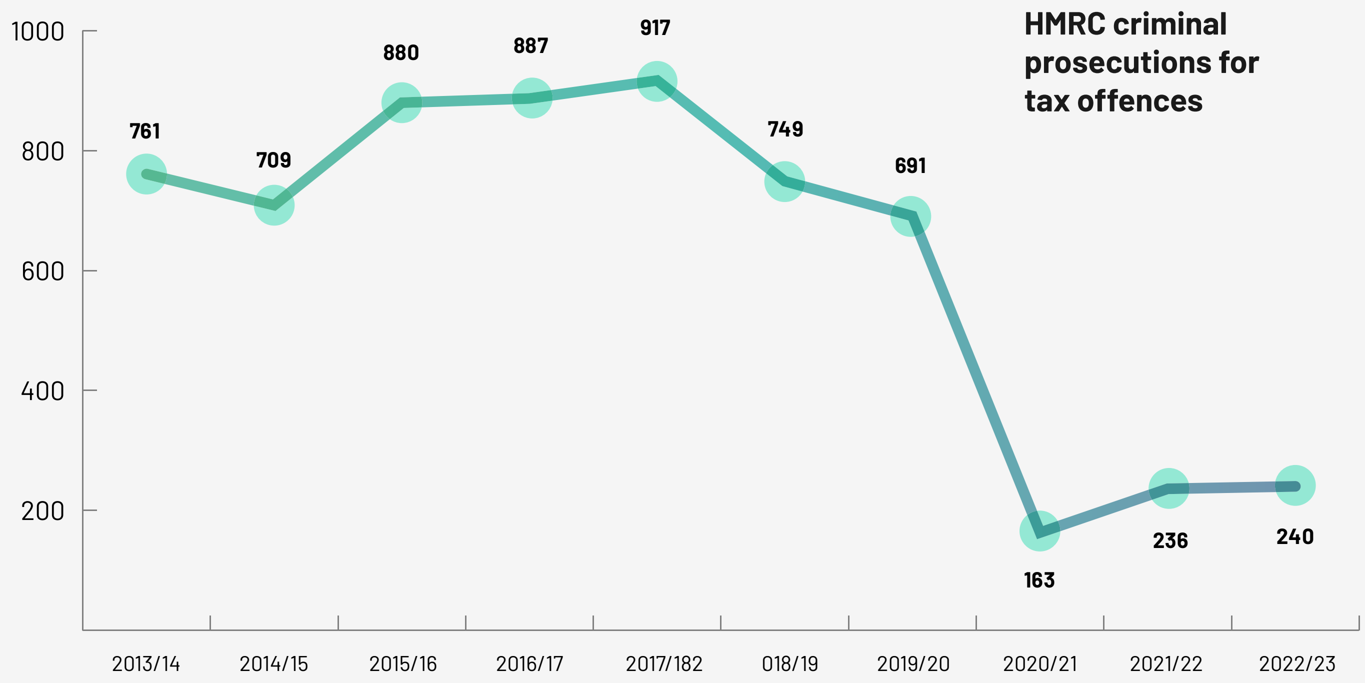
HM Revenue & Customs' recent prosecution record

HMRC is responsible for criminal investigations into tax fraud and money laundering in the sectors that it is responsible for supervising (namely estate agents, high value dealers, Money Service Businesses among others).[103] The Crown Prosecution Service (CPS) acts as the prosecutor for HMRC cases.

There are widespread concerns about levels of prosecutions resulting from HMRC investigations.[104] In 2023 HMRC was criticised by the Public Accounts Committee for falling prosecutions for tax-related offences after prosecutions fell from *"around 900"* in 2017-2018 to 236 in 2021-22, and the agency said it did not intend to increase prosecutions to pre-pandemic levels.[105] In 2022/23 it brought 240 prosecutions.[106]

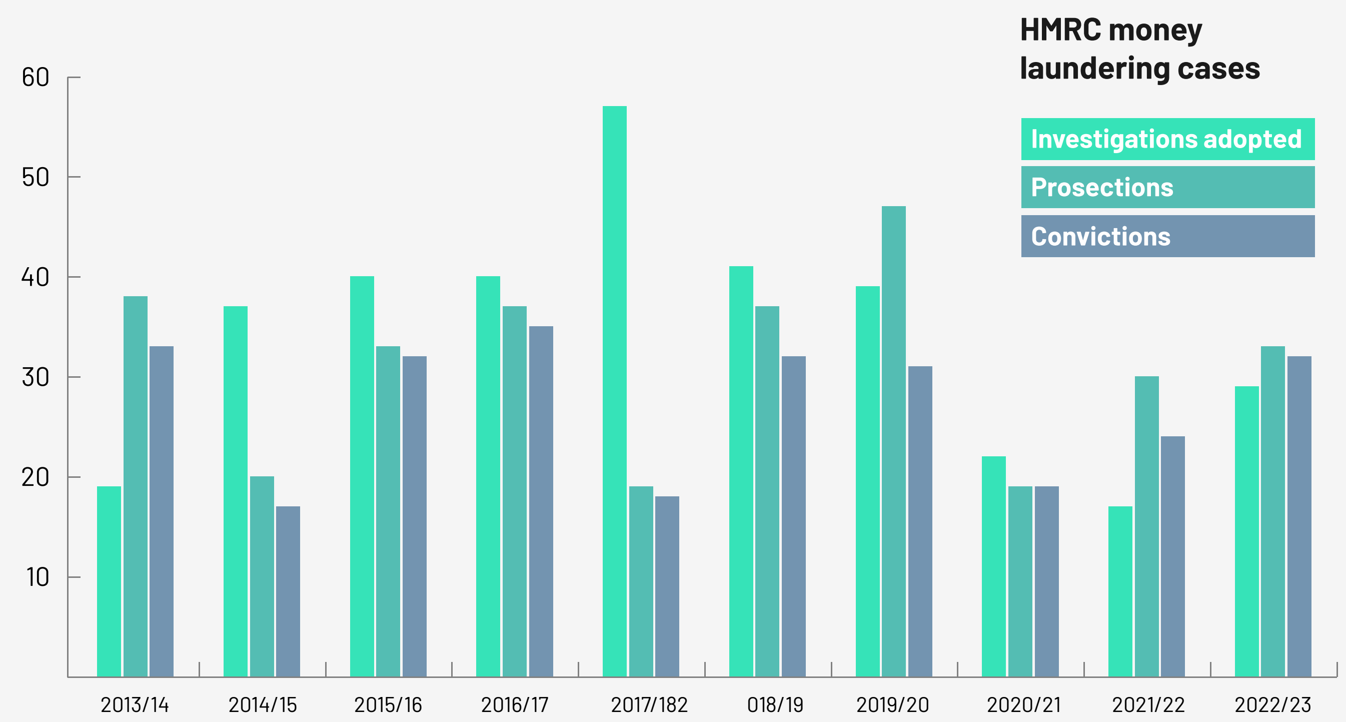
The agency has said it plans to focus prosecutions on the *"most serious and complex cases."*

It is not clear how it will do this. HMRC has had targets in the past to increase the number of prosecutions of serious and complex tax crime to over a 100 a year.[107]



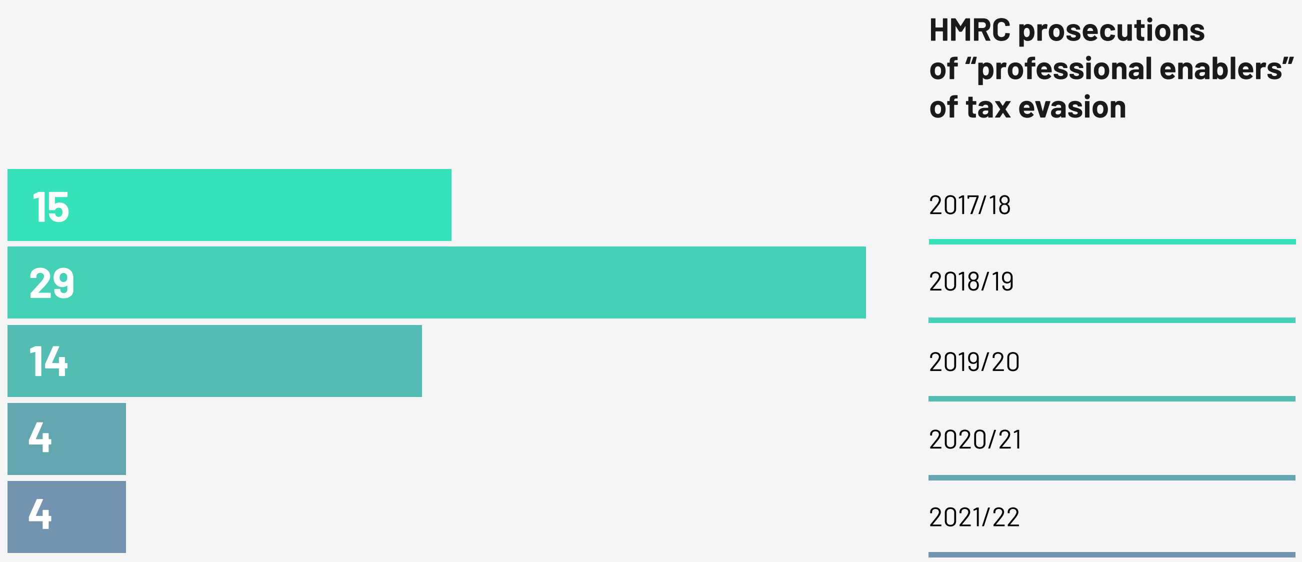
However, according to the NAO, HMRC has only reported once on targets for prosecuting serious and complex cases.[108] This was in 2018/19, when it reported 42 prosecutions against a target of 30 and said it was unlikely it would reach the 100 target by 2020/21.[109] HMRC has recently removed all prosecution targets and has not reported on its serious and complex case target since 2019/20.[110]

In relation to money laundering, HMRC has said that between 2011-2022 it opened 358 investigations into money laundering, and prosecuted 301 individuals during that period.[111]



As with tax evasion, however, money laundering criminal investigations into individuals are declining with HMRC opening 57 investigations in 2017/2018 and 17 investigations in 2021/22.[112] HMRC does not keep information about prosecutions in a way that enables an analysis of whether any of these involve directors.[113]

HMRC does not appear to report on prosecutions of directors in relation to tax related offences either, but does keep a record of prosecutions of *"professional enablers"* of tax evasion.[114] These prosecutions have also fallen in number.



Meanwhile the agency has yet to prosecute any businesses for the new failure to prevent the facilitation of tax evasion offence introduced in 2019.[115]

In December 2023, Entain plc, the owner of betting agency Ladbrokes, paid financial penalties of £615 million under a Deferred Prosecution Agreement agreed with the CPS following an HMRC criminal investigation.[116] Entain is a FTSE 100 firm, and the alleged conduct in question relates to bribery arising from a Turkish subsidiary.[117] This is the first ever DPA agreed as a result of an HMRC investigation.

As industry news outlets have noted, a DPA with Entain will be a key test for HMRC and the CPS as to whether they also pursue the directors in charge of the firm at the time of the alleged offending.[118]

The Competition and Markets Authority's recent record on prosecuting directors of firms

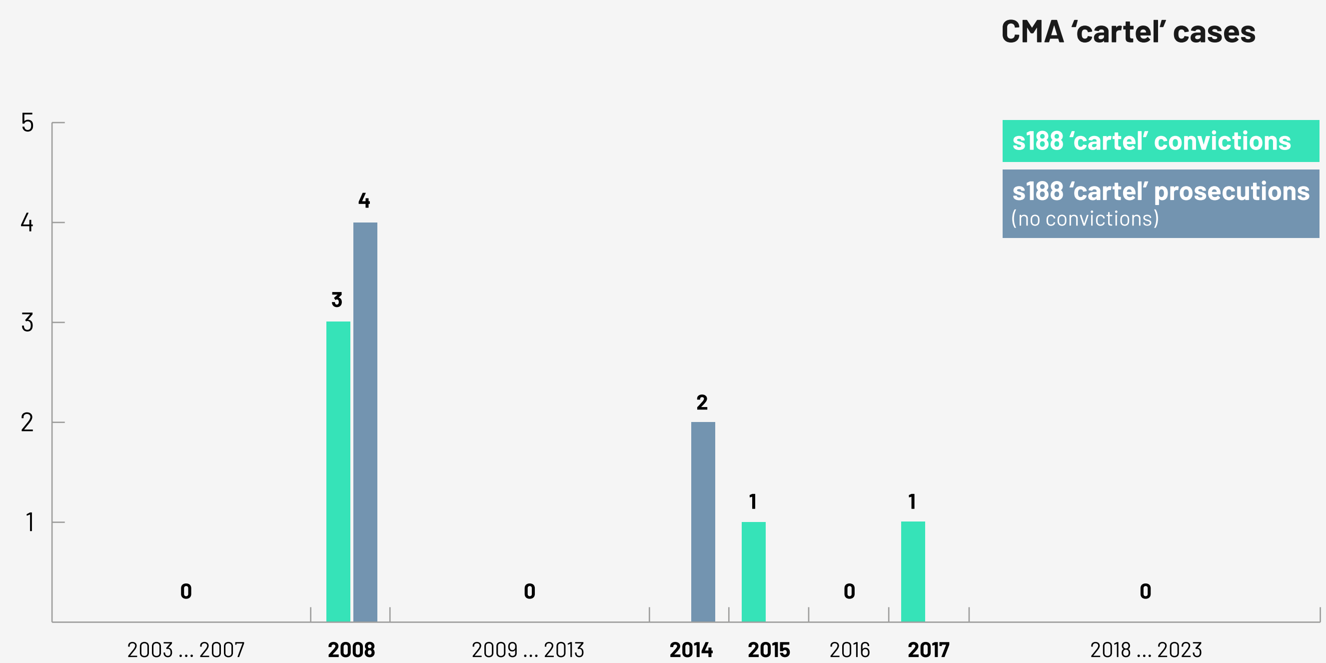
The CMA is the UK's main regulator responsible for ensuring fair competition in markets and for protecting consumers. Like the FCA, the CMA can use both regulatory and criminal enforcement to police anti-competitive behaviour. The nature of its core business means the CMA mostly focuses on large firms.

The CMA has powers to prosecute individuals involved in "hardcore cartels" – cases where agreements exist to fix prices, share markets, rig bids or limit output at the expense of the interests of customers.[119] Those convicted of the offence can be subject to unlimited fines and prison sentences of up to five years.[120]

The vanishing cartel prosecutions

Since 2003 when the UK's cartel offence came into force, the Office of Fair Trading and its successor the CMA have secured just five individual convictions resulting from eleven prosecutions.[121] It has yet to secure a conviction in a case where a director has pleaded not guilty,[122] or secure a conviction against an individual formerly employed by a large firm.

The last major case where the CMA successfully prosecuted a director in a firm (which related to the construction industry), was in 2017.[123]



As with the SFO and FCA, the CMA has had most success in achieving successful prosecutions against senior personnel in SMEs.

Individual	Prosecuted	Convicted	Firm	Role	Firm size
1	2008	✔	British Airways	Former commercial director	Large
2	2008	✖	British Airways	Head of sales	Large
3	2008	✖	British Airways	Former head of corporate communications	Large
4	2008	✖	British Airways	Head of UK and Ireland sales.	Large
5	2008	✔	Connected to Dunlop Oil and Marine Ltd	Independent consultant	Medium
6	2008	✔	Dunlop Oil and Marine Ltd	Sales Director	Medium
7	2008	✔	Dunlop Oil and Marine Ltd	Managing Director	Medium
8	2014	✖	Galglass	Director	Medium
9	2014	✖	Kondea Water Supplies	Director	Small
10	2015	✔	Franklin Hodge Industries Ltd	Managing Director	Small
11	2017	✔	Stanton Bonna Concrete (Stanton Precast Ltd)	Director	Medium

This thin enforcement record comes despite the CMA's tough public stance to *"stamp out illegal cartels,"*[124] and despite the fact that the cartel offence was amended by the Enterprise and Regulatory Reform Act 2013, to remove the requirement to prove dishonesty.[125] This amendment came after concerns were raised by the government over the lack of CMA-led cartel cases brought to trial.[126] However, there have been no prosecutions under the amended offence since it was introduced.

The lack of criminal enforcement has led to fears that the CMA has effectively de-prioritised criminal cartel prosecutions.[127] It has also led to concerns that the absence of prosecutions has resulted in low awareness among the UK's business community about cartel offences, with 43% of businesses not knowing that fixing prices is illegal.[128]

Who's responsible for enforcing cartel offences?

In 2019, then chair of the CMA, Lord Andrew Tyrie, made a number of recommendations to the government about how the CMA could improve enforcement, noting that it was *"difficult and costly to bring prosecutions"* partly because the CMA did not *"maintain the scale of specialist expertise normally possessed by agencies with powers of prosecution."*[129] Tyrie recommended consideration be given to moving responsibility for prosecution to *"an agency that routinely brings criminal prosecutions, such as the Serious Fraud Office."*

In 2020, in response to these recommendations, the CMA signed a Memorandum of Understanding (MoU) with the SFO for coordinating investigation and prosecution of individuals for criminal cartel offences.[130] The MoU includes information on how the agencies plan to undertake joint and cooperative investigation, participate in joint decision-making and on collaboration and information-sharing.

However, since the signing of the MoU the SFO has not launched any investigations into cartel offences, and enforcing cartel offences is not referred to in the SFO's latest strategic plan (2022-2025).[131] The SFO has not received any additional funding specifically to prosecute such offences.

If neither agency takes the lead in prosecuting such offences, then the MoU will create a potential enforcement gap instead of restarting efforts to prosecute criminal cartel offences.[132]

New powers being proposed for the CMA under the Digital Markets, Competition and Consumers Bill, currently before Parliament – which make it much easier for the CMA to issue enforcement notices and impose civil fines – may also reduce the likelihood of criminal cartel prosecutions, as the agency will be likely to prioritise the easier civil enforcement route.

The new Bill does however introduce new criminal offences relating to unfair commercial practices.[133] It remains to be seen how the CMA will enforce these criminal offences given its lack of criminal prosecutions in the last six years and the lack of clarity as to who is responsible for prosecution of these offences.

Analysis: what's going wrong with prosecutions?

Is the law at fault?

The current UK legal context for holding senior managers criminally liable for corporate criminality is, in the words of the Law Commission's 2022 review of corporate criminal liability, *"highly unsatisfactory."*[134] Different modes of liability and even different definitions of *"senior managers"* apply in different statutes creating a lack of clarity and consistency.

This includes that:

- Some statutes such as the Bribery Act 2010 and Fraud Act 2006 impose liability where there is consent or connivance by the director in the corporate offending (covering where a director knew of, or engaged in wilful blindness in relation to the offending).
- Others such as the Proceeds of Crime Act 2002 – which contains the UK's main money laundering offences – and the failure to prevent facilitation of tax evasion offence have no provision at all to hold directors to account for their involvement in corporate crime.
- And others (primarily covering 'strict liability' offences – where there is no need to prove a person intended for the offence to happen) impose it where there is consent, connivance or neglect by the senior manager. Examples of this include section 37 of the Health and Safety Act of 1974 which has seen a considerable number of prosecutions of directors,[135] and section 92 of the Money Laundering Regulations 2017 which have seen very few if any.

> *You can't interfere in the work of the prosecutors. What you can do, of course, is change the law and make it tougher on people.*
>
> **Gordon Brown** – former Prime Minister on the lack of prosecutions of senior executives

The Law Commission concluded that *"it is reasonable for directors to be criminally liable where they have consented to or connived in corporate offending, and – in some cases – where that is attributable to their neglect."*[136] Neglect should however only apply, it argued, in 'strict liability' offences. It called for a general principle developed in legislation or through prosecutorial guidance to make this clear for all corporate offending.[137]

The Law Commission found that there was *"a case"* for directors to be held to account on the basis of neglect for failure to prevent offences (which are strict liability). However, the Law Commission went on to raise concerns about discrepancies this would throw up, without providing a thorough analysis of the case for these concerns.[138] It concluded that *"if it was thought desirable"* to take this route, such offending should only incur a lower-level sentence.

Do UK prosecutors need to change strategy in order to go after senior managers?

Our research did not find any prosecution strategies which specifically focus on senior managers for any of the agencies in our report.

This is in stark contrast to the US where the US Department of Justice (DOJ) has issued a series of 'memos' over the past decade about the importance of individual liability for corporate crime. The 2015 'Yates' memo for instance laid out a series of principles for prosecutors requiring that in corporate crime cases:

- all relevant facts about individuals should be handed over by firms;
- criminal and civil corporate investigations should *"focus on individuals from the inception of the investigation;"* and

- no corporate case should be concluded *"without a clear plan to resolve related individual cases."*[139]

In September 2022, the DOJ issued a new memo[140] going even further on individual accountability, emphasising the timely handing over of information by firms, and stipulating that:

> *"prosecutors must strive to complete investigations into individuals – and seek any warranted individual criminal charges – **prior to or simultaneously** with the entry of a resolution against the corporation."* [emphasis added][141]

By comparison, none of the guidance issued by the SFO about corporate cooperation requires firms to hand over evidence on individuals in order to be given credit for that cooperation.

The Code of Practice on DPAs issued by the Director of Public Prosecutions and the Director of the SFO states that "*it will ordinarily be appropriate that … individuals are investigated and where appropriate prosecuted."*[142] SFO guidance on Corporate Cooperation meanwhile, has a section on individuals which refers only to the need for firms to provide witnesses to the SFO, and not to tamper with witness evidence.[143]

The SFO is not alone. While the FCA does not have specific guidance in relation to corporate prosecutions, the CMA guidance on settlements with firms contains no reference to the need for corporate bodies to hand over relevant information about individuals or for sequencing individual and corporate settlements.[144]

Other tools that could help ensure greater criminal accountability for senior executives

There are two other specific areas where policy shifts or new tools could significantly help ensure more effective prosecutions against senior managers:

1. **the use of cooperating witnesses to provide evidence against senior managers**

Despite strong noises from both the former General Counsel of the SFO, Alun Milford,[145] and the recently departed Director, Lisa Osofsky,[146] about making greater use of cooperating witnesses for complex fraud and corruption cases, the lack of reassurance that prosecutors are able to give those wanting to cooperate has restricted their use.

The granting of immunity from prosecution by UK prosecutors can only be done *"in the most exceptional circumstances,"*[147] and has been controversial in some cases.

However, prosecutors may seek a reduced sentence, and under section 74 of the 2020 Sentencing Act, courts may reduce a sentence where an offender has provided assistance. UK prosecutors are unable to offer any guarantee that the court will do so in negotiations with such witnesses.[148]

Mr Lufkin's role as a cooperating witness against Petrofac is a case in point. While the SFO and the court bent over backwards to accommodate the firm's needs including in relation to timetabling of court hearings and which charges it would face, in the words of his barristers, Mr Lufkin spent *"over four years in no-man's land waiting to know whether the cooperation [he] had given .. would lead to freedom or incarceration."*[149]

Lufkin's counsel, Claire Sibson KC and Tom Allen KC, argue that if individuals are to be encouraged to be cooperating witnesses in the future, *"policy must shift"*.[150]

In their words, *"whether this means prosecutors being able to make more robust submissions in support of assisting defendants, or judges giving indications on sentence at some earlier point... the current balance weighs unfavourably against an individual defendant who is considering taking the plunge."*

2. Whistleblower compensation

There is considerable academic evidence emerging that compensation or incentivisation of whistleblowers can increase detection of wrongdoing, the quality of intelligence provided to law enforcement, and even, in competition cases, be more effective in preventing cartels than leniency programmes.[151]

In 2022, a survey by the FCA threw up huge dissatisfaction by whistleblowers with the agency, with less than 20% feeling their complaint had been adequately investigated and 40% saying they would not blow the whistle to the FCA again.[152] In May 2023, the FCA set out steps about how it would *"improve the confidence of whistleblowers."*[153] None of these steps however included whistleblower compensation or incentivisation.

Only two agencies are able to give whistleblower rewards in the UK: HMRC for tax fraud, and the CMA for competition breaches.[154] In the summer of 2023 there were calls for HMRC to increase the amount of rewards it offered, after freedom of information requests found that it had paid out just 1.7% of what the US paid out to tax whistleblowers.[155]

The UK is losing credible whistleblowers and intelligence to the US where authorities pay rewards to whistleblowers.[156] In 2022, 86% of the $2.2 billion recovered by the DOJ in settlements and judgments in civil fraud and false claims cases involved whistleblower tip offs.[157]

II.
Regulatory Action

II. Regulatory action

Good regulation is essential to protect the integrity of the UK's markets, UK consumers, and the wider public. It establishes strong rules and procedures that must be followed to ensure good corporate governance. However, for regulation to be effective it must include proportionate and dissuasive sanctions in cases of non-compliance.

Risk-based sanctions, as identified in Professor McCrory's 2006 government-commissioned review of regulatory justice, provide:

- deterrence,
- *"improve outcomes for society as a whole,"*
- *"raise standards across industry,"* and
- *"create a level playing field."* [158]

This was reiterated by HM Treasury's 2014 review of enforcement decision-making at financial services regulators which noted that: *"effective, proportionate and robust enforcement action delivers credible deterrence, so that wrongdoers believe they will be held to account and that meaningful sanctions will follow."*[159]

This section covers the record of the Financial Conduct Authority (FCA) over the last 10 years in taking regulatory enforcement action against individuals and directors for financial crime and money laundering. It focuses on:

1. The fines and prohibition orders imposed on directors in the financial sector
2. Enforcement of the Senior Managers and Certification Regime (SM&CR) by the FCA and the Prudential Regulation Authority (PRA)
3. Individual enforcement following a corporate regulatory fine.

Key findings on regulatory enforcement

1. FCA fines and prohibition orders against individuals are declining:

- The FCA issued half as many fines to individuals in 2022 than it did in 2013, while the average fine (with two notable exceptions[160]) has shrunk by 32% from an average of £250,000 a decade ago to £170,000 in 2022.[161]
- The number of prohibition orders (or bans on operating in the financial sector) issued by the agency has also shrunk by 62%, from 26 in 2013/14 and 2014/15, to 10 in 2021/22.[162]

2. The FCA issues significantly more financial penalties and prohibition orders against directors in the SME sector than senior executives in large firms:

- 84% of individual fines issued by the FCA against directors were given to those in the SME sector while 16% went to senior executives in large firms.[163]

- Senior executives in large firms paid fines that represented just 2% (£2.3 million) of the overall value of fines (£113 million) imposed over the last decade.[164]
- 90% of published prohibitions against directors in the financial sector imposed by the FCA went to those in the SME sector.[165]

3. There has been very limited enforcement of the SM&CR despite its role in raising corporate standards:

- Just six financial penalties have been issued under the SM&CR by the PRA and FCA since it came into force in 2016, one of which was overturned, another of which was not enforced in exchange for compensation paid, and another which is under appeal.
- Just two of the financial penalties were issued by the FCA, which occurred in 2018 and 2023, both in relation to non-financial misconduct.[166]
- Of the 70 investigations the FCA opened under the SM&CR between 2016 and 2022, 76% were into senior managers, but just 6% resulted in any enforcement action at all.[167]

4. The FCA rarely takes any action against firms' employees following corporate fines:

- Between 2013 and 2022 the FCA fined 139 firms £4.1 billion, but in only 13% of instances involving 30 individuals did the FCA fine any of a firm's employees in relation to the underlying misconduct, and less than a third of these fines (eight) were given to senior executives formerly employed by large firms.[168]
- Since 2013 the FCA has taken enforcement action against 17 banks resulting in it issuing fines worth £777 million in relation to AML failings, but in only one case did the FCA take enforcement action against an individual working for any of the banks.[169] This was despite the fact that in seven of these cases, the conduct had carried on after the SM&CR regime was brought into effect.[170]

The FCA's approach to regulation

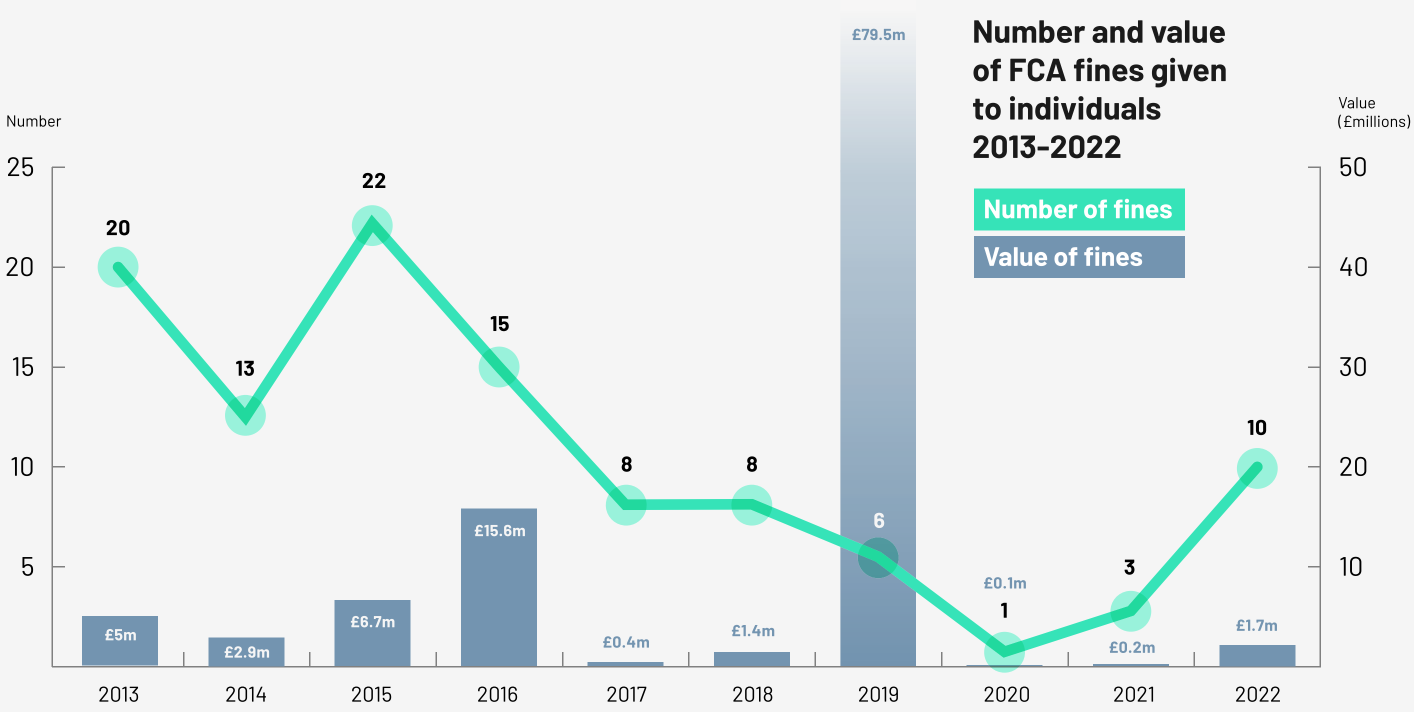
To fulfil its statutory objective to protect and enhance the integrity of the UK financial system,[171] the FCA has a range of civil powers including fining, banning and publicly censuring individuals and firms, both as a deterrent against misconduct, and as a remedial action to repair harm.[172] Fines and prohibition orders are the most serious of these powers and are an essential part of the FCA's approach to regulation.

The FCA has faced scrutiny about its approach to regulation with a December 2023 report by the UK's National Audit Office finding *"significant delays"* between the FCA identifying an issue and taking regulatory action.[173]

FCA published outcomes	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22[174]
Cancellation of permissions or withdrawal of approvals of individuals	80	30	65	149	249	238	176	107	218
Civil outcome	2	5	10	4	14	0	4	6	0
Public censure	5	6	4	4	1	0	14	5	2
Suspension / restrictions	0	3	1	1	2	2	0	2	0
Prohibition orders	26	26	24	23	19	20	12	15	10
Fixed Notices issued against individuals	n/a	n/a	30	25	21	22	16	15	12

Financial penalties: fewer and smaller

Over the last decade the FCA has issued several hefty individual fines, such as in 2016 when it fined an insurance fraudster £14 million,[175] and in 2019 when it fined the former director of Keydata Investment Services £76 million.[176] These two fines by themselves represent 80% of the total value of fines the FCA handed to individuals during the decade.



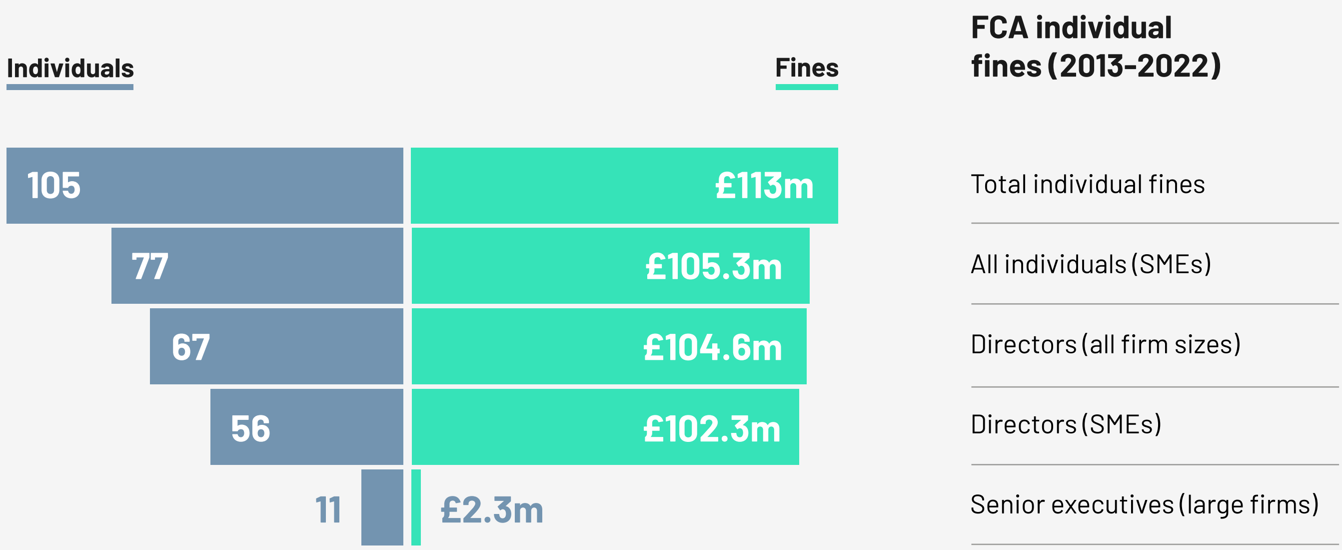
But barring these two fines, and despite a renewed commitment to use financial penalties in its latest 2019 enforcement strategy,[177] the emerging trend over the last decade is for the FCA to fine fewer individuals, and for smaller amounts. This trend, it should be noted, took hold prior to the Covid-19 pandemic.

In 2013 the FCA issued 20 fines to individuals worth an average of £250,000, but 10 years later in 2022 it issued half the number of fines, while the average fine shrank by 32% to £170,000.[178] Allowing for inflation, however, the reduction in real terms is much higher, reaching 47%.[179]

Given the FCA describes deterrence as one of the *"principal purposes"* of issuing financial penalties,[180] it is concerning that a gradual decline in fining levels has taken hold.

Who does the FCA fine?

Between 2013-2022 the FCA issued a total of 105 fines against individuals worth £113 million.[181] The table below shows the distribution of FCA fines, both in relation to the seniority of individuals being fined (directors with board level responsibilities and other employees[182]) and firm size (based on the definitions used in the Companies Act 2006).[183]



We found that:

1. Three in four FCA fines are given to individuals employed by SMEs

- 77 of the 105 individuals (73%) fined worked for SMEs.[184] These individuals were fined a total of £105.3 million – equal to 93% of the total value of fines the FCA issued.

- In contrast, the FCA fined 26 individuals (25%) working for large firms between 2013 and 2022.[185] These individuals were fined £7 million – equal to just 6% of total amount of fines.[186]

2. Two thirds of FCA fines are given to directors but just 16% of such fines went to senior executives in large firms

- 67 of the 105 individuals (64%) fined between 2013 and 2022 were directors (in both SMEs and large firms).[187]
- Of these 67, just 11 (16%) were senior executives formerly employed by large firms. The other 56 fines were given to directors in the SME sector. [188]
- This means that the FCA issues **five times more** fines to directors in the SME sector than it does to senior executives working for large firms.

3. More than 90% of the value of all individual FCA fines were given to directors in the SME sector, while senior executives in large firms received just 2%

- When individual FCA fines are analysed by both seniority **and** firm size, it is clear that directors working for SMEs are fined more than senior executives in large firms.
- The 11 senior executives working for large firms were fined a total of £2.3 million, equal to just 2% of the total £113 million in fines.[189]
- In contrast, the FCA fined 56 directors working in the SME sector, a total of £102.3 million – equal to 91% of the total £113 million in fines.[190] This means that collectively directors in the SME sector **paid fines worth a total value 44 times greater** than those paid by senior executives in large firms.

Bans on directors: the declining use of prohibition orders

Another vital tool in the FCA's armoury to tackle executive misconduct is its power to issue prohibition orders to prevent individuals from carrying out particular functions.[191]

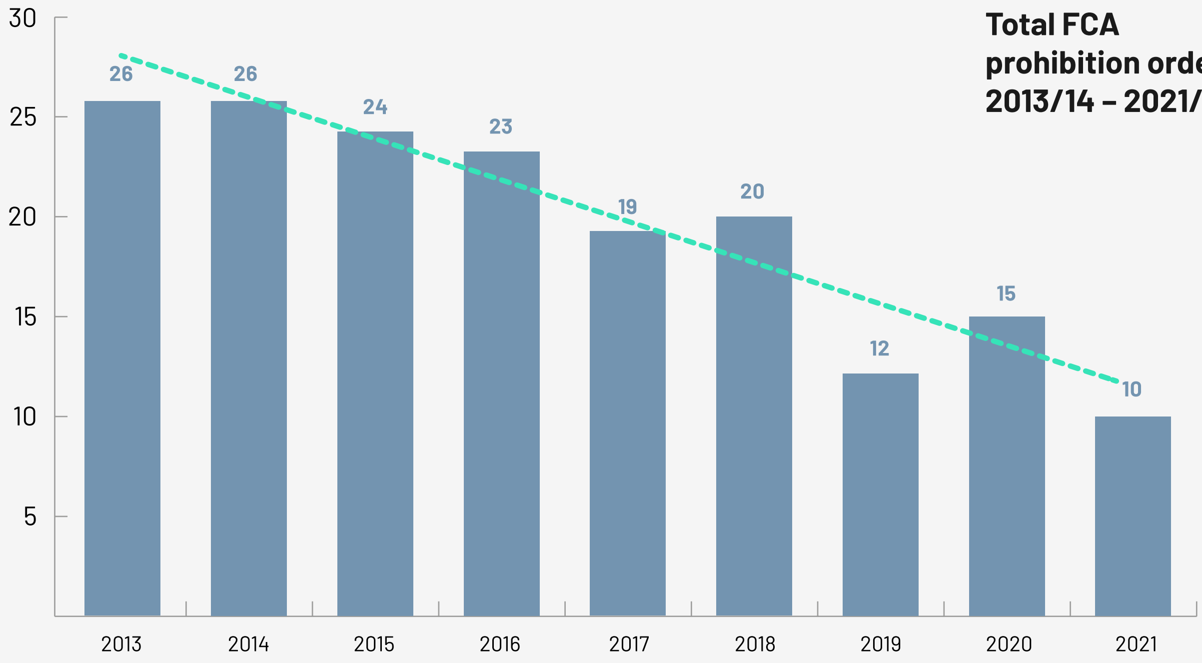
In deciding whether to ban an individual the FCA considers a range of factors including whether the individual is fit and proper, has failed to comply with the Statements of Principle or Code of Conduct, or has engaged in serious misconduct including market abuse.[192]

The FCA's use of prohibition orders has also declined, alongside the number and value of fines, since 2013.

Who does the FCA ban?

From a manual review of the FCA's website, we reviewed 80 instances between 2013 to 2022 where the FCA imposed a fine and a prohibition order on an individual. Information on individual prohibition orders is only published where a financial penalty is also imposed, with just under half of the 175 orders made between 2013/14 and 2021/22 published.[193]

Total FCA prohibition orders 2013/14 – 2021/22



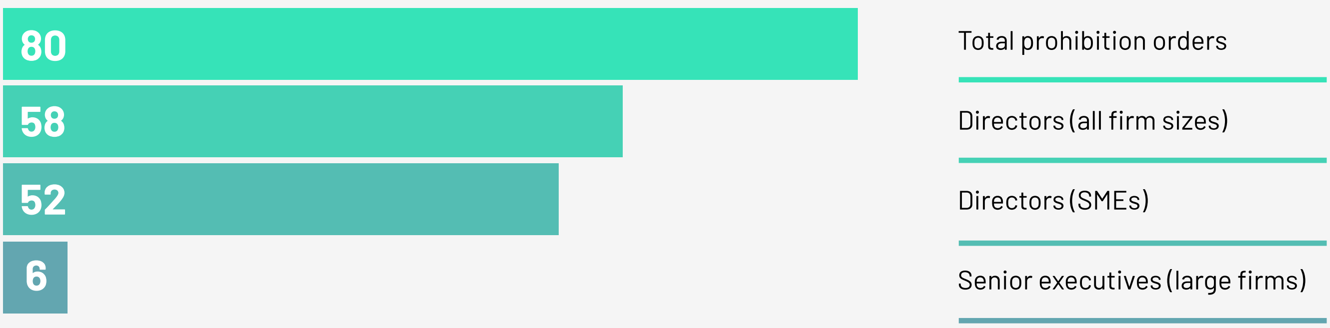
Overall, those facing a prohibition order are much more likely to work for smaller firms with only a few bans being issued to senior executives in large firms.

We found that:

1. Three out of four FCA prohibition orders are given to directors
Mirroring the conclusions of the previous section on financial penalties, most prohibition orders are issued to directors. Between 2013 and 2022, 58 prohibition orders were given to directors, equal to 73% of the total.[194]

2. Senior executives working for large firms are least likely to receive a prohibition order
Only 6 out of 80 (8%) prohibition orders issued by the FCA between 2013 and 2022 were given to senior executives in large firms.[195]

FCA prohibition orders 2013 – 2022



Prohibition orders overturned in the Upper Tribunal suggest FCA is struggling to meet high bar for proving recklessness and lack of integrity

In several recent high-profile cases, the Upper Tribunal – the court which reviews FCA regulatory decisions – has overturned several fines and prohibition orders, and found shortcomings with the FCA's approach to enforcement. This appears to be a reversal of a trend where the Upper Tribunal has mainly upheld FCA decisions over the past seven years.[196] These cases include:

- Financial penalties and a prohibition order imposed in 2019 against the chief executive of the Scottish Boatowners Mutual Insurance Association,[197] which were overturned by the Tribunal in July 2021 after it concluded that allegations that the individual acted with a lack of integrity were not substantiated.[198]

- Financial penalties and a prohibition order imposed in 2021 against a director and chief executive of a mortgage brokerage firm,[199] which were overturned in April 2023 at the Tribunal after the FCA failed to provide sufficient evidence that the director had acted recklessly or without integrity.[200]

- Prohibition orders imposed in 2021 against three former employees of the Swiss advisory and wealth management firm Julius Baer in relation to behaviour relating to Russian oil group Yukos,[201] which were overturned in June 2023, after the Tribunal found that the FCA failed to provide enough evidence to prove the individuals had acted recklessly, and with a lack of integrity.[202] The Tribunal additionally issued a public rebuke of the FCA for its handling of the investigation, and awarded adverse costs.[203]

Over the next year the Upper Tribunal will hear cases brought by:

- Banque Havilland and three of its employees in relation to currency manipulation allegations;[204]
- three bond traders working for Mizuho International plc accused of market abuse;[205]
- three former Carillion directors for allegedly acting recklessly;[206]
- two former Metro Bank executives in relation to alleged breaches of the FCA's listing rules;[207]
- the former Barclays CEO in respect of recklessly approving misleading statements made to the FCA in respect of Jeffrey Epstein;[208]
- Barclays in relation to allegations it acted recklessly and without integrity for failing to disclose financial arrangements agreed with Qatar entities as part of its capital raising announced during the financial crisis.[209]

This recent run of bad results in the Upper Tribunal shows that the FCA's Enforcement division is facing increasing challenges in making individual fines and prohibitions stick. It is likely the FCA will need to review its enforcement strategy if this run continues and there is a risk it will make the agency more risk-averse. It may be necessary for the government to commission a review of what the underlying challenges are and whether the evidentiary threshold for lacking integrity is set at a level which is increasingly hard for the FCA to meet.

Senior Managers and Certification – the low enforcement regime

The SM&CR was introduced following extensive criticism in the wake of the financial crisis by the Parliamentary Commission on Banking Standards and was intended to make senior individuals in the financial sector *"more accountable for their conduct and competence."*[210]

The SM&CR applies to the chief executive, chair of the Board, partners, and those with oversight of compliance for money laundering such as the money laundering reporting officer (MLRO).[211]

Under the regime, firms are required to provide a statement setting out what senior managers are responsible and accountable for.[212] These managers hold a 'duty of responsibility' such that if a firm breaches one of the FCA's requirements, the manager can be held accountable if they did not take steps to prevent the breach.

Initially, the SM&CR applied to UK banks, building societies, credit unions, branches of foreign banks operating in the UK and the largest investment firms, then was extended in 2019 to include all FCA solo-regulated firms.[213] As of March 2023, 45,997 firms and 121,222 individuals fall within the scope of the regime.[214]

After eight years has the SM&CR made senior managers more accountable for their conduct?

The SM&CR creates a *"system that enables firms and regulators to hold individuals to account."*[215] The regime has no doubt helped change culture in the financial sector, and the FCA has noted that the primary purpose of the regime is not enforcement but *"to encourage firms and their staff to take greater responsibility for their actions."*[216]

Lack of enforcement may be, as the FCA argues,[217] a sign of the success of the regime and the fact that firms are indeed behaving in more responsible ways.

However, during this time, the FCA has continued to find corporate misconduct as evidenced by corporate fines imposed for money laundering and other corporate wrongdoing. This has included fining 13 banks a total of £693 million since 2016 for money laundering failings.[218] Over half of these banks – seven – were fined for failings that continued after the regime came into effect.[219] There has not been a single money laundering related enforcement action under the SM&CR to date.

Furthermore, there has been considerable commentary from the private sector about the lack of enforcement activity under the SM&CR, which suggests that there are real and widespread concerns that absent enforcement, the cultural changes the regime has brought about may not stick.

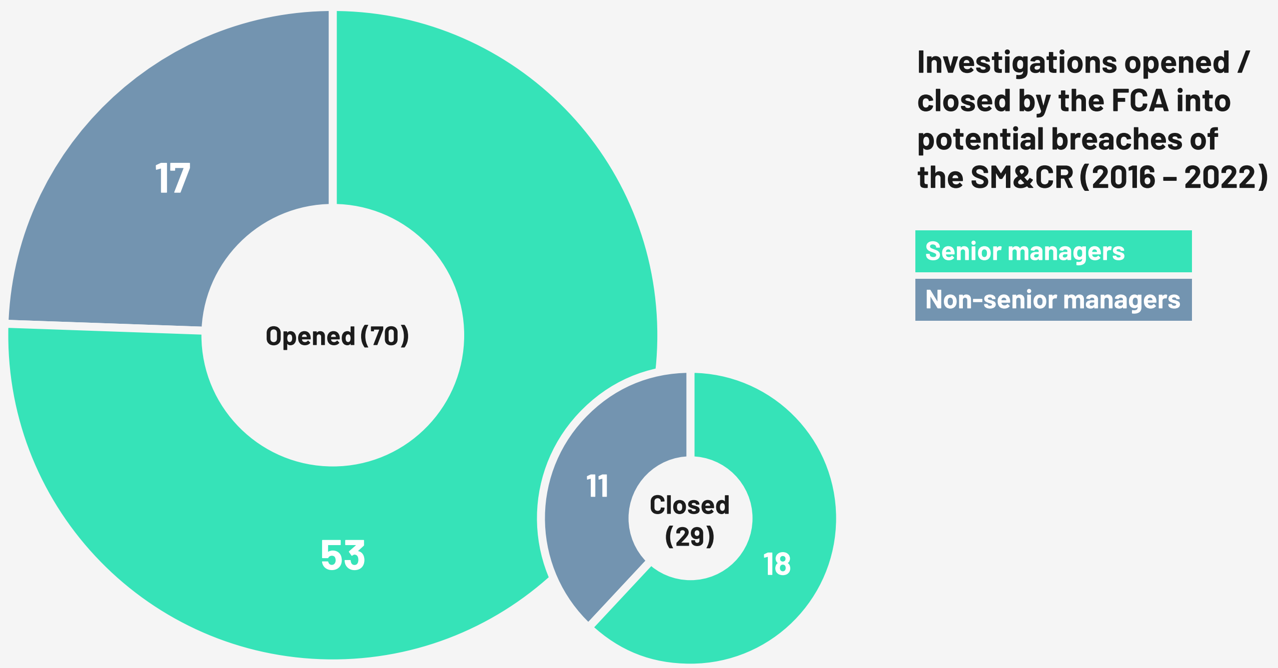
Meanwhile, as the 2023 Bank for International Settlements review of different senior executive accountability regime in major financial centres including the UK following the financial crash found, *"the threat of enforcement needs to be credible to prevent firms from adopting a checklist approach."* [220]

While cases are complex and may take years to investigate fully, the dearth of successful enforcement actions under the SM&CR does raise real questions about the FCA's appetite to enforce the rules.[221]

We looked at public data and asked the FCA and PRA for information under the Freedom of Information Act. We found:

1. The FCA has opened a considerable number of investigations under the regime, the majority of which are into senior managers, and has closed a lot too.

- The FCA opened 70 investigations into individuals between March 2016 and June 2022 under the regime with respect to potential misconduct.[222] According to FCA data provided to us, 53 of investigations under the SM&CR related to senior managers (76%) and 17 to non-senior managers (24%) including certified individuals, material risk takers, and other staff to whom the FCA Code of Conduct applies.[223]
- The FCA opened a further 13 cases in 2022/23, 10 of which were into senior managers.[224]
- FCA has closed 29 (or 41%) of its overall investigations under the SM&CR, of which 18 (62%) were investigations into senior managers.[225]
- The FCA has 41 ongoing investigations under the regime as of April 2022, of which 35 are into senior managers.[226]
- Since March 2016 the PRA has opened 18 investigations into senior managers under the regime. Nine of these investigations were open as of August 2023.[227]



2. The FCA and PRA have undertaken very little enforcement activity or supervisory action as a result of these investigations

- Of the 70 FCA investigations opened between 2016 and 2022, just four (6%) have resulted in any enforcement actions.[228]
- Of these enforcement actions, only two SM&CR investigations (both into the same person) have resulted in financial penalties being issued by the FCA to the CEO of Barclays Bank, Jes Staley, who was fined for *"non-financial misconduct"* for his handling of an anonymous letter sent by a whistleblower,[229] and for recklessly approving misleading statements to the FCA with respect to his relationship with Jeffrey Epstein.[230] The case has also been referred to the Upper Tribunal.[231]
- One fine and prohibition order imposed under the SM&CR jointly by the FCA and PRA in 2019 on the former CEO of a small mutual insurance firm was later overturned following the decision of the Upper Tribunal in 2021.[232]
- At the beginning of the 2023/24 financial year, the FCA imposed a £3.7 million fine and a prohibition order on the director of a small management firm, however the FCA decided not to enforce the penalty in exchange for the director paying £850,000 to the FCA towards compensation.[233]
- Only two financial penalties have been issued solely by the PRA. In 2023 it fined the former chief information officer of TSB Bank plc £116,600[234] and in January 2024 it fined the former chief executive officer of Wyelands Bank plc £118,808.[235]
- There has been very limited alternative supervisory action by the FCA under the regime other than these fines. It undertook two unspecified supervisory actions under the SM&CR, according to data it provided to us.[236] However, according to separate data provided to the financial services regulatory consultancy, Bovill, by the end of 2021, the agency had issued two compliance letters, four 'other' supervisory actions, and one undertaking in relation to senior managers under the regime.[237]

Astonishingly, neither the FCA nor the PRA publish any breakdown in their annual reports of enforcement or supervisory action under the SM&CR which makes it very hard to get accurate and timely enforcement data on the regime's implementation.

Dodging the bullet: how the FCA rarely takes action against firms' employees following corporate fines

Over the last decade (2013-2022) the FCA has issued 139 fines to firms worth a total of £4.1 billion.[238]

Our research finds that the FCA rarely fines employees of the firms in relation to the underlying misconduct, and even when it does, fines are mostly given to employees of small and medium-sized firms:

- In only 13% of instances (or 18) in which the FCA fined a firm did it also fine any of its employees (involving a total of 30 individuals).[239]
- Of these 30 individuals, only 12 were formerly employed by large firms, while over half (18) worked in the SME sector.[240] Only eight (or 27%) were senior executives formerly employed by large firms.[241]

We additionally found that these 18 corporate fines (where firms and employees were fined) amounted to £392.8 million – equivalent to just 9.5% of the total value of corporate fines the FCA issued during this period.[242]

Money laundering: a case in point

The FCA's enforcement record against banks in respect of money laundering failures reveals a particularly stark lack of individual accountability where firms have been fined for such failures.

Since 2013 the FCA has taken enforcement action against 17 banks resulting in it issuing fines worth £777 million for failing to comply with the 2007 MLR or for breaches of its AML rules.[243] In only one case, Sonali Bank, did the FCA take enforcement action taken against individuals working for the banks when in 2016 it fined Sonali's MLRO.[244]

In the following cases, the FCA took no action whatsoever against any individuals despite finding serious failings by senior management that continued after the SM&CR came into effect:

- In October 2020 the FCA fined Goldman Sachs £48.3 million as part of a worldwide $2.9 billion settlement in relation to the 1Malaysia Development Berhad (1MDB) scandal.[245] Goldman's UK subsidiary was the *"arranger, initial purchaser and underwriter"* and the majority of Goldman's profits for the deal were booked in the UK. The FCA found that *"senior personnel and a control function"* had received information about potential misconduct by a senior banker in relation to 1MDB, but no action was taken, and nor did they inform the FCA, despite reporting other minor misconduct to the FCA.[246] While two former Goldman Sachs bankers have been prosecuted in the US for their involvement in the scandal,[247] the FCA do not appear to have taken any type of regulatory action against senior personnel within the UK branch.

- In October 2021 the FCA fined Credit Suisse £147.1 million for serious financial crime due diligence failings relating to loans worth over $1.3 billion which the bank arranged for the Republic of Mozambique.[248] The FCA found that *"senior individuals, committees and control functions"* had information to enable the bank to appreciate the high risk of bribery and corruption in the deal, but provided *"insufficient challenge, scrutiny and investigation."* While three former London based bankers at Credit Suisse pleaded guilty to criminal charges in the US, of conspiracy to commit money laundering or wire fraud,[249] no regulatory action appears to have been taken by the FCA against any of the *"senior individuals"* identified in the final notice.

- In January 2023 the FCA fined Guaranty Trust Bank £7.6 million for failing to ensure it had in place effective anti-money laundering systems and controls. The FCA noted in its decision notice that it had previously fined the bank in 2013 for similar failures and found that the repeated misconduct was a *"a direct result of the inability of the senior management within GT Bank, over a prolonged period of time, to formulate and implement an effective plan capable of addressing the weaknesses identified within its AML and financial crime systems and controls."* [250] The FCA does not appear to have taken any action against any of the bank's employees in relation to the breaches.

Analysis: what's going wrong with regulatory enforcement?

There were high hopes when it was introduced that the SM&CR would significantly increase accountability of senior managers across the financial sector in the UK.

The SM&CR is well understood and well appreciated by the financial sector and as we noted earlier, there is some evidence that the regime has delivered on improving culture within firms. This includes that:

- 95% of firms surveyed by the PRA in 2020 were in agreement with the position that the regime *"was having a positive effect on individual behaviour;"* [251]
- the Financial Services Culture Board's latest annual survey identified a steady improvement to employees' perceptions that senior leaders are taking more responsibility for mistakes occurring under their watch;[252]
- widespread agreement found by UK Finance's 2019 survey of 25 banks and 60 senior managers that the regime had resulted in improvements in behaviour and processes within firms;[253]
- observations by the PRA made to the Bank for International Settlements 2023 review that the regime had led to *"a deeper understanding of the business by senior executives, greater questioning by boards and senior executives of relevant staff members, more openness of firm executives when dealing with supervisors and better documentation of decision-making."* [254]

Where is the SM&CR headed and will it be watered down?

Despite these positive indications that the SM&CR is having a beneficial impact on senior executive behaviour, the regime is currently being reviewed[255] as part of the Edinburgh Reforms announced by the government in December 2022.[256]

The government said in its Call for Evidence on the regime that it is specifically keen to explore whether there are better ways to deliver *"the regime's core objectives, while minimising the impact on firms and the regulators ... [to] enhance the attractiveness of the UK as a location for financial services* *business.”*[257] Among the questions it posed were whether the regime was impacting on the UK’s international competitiveness, and deterring individuals and firms from locating to the UK.

The FCA and PRA issued a complementary review focusing more on practical ways in which the regime could be streamlined.[258]

While there are no doubt ways in which the regime could be made more efficient, any significant moves to weaken the SM&CR will weaken the UK’s credibility internationally, and are unlikely to be universally popular with the business community in the UK as a result.

> *The institutional will to act against senior bank executives is fundamental in enforcing individual accountability rules.*
>
> **Bank for International Settlements** – the international forum for central banks

Enforcement – the missing ingredient

The Bank for International Settlements (BIS) found in its comparative review of such accountability mechanisms, that *“their effectiveness hinges on robust supervision and enforcement.”*[259]

Rather than looking at ways to minimise the regime, which could impact upon the UK’s market stability and financial integrity, the government and regulators should be looking more closely at the roadblocks to enforcing the regime effectively.

The FCA and PRA consultation document has asked consultees specifically whether they think enforcement is key to individual accountability and how their enforcement could be enhanced.

While this may provide a useful insight into the financial sector’s views, it stops far short of BIS’ recommendation that *“potential roadblocks to supervisors’ ability and will to take enforcement actions”* should be identified and resolved to enhance implementation of individual accountability regimes.[260]

Understanding whether the lack of enforcement action under the UK’s regime is because managers are responding quickly when behaviour is highlighted by the regulators, or because the regulators are having difficulties in establishing evidence of breaches of the rules, are risk-averse, or lack appropriate resourcing, is crucial to holding senior executives to account.

How the US does it

Despite the fact that the US does not have an individual accountability regime, like the UK’s SM&CR, the BIS report found that US supervisors had the most public information on enforcement actions against individuals of the countries it reviewed.

The FCA’s regulatory equivalent in the US, the Securities and Exchange Commission (SEC) which operates at a federal level, states that “*individual accountability is a pillar”* of its enforcement programme.[261]

While the FCA's use of prohibition orders has decreased over the past decade, the SEC announced in 2023 that it had barred the highest number of individuals – 133 – from serving as officers and directors in a decade.[262] Over the past two financial years alone it has taken enforcement actions, ranging from bans to fines, against eight former CEOs of firms,[263] including the CEO of a UK audit firm.[264]

III.

Director Disqualification

III. Director disqualification

Disqualification is a critical part of the armoury in holding directors to account where there is corporate wrongdoing.

Disqualification is recognised widely, including by the Organisation for Economic Co-operation and Development (OECD), as an important tool to provide deterrence in competition law, to protect the public and improve corporate management.[265] There is also good evidence according to the NAO that strong enforcement including through the use of disqualification under competition law can increase productivity and *"have a positive impact on growth."*[266]

In 2007, a review of competition enforcement undertaken by Deloitte on behalf of the then Office of Fair Trading (subsequently the CMA), found that disqualification of directors was ranked by firms as only second after criminal penalties as a factor motivating compliance.[267]

Under UK company law, since 1986, company bosses can be disqualified from being directors where they:

- are convicted of a criminal offence relating to managing or promoting a company,
- breach company law for instance by acting fraudulently or wrongful trading, or
- are considered 'unfit' by a court after an insolvency.[268]

The Enterprise Act 2002 brought in a new power to impose disqualifications in the case of breaches of competition law.

A director can be disqualified for between two and 15 years depending on how serious their misconduct was. They are then banned from any active management role or a role that can exert influence on a firm.[269]

The government has taken some recent legislative steps to tighten up the disqualification regime. These include:

1. creating a new power to investigate the conduct of directors where firms have been dissolved in 2021,[270] and
2. new provisions in the Economic Crime and Corporate Transparency Act to ensure that a director is automatically terminated at Companies House following a disqualification, and to introduce new checks so that disqualified directors cannot form a new firm.[271]

Key findings on director disqualification

1. The CMA policy decision to pursue director disqualification yielded a significant uptick in their use but had not been accompanied by a prosecution strategy.

- Disqualifications went from no more than two a year between 2016/17 to 2018/19 to at least 10 a year in 2019/20 and 2020/21 after a decision to pursue a more robust disqualification strategy.[272]
- 16 of the 29 directors the CMA has obtained disqualification orders against since 2016 worked for large firms.[273]
- However, the CMA's strategy is heavily reliant on voluntary undertakings, with 96% of disqualifications resulting from such undertakings.[274] This approach may be tested by an imminent court decision involving a CMA enforcement action against anti-competitive agreements in the pharmaceutical industry.[275]
- The CMA's disqualification powers are being used in lieu of prosecution, with no prosecution strategy yet to complement the powers it has in place or new powers it will acquire under the Digital Markets, Competition and Consumers Bill.[276]

2. The Insolvency Service's record on consistent rates of disqualification and accompanying prosecutions has been heavily impacted in the run up to and during the Covid-19 pandemic.

- The consistent rate of 1,200 disqualifications a year achieved by the Insolvency Service, which focuses heavily on directors in the SME sector, fell significantly in the run up to and during the pandemic.[277]
- Despite a spike in prosecutions in 2021/22 in Covid-19 related cases, Insolvency Service prosecution of directors has declined from 108 in 2016/17 to 69 in 2022/23.[278]
- Similar to the CMA, the Insolvency Service is heavily dependent upon voluntary undertakings to achieve disqualifications, which represent an average of 84% of disqualifications a year without cases going to court.[279]
- The recent three director disqualifications in the Carillion case by the Insolvency Service are an important step in holding senior executives of large corporates to account.[280]

Does the UK disqualification regime work?

There has been considerable public and parliamentary concern about whether the UK's director disqualification regime is fit for purpose, particularly in light of recent collapses such as Carillion and Thomas Cook.[281]

Several gaps in the regime have been identified by parliamentarians, lawyers and industry groups, including that:

- there is lack of consistency in how disqualifications are applied,[282] with industry bodies warning that insolvency practitioners *"often encounter cases involving significant breaches by directors ... that are not investigated and acted upon;"* [283]
- the bar for proving unfit conduct is *"very high and often difficult to prove;"* [284]
- there is too little regulation of disqualified directors to *"ensure that they cannot exert influence or engage in wrongful activities through indirect means;"* [285] and
- in some instances, according to an investigation by The Times newspaper, disqualified directors have continued to be listed on the FCA's approved persons list.[286]

Meanwhile industry bodies such as R3, the trading association for insolvency and restructuring practitioners, have noted that disqualification should be very much a *"first step,"* and warned that *"disqualifications alone have had little to no effect on fraudulent directors, and that 'serious' rogue directors do not see being disqualified as a significant deterrent, and will often go on to commit repeat frauds."* [287]

R3 has stated that disqualification should be accompanied by prosecutions, and the recovery of misappropriated assets to be effective.[288]

Who can seek a disqualification order?

The two primary bodies in the UK that are responsible for applying directly to the courts to seek disqualification orders are the Insolvency Service and the CMA.

Other bodies or entities that can apply directly to a court for an order relating to insolvency or misconduct include Companies House (which holds the register of disqualified directors) and company insolvency practitioners.[289] Competition disqualification orders meanwhile can also be sought by other regulators than the CMA such as Ofwat, Ofgem and Ofcom among others.[290]

Within the financial services sector, the FCA can impose its own version of a disqualification order for the financial services sector, a prohibition order – covered in the previous section. It also regularly prosecutes directors in the financial services sector who have breached director disqualification orders.

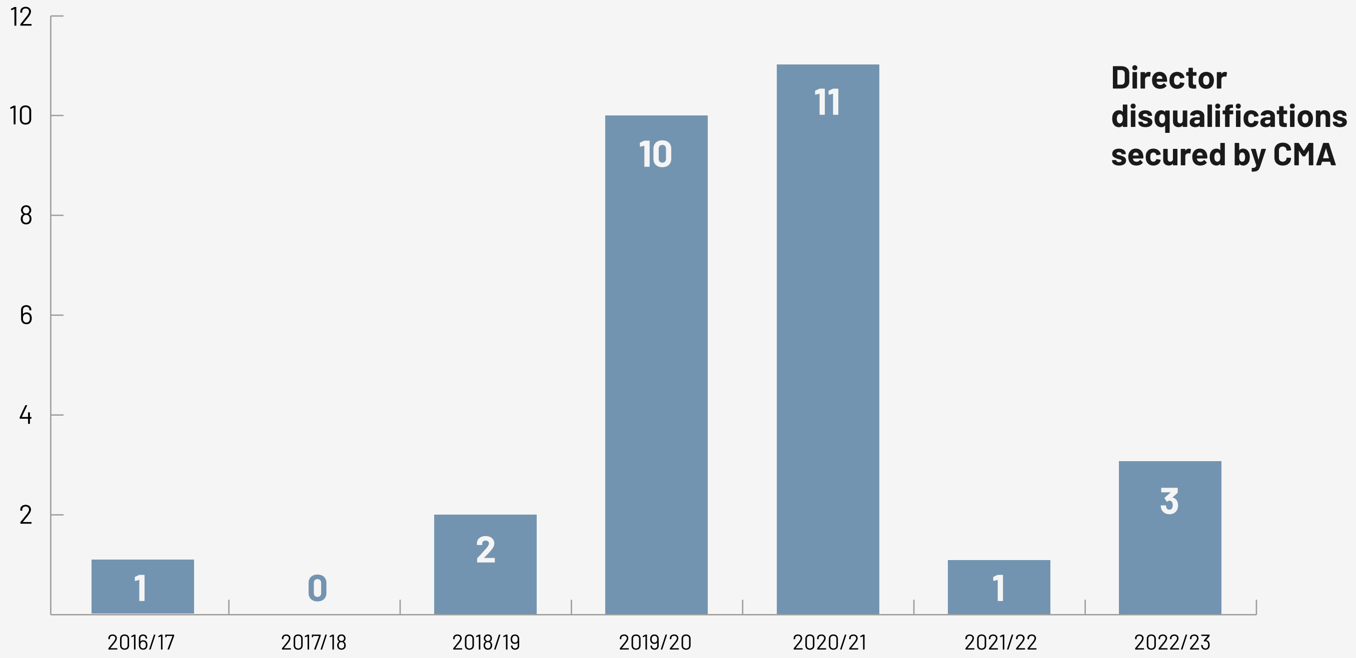
The SFO meanwhile can and regularly does seek disqualification as part of sentencing in fraud and corruption cases where it brings successful prosecutions, but cannot otherwise apply for disqualification orders.

Is disqualification working in practice?

In November 2016, the CMA used powers created in 2002 to disqualify directors for the first time.[291] Between 2016/17 and 2018/19 the CMA secured just three disqualifications.[292]

In 2019, it decided to update its disqualification processes in order to increase its efficiency in using the power.[293] This included using its full powers under the law to seek disqualification before a firm has been found to have engaged in competition breaches.[294] This followed a decision to focus on ramping up disqualifications after the CMA acknowledged difficulties with pursuing cartel prosecutions, noting that *"the bar to a successful prosecution is high."* [295]

As a result of these changes, it secured 10 orders in 2019/20 and 11 in 2020/21.[296] In the aftermath of the Covid-19 pandemic this slowed to one in 2021/22 and three in 2022/2023 and one to date in 2023/24.[297] In total, since 2016, when the CMA started using its disqualification powers, it has achieved 29 disqualifications.[298] During that period it found 38 infringement decisions under the Competition Act.[299] Four disqualifications have been overturned by a court since 2019.[300]



Just over half (16) of the 29 disqualifications secured by the CMA since 2016 have involved individuals working for large firms.[301] The majority of them have been in the construction industry.[302]

Almost all of the disqualifications in place to date are voluntary Competition Disqualification Undertakings (CDU) – where a director agrees to a set period of disqualification – rather than the CMA taking the matter to court.

CDUs have the same legal force as disqualification. However, they normally result in some discount in the disqualification period, and the CMA will usually not seek to recover costs from the director, unlike if they take the case to court.[303] In December 2019, two directors successfully applied to the court to have their voluntary undertakings set aside.[304]

The only time the CMA has successfully obtained a Competition Disqualification Order through court proceedings was in 2020 in relation to an estate agent who was fined and disqualified for seven years.[305] In September 2022, however, it applied to the High Court for seven CDOs in relation to a pharmaceutical case.[306] The case was heard by the Competition Appeal Tribunal in the summer of 2023 but judgment has been reserved.[307]

The Digital Markets, Competition and Consumers Bill (DMCC), currently in report stage in Parliament, will significantly enhance the CMA's civil enforcement powers and expand its director disqualification powers. The pharmaceutical court ruling will be critical to how effectively it will be able to exercise both new and existing powers. An adverse judgment for the CMA would impact upon the willingness of directors to enter into voluntary undertakings.

Insolvency and company director disqualification

Between 2013/14 and 2019/20 the Insolvency Service – responsible for bringing insolvency relating enforcement actions on behalf of the Secretary of State for Business and Trade – obtained on average 1,200 director disqualifications every year. This dropped significantly in the run up to and during the Covid-19 pandemic, with 981 disqualifications in 2019/20, 802 in 2021/22, and 932 in 22/23.[308]

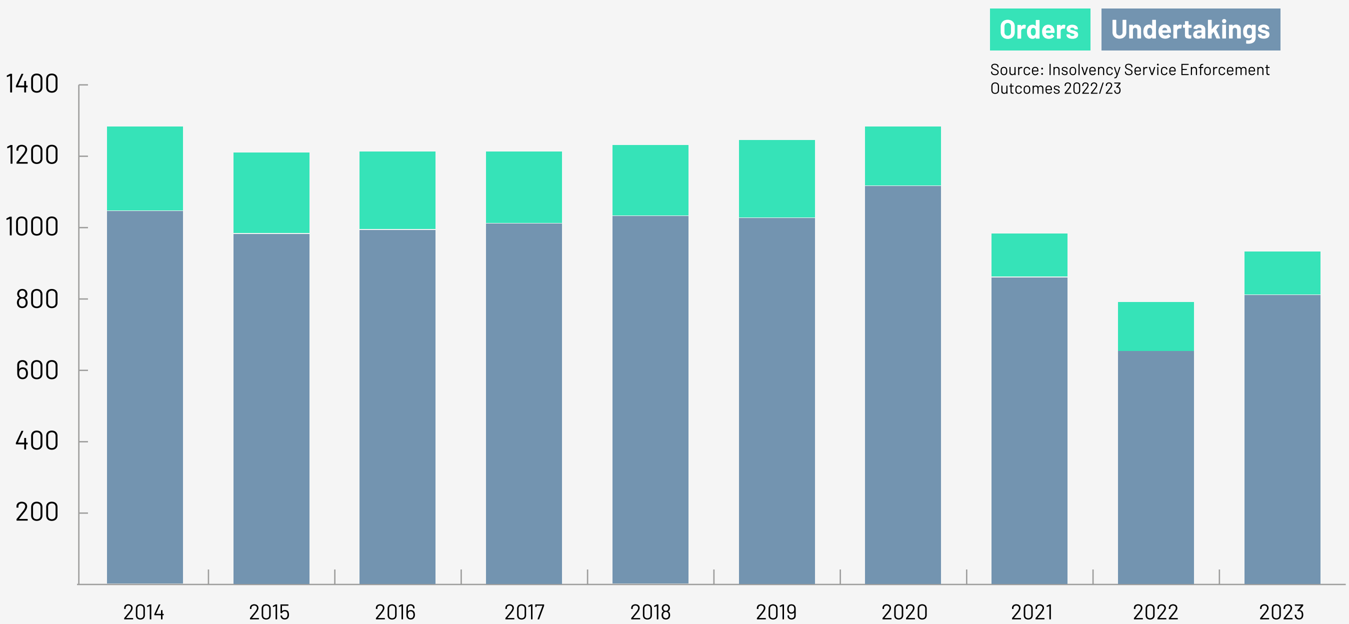
The Insolvency Service has said the lower level of disqualifications over the past three years is a result of a low level of insolvencies during this period. However, given the critical role that Insolvency Service plays in holding directors to account for abuse of Covid-19 government support schemes, the low levels of disqualification in 21/22 and 22/23 are worrying.

In 2023, the number of insolvencies jumped to the highest rate since 2009, following the financial crisis.[309] It remains to be seen whether this will translate into higher numbers of disqualifications.

Government statistics show that the vast majority of insolvencies affect SMEs, with nearly 60% of insolvencies affecting small firms with four or fewer employees,[310] and that large firms are far less likely to face insolvency, and more likely to face administration. As a result, the vast majority of Insolvency Service enforcement action is against directors in the SME sector.

As with the CMA most director disqualifications sought by the Insolvency Service are through undertakings with directors rather than going to court. Between 2014/15 and 2022/23, directors agreed to undertakings in 81%-88% of cases.[311]

Number of director disqualification orders obtained by the Insolvency Service



Source: Insolvency Service Enforcement Outcomes 2022/23

Greensill – a test case of disqualifications involving politically connected individuals

A key test of the Insolvency Service's appetite to take enforcement action against directors working for larger firms will come in 2024 after it was reported that the Insolvency Service has written to the lawyers of Lex Greensill, CEO and founder of Greensill Capital, stating that it intends to commence disqualification proceedings against him.[312]

The firm collapsed in March 2021 leaving a £6 million debt to public creditors including HMRC and two local authorities.[313] It was subsequently at the centre of a major lobbying scandal in 2021 involving former prime minister Lord Cameron which resulted in several parliamentary investigations, and an independent review commissioned by the government which was led by Sir Nigel Boardman.[314]

A further £2 million was paid out by the Government's Redundancy Payments Service (RPS) to employees of Greensill shortly after it fell into administration in 2021, an amount which the government confirmed in December 2023 it is trying to recover from Greensill's administrators.[315]

Lex Greensill has been named as a suspect in a Swiss criminal investigation into Greensill Capital's collapse.[316] The UK's Serious Fraud Office is currently conducting a criminal investigation into suspected fraud, fraudulent trading, and money laundering in the financing arrangements, including with Greensill Capital, of Gupta Family Group Alliance – a collection of mining, metals and trading firms.[317]

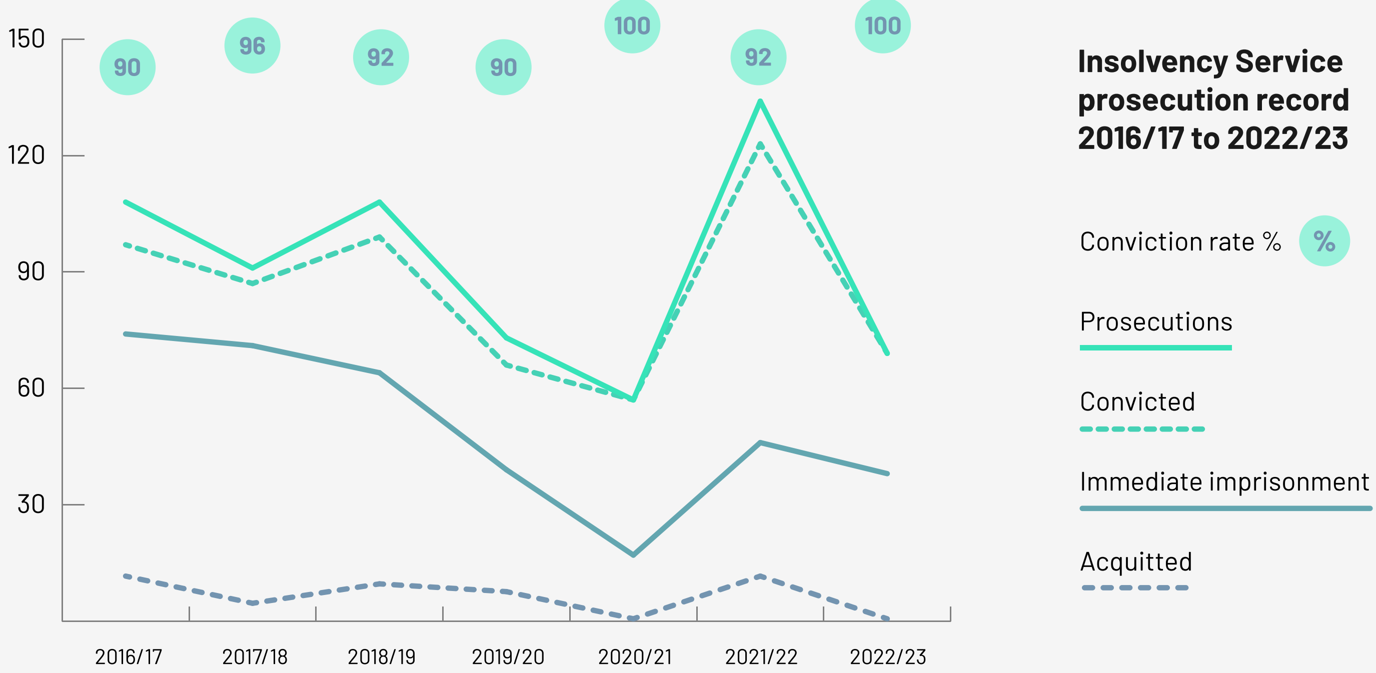
Given that it is coming up to three years since Greensill Capital collapsed, it is surprising that it has taken this long for the Insolvency Service to write to Greensill's lawyers. The strong public interest in the case and the cost to the public purse is likely to mean there will be considerable debate as to whether disqualification proceedings without a corresponding criminal investigation into Lex Greensill's role in the collapse of Greensill Capital is an appropriate accountability mechanism. Disqualification without a corresponding compensation order being sought would be particularly open to scrutiny.

Is the Insolvency Service using prosecution when it disqualifies directors?

The insolvency industry body, R3, has stated that in order to deter fraud, prosecutions as well as disqualifications by the Insolvency Service are crucial.[318]

So how is the Insolvency Service doing on prosecutions?

Prior to Covid-19 the Insolvency Service brought over 100 prosecutions per year.[319] This figure started to drop the year before the Covid-19 pandemic, when prosecutions fell to 74 – a 31% drop from the previous year.[320] However, the Insolvency Service ramped up prosecutions relating to the abuse of Covid-19 financial support schemes in 2021/22, leading to a spike in prosecutions to 130 that year.[321] In 2022/23, the number of prosecutions fell back to 69.[322] Given the critical role that the Insolvency Service plays in holding directors to account for abuse of Covid-19 financial support schemes, the recent drop in prosecutions is concerning.



Carillion – a test case of disqualifications in large firms

In January the 2021 Insolvency Service applied to the High Court for director disqualification orders against eight former Carillion directors to bar them from holding senior management roles in the UK.[323] This followed the 2018 collapse of the government super-contractor, which left a pension liability of around £2.6 billion affecting 27,000 people, the immediate loss of 2,000 jobs, and left the firm's 30,000 creditors £2 billion out of pocket.[324]

From July to October 2023, the Insolvency Service obtained three director disqualifications in relation to Carillion:

- Two former finance directors, Zafar Khan and Richard Adams, who accepted disqualification undertakings of 11 and 12.5 years respectively,[325] and;
- The former chief executive, Richard Howson, who accepted a disqualification undertaking for eight years.[326]

The Insolvency Service was additionally seeking disqualification of five non-executive board members, in a test case of whether non-executives were covered by disqualification law. However, in October 2023, as the trial was due to start, the Insolvency Service dropped the proceedings after judicial criticism that the case was unclear.[327]

It is not clear whether the Insolvency Service will seek a compensation order against the disqualified directors. Compensation orders were introduced in 2015, and allow the agency to ask a court to require a director to pay compensation. The Insolvency Service has only ever sought three such orders since 2015.[328]

Analysis: where next for the UK on director disqualifications?

Director disqualification is the one area where the UK has made some progress in holding directors of large firms to account. A decision by the CMA to ramp up disqualifications has led to a significant increase of their use in competition cases.

The recent disqualifications of former directors of collapsed outsourcing firm Carillion, following action by the Insolvency Service, were a major if belated step forward. However, the Insolvency Service's overall use of disqualification and related prosecutions has been declining over the past few years.

Much wider consideration needs to be given to how the disqualification regime complements the criminal and civil enforcement regimes, particularly with new powers being given to the CMA under the Digital Markets, Competition and Consumers Bill due to be passed in Parliament in 2024.

Disqualification is unlikely to achieve maximum deterrence where it is not accompanied by a prosecution strategy, however, and without concerted efforts to recover money from directors such as through compensation orders.

Both the CMA and Insolvency Service need much more clearly articulated strategies for how and when they will seek disqualification, where they will use prosecution, and how they will recover money from directors.

IV.

Executive Remuneration: Malus and Clawback

IV. Executive remuneration: malus and clawback

Levels of executive pay or remuneration in the financial and corporate sector have long been controversial and no more so than when a firm has engaged in misconduct.

Regulation of remuneration is essential to protect consumers and the markets from the harms caused by excessive risk-taking by those at the helm of firms – risk-taking that can lead to corporate misconduct or in some cases collapse. Using clauses that allow bonuses and rewards to be removed or recovered – known as malus and clawback – is a critical part of that regulation.

Research from the US strongly suggests that firms that adopt clawback clauses have improved financial reporting, and better corporate governance.[330]

Clawing back bonuses of senior executives is also popular with the public and politicians. During 2023, there were:

> *It is widely recognised that remuneration arrangements ... may create financial incentives that result in an excessive short-term focus at the cost of the long-term viability of the firm.*[329]
>
> **Bank for International Settlements**

- calls (including from the government) for NatWest to cancel over £5 million of benefits to the outgoing chief of NatWest, Dame Alison Rose, following a scandal about closure of bank accounts belonging to UK politician Nigel Farage.[331]
- calls for and a commitment by the Labour Party to introduce new powers to allow the water sector regulator, Ofwat, to ban the payment of bonuses to water firm executives that fail to meet high standards on environmental protection in relation to sewage pollution.[332]

Key findings on executive remuneration

1. The UK's clawback regime is unevenly implemented outside of financial services, and there is little if any public supervisory enforcement even within the financial services for failure to impose clawback.

2. Across the UK's FTSE All-Share Index (comprising 98-99% of all UK listed firms), from industry surveys it appears that clawback provisions were invoked on average just 1.3 times a year between 2014 and 2022.[333]

3. Just one out of the five large firms that received the biggest penalties after SFO investigations imposed any clawback.[334]

4. Despite a lowering of the total bonus pool as a result of the fine imposed on NatWest following its money laundering prosecution in 2021, the CEO's overall remuneration package rose 19%.[335]

Learning from the financial crisis

Following the financial crisis, the Parliamentary Commission on Banking Standards called for stronger powers to ensure that remuneration could be clawed back or withheld from senior managers in the financial sector in instances of corporate misconduct. The primary purpose of doing this is to prevent the managers and senior staff of corporations that commit misconduct from being rewarded for failure.

The Commission called among other things for:

1. The recovery of *"a significant portion of fines on firms"* to be "met from deductions from the remuneration of staff of the bank at the time of the misconduct;" and
2. Regulators to explore *"further powers, in the cases of individuals who have been the subject of successful enforcement action, to recover remuneration received or awarded in the period to which the enforcement action applied."* [336]

In the wake of the Commission's recommendations, the FCA and the PRA introduced new rules in 2015 that require regulated banks, building societies, and investment firms to include deferral, malus and clawback provisions in remuneration agreements of senior managers (as well as other employees who are known as high-paid material risk-takers).[337]

It is not clear what consideration was given to the Commission's recommendation for regulators to explore powers to recover remuneration following individual enforcement action. The government's response to the Commission stated that the PRA would consider this issue.[338]

What's the current regulatory landscape for malus and clawback in the UK?

The PRA and FCA's 2015 rules apply to rewards and incentives outside of agreed salary and benefits, including bonuses and incentive plans (known as Long Term Incentive Plans or LTIPs) such as shares or cash. While malus concerns the cancellation or reduction of future rewards, clawback relates to recovering rewards already paid out.[339]

These rules require financial services firms to have procedures that:

- outline the kind of cases or conducts that may trigger the enforcement of clawback provisions, which must include reasonable evidence of employee misbehaviour or material error, and material failure of risk management in the firm or relevant business unit;[340] and
- consider the degree of culpability, responsibility or accountability of individuals including senior executives.[341]

In most cases, clawback conditions will be triggered by misconduct, or some form of material financial misstatement for which the employee is responsible.[342] FCA guidance confirms that clawback should in particular be applied in cases of fraud or other conduct with intent or severe negligence which led to significant losses to the firm.[343] Under these rules, senior managers' rewards are subject to clawback under certain conditions for at least seven years, and potentially up to 10 years.[344]

While these rules are mandatory in the regulated financial sector, all firms listed on the London Stock Exchange are **encouraged but not required** to have malus and clawback provisions in remuneration agreements.[345]

The UK Corporate Governance Code from 2014 issued by the Financial Reporting Council states that firm remuneration schemes should include malus and clawback provisions that would *"enable the company to recover and/or withhold sums or share awards and specify the circumstances in which it would be appropriate to do so."*[346]

Who's policing executive pay clawback?

The only bodies that can enforce or require malus and clawback in practice are a firm's remuneration committee,[347] or the Official Receiver in the event of the firm entering insolvency proceedings.[348]

In the case of insolvency, the Official Receiver may apply to a court to compel a director to repay money to a firm, where it can prove serious misconduct against the firm or its creditors that led up to a firm's collapse.[349]

However, in several cases of large corporate collapse, such as Carillion and Thomas Cook, there has been little evidence that the Official Receiver has been able to require repayment of money from former directors despite opening proceedings to disqualify them. This is despite considerable pressure from government[350] and Parliament to do so, and in the case of Carillion, clearly stated intentions to do so.[351]

In the case of remuneration committees, there are real questions over whether they are sufficiently robust and independent enough to impose malus and clawback provisions. In 2019, the Parliamentary Business, Energy and Industrial Strategy (BEIS) Committee expressed its lack of confidence in remuneration committees as part of its review of executive pay.[352] The Committee found that these committees had *"helped fuel the excessive levels of executive pay we see today"* and that *"there are no effective sanctions."*[353]

While the FCA rules require financial services institutions to have malus and clawback policies, it is not clear whether the FCA has ever imposed a supervisory action, or any penalties on a firm for failure to use clawback and malus in practice. The FCA, however, does circulate an annual *"Dear Remuneration Committee Chair"* letter to banks, building societies and PRA designated investment firms in which it sets out its expectations for firms to use pay adjustments including malus or clawback.[354]

While the Financial Stability Board found in 2021 that the UK has good supervision around remuneration packages,[355] neither the FCA or PRA report regularly on the outcomes from that supervision, or whether they have undertaken any enforcement action.

The Financial Reporting Council has no powers to require firms within its remit to have such policies or police their implementation and was described by the BEIS Select Committee as *"underpowered and passive."* [356]

How is clawback working in practice?

Findings from recent director remuneration surveys show that 99% of FTSE 100 firms have put in place some form of malus and clawback provisions in their remuneration policies since 2014.[357] However, according to Deloitte's 2022 survey, just 11 firms since 2014 across the FTSE All-Share (an index representing 98-99% of UK market capitalisation[358]) disclosed to them that they used their discretion to apply malus or clawback during that period.[359]

The FCA and PRA do not produce public data about the number of financial institutions that they regulate which have used malus and clawback.

Instances where committees have applied clawback appear to be fuelled primarily by public or political pressure, or only come to light in these instances. For instance, at the height of banking scandals relating to the financial crash and rate-rigging, in 2012/13:

- RBS used its incentives fund to pay the £300 million fine it received for rigging rates in the LIBOR/Euribor scandal;[360]
- Barclays reduced its incentives fund by £860 million and clawed back £300 million from deferred bonuses;[361] and
- UBS announced it would clawback up to 50% of bonuses from its high-flying investment bankers.[362]

Likewise in 2015, after the Payment Protection Insurance (PPI) mis-selling scandals, Lloyds Bank clawed back small amounts of bonuses from directors including from its chief executive after being fined £117 million and forced to pay out £3.2 billion to customers in compensation.[363] Questions were raised however whether docking £234,000 from CEO Antonio Horta-Osorio's £8.5 million pay package was adequate.

Without accurate figures from the regulators, it is impossible to tell how well used malus and clawback is in the absence of newsworthy cases.

Are firms fined in criminal cases brought by the SFO and FCA seeking clawback?

We reviewed the remuneration committee reports of five firms that received the highest multi-million-pound criminal fines for economic crime (either through convictions or Deferred Prosecution Agreements) resulting from SFO investigations to see if firms were applying clawback in these instances. This included Rolls-Royce, Tesco, Airbus, Petrofac and Glencore.

We found that:

- There is a wide variation in the policies of large listed firms in relation to clawback and how they apply it. Rolls-Royce had a policy that does not apply to conduct that happened before it came into place, even if the fallout was after its implementation.[364]
- Only one of the five firms appears to have applied clawback to any employee. In its 2016 annual report, Rolls-Royce said it had clawed back shares and incentives from those employees that had been sacked or resigned following an internal investigation which it instituted after the SFO announced its own investigation.[365] It is not clear whether clawback was applied to senior managers or directors who were in charge of the firm at the time but subsequently left.
- One firm, Petrofac at first stated it would only institute clawback provisions if criminal charges against individuals were successful,[366] but in 2019 introduced more standard clawback provisions and said the CFO and members of the executive committee would be subject to indefinite clawback in the event of a conviction.[367] However, there is no evidence it sought clawback of previous bonuses.
- In three firms (Glencore, Rolls-Royce, and Tesco) the chief executives were either not given a bonus or themselves asked not to be given a bonus after the SFO investigation was announced. In the case of Rolls-Royce, this appears to have been due to the financial performance of the firm rather than the investigation.[368] In the case of Tesco, the CEO did not take a bonus due to weaker firm performance,[369] and with Glencore, the CEO stopped taking a bonus well before the SFO investigation started.[370]
- In the case of Petrofac, the CEO chose to take his bonus in shares rather than cash following the SFO investigation being announced, but then did not receive bonuses for the following two years.[371]
- In the case of Airbus, which is subject to Dutch clawback rules, in contrast, the outgoing CEO, who had run the firm and a division implicated in bribery that formed the basis of its DPA, received a golden handshake of £34 million.[372]

We also reviewed whether NatWest imposed any clawback following its £264.8 million criminal fine following an investigation by the FCA.[373] NatWest's remuneration committee specifically considered this fine when looking at remuneration in 2021, and decided to apply a downward adjustment to the bonus pool across all of the bank's divisions including the CEO and CFO.[374] It did not specify the exact amount that this downward adjustment resulted in for the CEO and CFO remuneration packages.

NatWest also said it would consider *"the possible need"* for individual pay adjustments to awards made in preceding years as part of clawback.[375] However, there is no mention of any such adjustments being applied in its subsequent remuneration committee report in 2022.[376]

In an indication of the limits of clawback as an accountability measure, despite the downward adjustment to the CEO's bonus in 2021 in line with adjustments across the firm, the CEO's total remuneration increased by 19% that year.[377]

Analysis: Where next for the UK on malus and clawback?

As this section has shown, there are several major issues with the UK's clawback regime which inhibit how effective it is in practice. As a result, there is a real risk that senior executives in the corporate sector continue to be rewarded for failure following corporate misconduct.

These weaknesses include that:

1. There are different rules across the corporate sector, with mandatory rules for the financial sector and non-mandatory rules for all those with premium listings on the London Stock Exchange.
2. There is little evidence of any robust enforcement of clawback, with no known enforcement by the FCA or PRA for the failure of firms to apply clawback, and with the FRC having too few powers to enforce the clawback provisions in the Corporate Governance Code.
3. The malus and clawback system is too reliant on remuneration committees who may be captured by Boards, and are not perceived to be independent enough. Remuneration committees meanwhile provide too little public detail about their considerations to allow proper scrutiny.

As a result, there are widespread discrepancies in the nature of clawback policies and how they are applied. This includes:

A. Different thresholds for triggering malus and clawback

According to Deloitte's 2022 executive remuneration survey, while malus and clawback is almost universal for misstatement of results, other triggers are less common in firm policies. 81% of firms had reputational damage as a trigger for clawback, but only 49% for corporate failure, 39% for misconduct, and 39% for failure of risk management and control.[378]

B. Different time periods for how far the rules apply (lookback period)

Senior executive misconduct may emerge over a period of years. If clawback provisions are to be enforced at a later point, they must cover a sufficient time period.

In the case of Thomas Cook, clawback provisions were limited to two years, meaning that only approximately £1 million in cash bonuses paid to the firm's former CEO and finance director could have been recovered by the Official Receiver.[379] In the case of Rolls-Royce, the lookback period could not cover the period where wrongdoing occurred because the policy had not yet taken effect.

Rowing back on reform

In 2021, the government announced plans to enhance corporate governance in the UK, in its White Paper *"Restoring trust in audit and corporate governance."* [380] Among other things the government proposed:

- Greater accountability for directors of firms by strengthening malus and clawback provisions in remuneration agreements;
- Replacing the Financial Reporting Council with a new statutory corporate governance regulator, the Audit, Reporting and Governance Authority (ARGA), with investigation and enforcement powers over directors;
- Expanding the definition of a 'public interest entity,' bringing an additional 600 private firms within the scope of corporate regulation.

The White Paper proposed the establishment of **minimum conditions** for malus and clawback, which would include misconduct, reputational damage and unreasonable failure to protect the interests of employees and customers. Remuneration committees would **be required to comply** with these conditions or explain why not.

A year later, in May 2022, the government introduced a Draft Audit Bill in the Queen's Speech to establish a new corporate governance regulator, to replace the FRC, which would among other things supervise corporate reporting.[381]

At the same time, it published its response to the White Paper consultation, which stated that of those who responded to the question on clawback, *"most were in favour in principle of increasing transparency and rigour in malus and clawback arrangements,"* but there was opposition primarily from listed firms.[382] It opted to get the FRC to undertake further consultation on the issue.[383]

The FRC consultation announced in May 2023, stopped well short of establishing minimum conditions for malus and clawback opting instead for greater transparency over greater rigour. It proposed that firms should be required to include in their remuneration reports:

> *"a statement on whether the company has malus and clawback arrangements in place, the minimum conditions in which these would apply, the minimum period for applying them and why the selected minimum period is best suited to the organisation, as well as whether they have been used in the last financial year."* [384]

The FRC's proposals are relatively uncontentious and are not particularly onerous on firms. While they will make it easier for the public and investors to know how and when malus and clawback is being applied by firms, they:

- will not ensure greater consistency of malus and clawback provisions across the corporate sector, leaving it up to firm discretion about what provisions to have in place and
- do not create any enforcement measures which would penalise firms for failure to use malus and clawback robustly.

Just after the King's Speech, the FRC announced that it was dropping the majority of reforms to the Corporate Governance Code that it was consulting on.[385] In January 2024 the FRC announced revisions to the Code that would take effect in 2025 and which will include *"minor changes"* to malus and clawback rules.[386]

Reducing clawback in the financial sector

Separately, as part of the PRA and FCA's broader work on remuneration, which included removing the cap on bonuses, the PRA and FCA have been consulting on removing the need for malus and clawback provisions altogether for smaller banks.[387] Banks with average total assets below £20 billion would be exempt.[388] This consultation also proposes reducing requirements on the proportionality of remuneration.

The application of malus and clawback to smaller firms was only introduced in 2020. However, the PRA has stated that it is applying its new 'competitiveness' remit in consulting on the relaxation of the rules, particularly with regard to government policy on increasing:

> *"the attractiveness of the UK as a domicile for small, internationally active financial institutions, and help[ing] retain its position as a leading international financial centre."* [389]

The move comes as the IMF has warned in its 2022 Global Financial Stability Report that smaller 'fintech' financial services firms, who are well represented in the smaller banking sector, *"give rise to systemic risks and pose challenges to financial stability."* The IMF found that fintech financial services firms take on more risk, including by scaling up *"very rapidly across both riskier clients and business segments than traditional lenders."* [390]

Reducing measures that can protect against risk-taking in these smaller firms is thus a highly concerning development, especially as the new rules would appear to include the UK's challenger banks. Nine of the UK's 10 most popular challenger banks from the fintech sector such as Monzo, Starling and OakNorth, for instance, would appear to be eligible for an exemption from clawback requirements.[391] The British Business Bank has recently flagged that these banks have a growing market share, with 55% of total gross lending to the SME sector coming from challenger and specialist banks.[392]

Out of step with the US

There is a real risk that the current trajectory on clawback rules in the UK will leave it out of step with comparable financial centres, could undermine the financial stability of the UK's market, and sends entirely the wrong message to the corporate sector about the standards of corporate governance required to operate in the UK.

In contrast, the US has ramped up requirements for and enforcement of clawback across the board.

This includes:

1. **New listing rules on clawback:**
Since December 2023, firms listed on the New York Stock Exchange (NYSE) and Nasdaq[393] have been required to have clawback rules for all incentive-based compensation given to current and former executives.[394] These rules require mandatory clawback where a firm restates its accounts following non-compliance with financial reporting obligations and apply to foreign issuers, smaller reporting firms and emerging growth firms.

2. **Increased enforcement of existing clawback rules by the SEC:**
The SEC has been ramping up use of its power to require CEOs and CFOs to reimburse a firm the bonuses and share profits where the firm restates its accounts following misconduct, under the Sarbanes-Oxley Act 2002.[395] The SEC does not need to show that the CEO or CFO was involved in the misconduct in order to use this power.

3. **New measures to incentivise firms facing enforcement action to have clawback policies in place:**
In March 2023, the US DOJ announce a new three-year Compensation Incentive and Clawback pilot scheme,[396] a primary aim of which is to *"shift the burden of corporate financial penalties away from shareholders …onto those more directly responsible."*[397] It requires firms facing enforcement action to implement policies that incentivise compliance within their compensation and bonus schemes if they want credit for cooperation, and allows for fine reduction for firms if they seek to clawback compensation and remuneration from those who engaged in the misconduct or those who had *"supervisory authority"* over, or knew about the misconduct.[398]

The increasing divergence of the UK from the US risks attracting the wrong kind of capital and foreign investment into the UK, and encouraging greater risk-taking by those in charge of UK plc. That is a major missed opportunity for the UK to ensure the sustainability and integrity of the economic growth that the government seeks is underpinned and indeed fuelled by strong corporate governance.

Endnotes

1. To differentiate between small, medium-sized and large firms, this report uses the criteria used in s382 and s465 of the Companies Act 2006.
2. https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/documents/corporate-governance-and-company-performance.pdf
3. https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27.pdf
4. https://www.parliament.uk/globalassets/documents/banking-commission/Banking-final-report-vol-ii.pdf
5. https://www.thetimes.co.uk/article/gordon-brown-we-should-have-jailed-the-bankers-w3zp3cmg6
6. https://www.theguardian.com/politics/2017/oct/31/gordon-brown-bankers-should-have-been-jailed-for-role-in-financial-crisis
7. https://news.sky.com/story/who-are-the-key-figures-in-post-office-it-scandal-13044572; https://www.theyworkforyou.com/lords/?id=2024-01-16a.379.0&s=post+office+sack#g397.0; https://www.dailymail.co.uk/news/article-12944847/post-office-boss-paula-vennells-bonuses-pension-return.html
8. https://www.gov.uk/government/publications/water-and-sewerage-companies-in-england-environmental-performance-report-2021/water-and-sewerage-companies-in-england-environmental-performance-report-2021
9. https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-identification-principle-for-economic-crime-offences
10. https://www.gov.uk/government/collections/financial-services-the-edinburgh-reforms
11. https://www.gov.uk/government/consultations/senior-managers-certification-regime-a-call-for-evidence
12. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970676/restoring-trust-in-audit-and-corporate-governance-command-paper.pdf
13. https://www.bankofengland.co.uk/prudential-regulation/publication/2023/february/remuneration-enhancing-proportionality-for-small-firms; https://www.fca.org.uk/publications/consultation-papers/cp23-11-remuneration-enhancing-proportionality-dual-regulated-firms; https://www.shlegal.com/news/pra-proposes-smaller-banks-will-no-longer-have-to-operate-clawback-on-key-staff-bonuses.
14. https://www.bankofengland.co.uk/prudential-regulation/publication/2023/february/remuneration-enhancing-proportionality-for-small-firms
15. https://www.elibrary.imf.org/view/journals/001/2018/008/article-A001-en.xml
16. https://isc.independent.gov.uk/wp-content/uploads/2021/03/CCS207_CCS0221966010-001_Russia-Report-v02-Web_Accessible.pdf
17. https://www.imf.org/en/Publications/CR/Issues/2023/07/10/United-Kingdom-2023-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-535878
18. https://www.imf.org/en/Publications/CR/Issues/2022/04/07/United-Kingdom-Financial-Sector-Assessment-Program-Some-Forward-Looking-Cross-Sectoral-516282
19. https://www.freshfields.com/49bbf2/globalassets/imported/documents/996d86f8-4cce-4f68-9fe1-82a490a80a3f.pdf
20. https://complyadvantage.com/insights/aml-fines-2022/#:~:text=Bank%20AML%20fines%20in%202022,due%20diligence%20(EDD)%20measures.
21. Ibid.
22. https://www.cambridge.org/core/books/abs/cambridge-handbook-of-compliance/corporate-crime-deterrence/7275B55E86084DEFE82F6F1950406FC1
23. Corporate Crime and Punishment: An Empirical Study. Lund & Sarin, 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537245
24. https://complyadvantage.com/press-media/complyadvantage-releases-2022-state-of-financial-crime-report/#:~:text=driven%20Fraud%20Detection-,ComplyAdvantage%20Releases%202022%20State%20Of%20Financial%20Crime%20Report,the%20ever%2Dchanging%20sanctions%20landscape
25. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537245
26. https://www.researchgate.net/publication/339300431_The_Cost_of_Doing_Business_Corporate_Crime_and_Punishment_Post-Crisis
27. https://www.bis.org/fsi/publ/insights48.pdf
28. https://journals.sagepub.com/doi/10.1177/10659129231176211
29. https://ig.ft.com/jailed-bankers/
30. https://www.sfo.gov.uk/2020/02/28/former-barclays-executives-acquitted-of-conspiracy-to-commit-fraud/
31. https://www.law360.com/articles/1248947/the-rulings-that-doomed-the-sfo-s-barclays-fraud-case
32. https://www.ft.com/content/f666b592-5a4b-11ea-abe5-8e03987b7b20
33. https://www.sfo.gov.uk/cases/barclays-qatar-holding/
34. https://www.sfo.gov.uk/2019/10/18/sfo-concludes-investigation-into-libor-manipulation/
35. https://www.ft.com/content/3f645e02-3dc6-4728-a428-fd0bf48c677b
36. Ibid.
37. https://ccrc.gov.uk/news/tom-hayes-libor-referred/
38. https://www.bis.org/fsi/publ/insights48.pdf
39. Buell, Samuel W., Corporate Criminal Liability. https://ssrn.com/abstract=4059481 or http://dx.doi.org/10.2139/ssrn.4059481
40. https://kluwerlawonline.com/journalarticle/European+Business+Law+Review/28.4/EULR2017027
41. Of the 46 most senior directors, business owners and partners of firms convicted by the SFO between 2013-2023, 35 were employed by SMEs while 11 were employed by large firms.
42. 11 of the 88 (12.5%) individual convictions obtained by the SFO related to directors of large firms or major investment funds. This included senior executives formerly employed by Torex Retail, Aluminium Bahrain, Innospec, JJB Sports, Weavering Capital, Afren plc, Axiom Legal and Orb Group.
43. https://www.linklaters.com/en/insights/blogs/businesscrimelinks/2023/april/sfo-faces-yet-another-defeat-after-small-victory-in-dpa-related-conviction#:~:text=Conviction%20secured,amounting%20to%20nearly%20%C2%A3291%2C000. In connection with the eight corporate convictions obtained by the SFO it convicted 14 individuals: two individuals formerly employed by Smith and Ouzman, one individual formerly employed by Sweett Group plc, three individuals formerly employed by Alstom Power, seven formerly employed by FH Bertling, one individual formerly employed by Petrofac.
44. https://www.sfo.gov.uk/2016/12/21/richard-kingston-convicted-sentenced-destroying-bribery-corruption-evidence/
45. Tesco's £129 million fine was approximately 0.2% of its £61 billion average turnover from the previous five years. Airbus' £333 million fine was approximately 0.6% of its £56 billion average turnover from the previous five years. In comparison, Sarclad's 's £350k fine was approximately 2.8% of its £12.5 million average turnover from the previous five years. Bluu/Tetris' £1.9 million fine was approximately 5.1% of its £37 million average turnover from the previous five years. Turnover figures taken from annual reports filed at Companies House.
46. 10 out of 54 individuals (19%) were formerly employed by large firms and included individuals working for BlackRock, Schroders, Morgan Stanley, UBS, Moore Capital, Logica, Redcentric and Morrisons. Data taken from FCA press releases.
47. Three out of 54 individuals (6%) convicted by the FCA were directors in large firms. This includes the former Group Treasurer and Head of Tax at Morrison Supermarkets plc, and the CFO and finance director of Redcentric plc.
48. https://www.fca.org.uk/news/press-releases/natwest-fined-264.8million-anti-money-laundering-failures
49. https://www.nao.org.uk/wp-content/uploads/2022/12/managing-tax-compliance-following-the-pandemic-report.pdf
50. https://www.theyworkforyou.com/wrans/?id=2022-12-16.HL4366.h&s=HMRC+prosecution#gHL4366.q0 and; https://www.theyworkforyou.com/wrans/?id=2023-03-08.HL6278.h&s=HMRC+prosecution#gHL6278.q0
51. https://igamingbusiness.com/legal-compliance/legal/entain-takes-585m-provision-amid-hmrc-turkey-investigation/
52. https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry#:~:text=CE%2F9705%2F12-,Update%2015%20September%202017,order%20from%206pm%20to%206am.
53. Since 2003 when the UK's cartel offence came into force, the Office of Fair Trading and its successor the CMA have secured just five individual convictions resulting from eleven prosecutions. All five directors were employed in the SME sector.

54. Enforcing the cartel offence is not referred to in the SFO's latest strategic plan (2022-2025) and the word 'cartel' is not mentioned on the SFO website in any other document apart from the MoU (accurate on 15/01/2024).
55. https://www.spotlightcorruption.org/serious-fraud-office-sfo-4-priorities/
56. https://www.telegraph.co.uk/news/2023/08/02/serious-fraud-is-a-rot-eating-away-at-brand-britain/
57. Data is based on instances where an individual has been both convicted and sentenced.
58. This involved 46 out of the 88 convictions (52.2%).
59. https://www.sfo.gov.uk/2021/12/15/serious-fraud-office-secures-confiscation-against-former-petrofac-executive/. See also http://www.clothfairchambers.com/img/upload/news-1064.pdf
60. https://www.sfo.gov.uk/2021/11/03/sfo-reclaims-100000-from-unaoil-executive/
61. To differentiate between small, medium-sized and large firms, this report uses the criteria used in s382 and s465 of the Companies Act 2006.
62. This included directors formerly employed by Xclusive Tickets, Fashion and Sport, Sustainable Growth Group, SJ Stone, Arboretum Sports, Secure Trade & Title, Arck LLP, Tresaderns & Partners, Saunders Electrical Wholesalers, H2O Networks, Luis Michael Training, Global Forestry Investments, Total Asset, Solar Energy Savings and ALCA Fasteners.
63. The SFO secured eight individual convictions against F.H. Bertling employees, but only five had board level responsibilities while the others were regional managers.
64. This included cases which saw senior executives formerly employed by Torex Retail, Aluminium Bahrain, Innospec, JJB Sports, Weavering Capital, Afren plc, Axiom Legal and Orb Group convicted.
65. https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/
66. The SFO charged three individuals in the Sarclad Ltd case (a managing director and two managers), three in relation to Tesco plc (three directors), two in relation to Serco Geografix (two directors), three in relation to Güralp Systems Ltd (two directors and a head of sales), three in relation to G4S Care and Justice Services (UK) Ltd (two directors and one manager), and three in relation to Bluu Solutions Limited (two directors and an agent).
67. https://www.linklaters.com/en/insights/blogs/businesscrimelinks/2023/april/sfo-faces-yet-another-defeat-after-small-victory-in-dpa-related-conviction#:~:text=The%20Serious%20Fraud%20Office%20(%E2%80%9CSFO,amounting%20to%20nearly%20%C2%A3291%2C000.
68. Smith and Ouzman (£2.2m), Sweett Group plc (£2.25m), Alstom Power Ltd (£18m), F.H. Bertling Ltd (£0.85m), Alstom Network UK Ltd (£16.4m), Petrofac Limited (£77m), GPT Special Project Management Ltd. (£30.3m), Glencore Energy (UK) Ltd (£280.9m). Total = £427.9 million.
69. Five directors from F.H. Bertling Ltd were convicted, the chairman of Smith and Ouzman, and a director of Sweett Group plc - the only director to be convicted who was formerly employed by a large firm.
70. https://www.ashfords.co.uk/insights/articles/ancillary-offences-former-sweett-group-managing-director-jailed-for-destruction-of-evidence
71. https://www.sfo.gov.uk/2022/11/03/glencore-energy-uk-ltd-will-pay-280965092-95-million-over-400-million-usd-after-an-sfo-investigation-revealed-it-paid-us-29-million-in-bribes-to-gain-preferential-access-to-oil-in-africa/
72. https://globalinvestigationsreview.com/article/sfo-delays-glencore-charging-decisions-again
73. https://www.sfo.gov.uk/2021/12/15/serious-fraud-office-secures-confiscation-against-former-petrofac-executive/#:~:text=In%20October%202021%2C%20Mr%20Lufkin,contracts%20to%20the%20Petrofac%20Group.
74. https://www.bcl.com/petrofac-and-socpa-agreements-has-the-sfo-found-a-way-to-crack-white-collar-cases/
75. Sentencing remarks of HHJ Taylor, SFO v Petrofac Ltd and Lufkin, 4th October 2021
76. The SFO states on its website that the last update to its Petrofac case page was made on 22/10/21. https://www.sfo.gov.uk/cases/petrofac/
77. https://www.sfo.gov.uk/2022/04/29/serious-fraud-office-recovers-almost-600k-from-bank-accounts-of-former-petrofac-fixer/
78. Corporate Crime and Punishment: An Empirical Study. Lund & Sarin, 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537245
79. Glencore Energy (UK) Ltd's £182 million fine is approximately 0.4% of £50 billion average turnover from the previous five years. In the case of Petrofac, its £47.1 million fine is approximately 1% of its £4.5 billion average turnover from the previous five years.
80. F.H. Bertling Ltd's £850,000 fine was approximately 4.1% of its £20.7 million average turnover from the previous five years. Smith and Ouzman's £1.3 million fine was approximately 9.5% of its £13.7 million average turnover from the previous five years.
81. Tesco's £129 million fine was approximately 0.2% of its £61 billion average turnover from the previous five years. Airbus' £333 million fine was approximately 0.59% of its £56 billion average turnover from the previous five years.
82. Sarclad's £350k fine was approximately 2.8% of its £12.5 million average turnover from the previous five years. Bluu/Tetris' £1.9 million fine was approximately 5.1% of its £37 million average turnover from the previous five years.
83. https://www.handbook.fca.org.uk/handbook/EG/19/14.html?date=2016-03-07
84. Data taken from FCA annual reports.
85. https://www.fca.org.uk/publication/news/enforcement-credible-deterrence-speech.pdf
86. https://irep.ntu.ac.uk/id/eprint/24857/1/PubSub2836_Wilson.pdf
87. https://www.bcl.com/the-fca-flexing-its-muscles-as-prosecutor/
88. https://www.fca.org.uk/publication/corporate/our-strategy-2022-25.pdf
89. Calculation based on seven years for which full data is available. 1438 investigations and 34 convictions (2.3%).
90. Data taken from correspondence sent by the FCA to Dame Margaret Hodge MP. 30/11/23.
91. For years 2016/17 data taken from FOI9358. For other years data taken from FCA annual reports.
92. Data taken from FCA press releases.
93. 31 out of 54 individuals were formerly employed by small firms while 13 were not authorised by the FCA, were sole traders, were engaged in activities such as forex trading, or were not associated with a firm.
94. 10 out of 54 individuals were formerly employed by large firms including; BlackRock, Schroders, Morgan Stanley, UBS, Moore Capital, Logica, Redcentric and Morrisons.
95. Individuals formerly employed by Logica, Moore Capital, Blackrock, Morgan Stanley, Lehman and Deutsche, and UBS did not perform board-level roles.
96. https://www.fca.org.uk/news/press-releases/former-group-treasurer-and-head-tax-morrisons-plc-sentenced-12-months#:~:text=In%20a%20case%20brought%20by,the%20dealing%20exceeded%20%C2%A379%2C000.
97. https://www.fca.org.uk/news/press-releases/redcentric-former-cfo-finance-director-guilty-misleading-investors
98. https://dwfgroup.com/en/news-and-insights/press-releases/2022/2/dwf-successfully-defends-client-accused-of-misleading-investors-in-case-brought-by-the-fca
99. https://www.fca.org.uk/publication/corporate/agreed-statement-facts-fca-national-westminster-bank.pdf
100. Ibid.
101. https://www.fca.org.uk/news/press-releases/natwest-fined-264.8million-anti-money-laundering-failures#:~:text='NatWest%20is%20responsible%20for%20a,open%20door%20for%20money%20laundering.
102. https://committees.parliament.uk/publications/8240/documents/84223/default/
103. See full list of sectors where the HMRC is the supervisory authority: https://www.gov.uk/guidance/money-laundering-regulations-who-needs-to-register
104. https://www.ft.com/content/2b571f7c-6ba5-489f-9450-ac952be9e27d; https://www.taxwatchuk.org/state-of-tax-administration-2023/
105. https://committees.parliament.uk/publications/39357/documents/194186/default/
106. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1179615/HMRC_annual_report_and_accounts_2022_to_2023.pdf and: https://www.theyworkforyou.com/wrans/?id=2022-12-16.HL4366.h&s=HMRC+prosecution#gHL4366.q0
107. https://www.nao.org.uk/wp-content/uploads/2022/12/managing-tax-compliance-following-the-pandemic-report.pdf
108. Ibid

109. Ibid
110. Ibid.
111. https://www.theyworkforyou.com/wrans/?id=2022-11-11.84794.h&s=HMRC+prosecution+money+laundering#g84794.r0
112. FOI2022/76683 received January 2023.
113. https://www.theyworkforyou.com/wrans/?id=2023-10-23.203731.h&s=HMRC#g203731.q0
114. https://www.theyworkforyou.com/wrans/?id=2023-03-08.HL6278.h&s=HMRC+prosecution#gHL6278.q0
115. https://rusi.org/explore-our-research/publications/emerging-insights/corporate-criminal-liability-lessons-introduction-failure-prevent-offences
116. https://www.cps.gov.uk/cps/news/first-ever-cps-deferred-prosecution-agreement-ps615-million#:~:text=The%20Crown%20Prosecution%20Service%20has,Customs%20investigation%20into%20the%20Company%20(
117. https://igamingbusiness.com/legal-compliance/legal/entain-takes-585m-provision-amid-hmrc-turkey-investigation/
118. Ibid.
119. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9__Cartel_Offence_Prosecution_Guidance.pdf
120. https://www.legislation.gov.uk/ukpga/2002/40/part/6
121. Stephan, A. (2023). The Cartel Trial: Issues of Dishonesty and Jury Nullification. Journal of Competition Law & Economics, 19(2), 312-332.
122. https://www.pinsentmasons.com/out-law/guides/individuals-liability-uk-competition-law-infringements
123. https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry#:~:text=CE%2F9705%2F12-,Update%2015%20September%202017,order%20from%206pm%20to%206am.
124. https://www.gov.uk/government/news/blowing-the-whistle-on-cartels
125. https://www.bcl.com/another-false-dawn-for-uk-criminal-cartel-enforcement/ and https://publications.parliament.uk/pa/bills/lbill/2012-2013/0089/2013089.39-45.html
126. Department for Business, Innovation and Skills, A competition regime for growth (16 March 2011).
127. https://www.linklaters.com/en/insights/blogs/businesscrimelinks/2020/october/will-the-sfo-and-cma-together-bring-new-life-to-criminal-cartel-cases
128. https://www.bcl.com/the-cartel-offence-has-a-lack-of-enforcement-contributed-to-a-lack-of-awareness/
129. https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy/summary-of-proposals-from-andrew-tyrie-cma-chair-to-the-secretary-of-state-for-business-energy-and-industrial-strategy
130. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/928324/SFO_CMA_MOU_amended_-_web_-_online.pdf
131. https://www.sfo.gov.uk/download/strategic-plan-2022-25/
132. https://www.linklaters.com/en/insights/blogs/businesscrimelinks/2020/october/will-the-sfo-and-cma-together-bring-new-life-to-criminal-cartel-cases
133. https://publications.parliament.uk/pa/bills/cbill/58-03/0350/220350.pdf
134. https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf
135. https://www.shponline.co.uk/sentencing-guidelines/number-directors-prosecuted-hse-trebles-year/
136. https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf
137. Ibid, para 9.71
138. Ibid, para 9.75
139. https://www.justice.gov/archives/dag/individual-accountability
140. https://www.justice.gov/opa/speech/file/1535301/download
141. Ibid.
142. https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf
143. https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance/
144. https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#settlement
145. https://www.sfo.gov.uk/2014/09/02/alun-milford-use-information-discern-control-risk/
146. https://www.bcl.com/petrofac-and-socpa-agreements-has-the-sfo-found-a-way-to-crack-white-collar-cases/
147. https://www.cps.gov.uk/legal-guidance/assisting-offenders-immunity-undertakings-and-agreements
148. Ibid.
149. https://www.clothfairchambers.com/img/upload/news-1064.pdf
150. Ibid.
151. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3100754; and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871748
152. https://www.fca.org.uk/data/whistleblowing-qualitative-assessment-survey-2022; https://www.akingump.com/en/insights/alerts/the-fca-pledges-to-improve-its-whistleblowing-framework
153. https://www.fca.org.uk/news/press-releases/fca-sets-out-steps-improve-whistleblower-confidence
154. https://protect-advice.org.uk/whistleblowing-rewards/
155. https://www.rpc.co.uk/press-and-media/hmrc-paid-over-500-000-pounds-to-whistleblowers-in-the-past-year/#:~:text=HMRC%20has%20paid%20out%20over,by%20international%20law%20firm%2C%20RPC.; https://www.ft.com/content/0e06c37a-eb96-4bd2-9429-603f5a26191b
156. https://www.spotlightcorruption.org/rethink-on-whistleblower-compensation/
157. Ibid.
158. https://www.regulation.org.uk/library/2006_macrory_report.pdf
159. https://assets.publishing.service.gov.uk/media/5a7ecd2c40f0b62305b8344a/enforcement_review_response_final.pdf
160. https://www.fca.org.uk/publication/final-notices/shay-reches.pdf and https://www.fca.org.uk/publication/final-notices/stewart-owen-ford-2019.pdf)
161. Data taken from 'fines' section of FCA website.
162. Data taken from FCA annual reports. Data for 2021/22 was taken from a letter sent to Dame Margaret Hodge by the FCA in November 2023.
163. Of the 105 financial penalties the FCA issued to individuals between 2013 and 2022, 67 were given to directors in SME and large firms. 56 fines were given to directors in the SME sector (84%), while 11 financial penalties were senior executives formerly employed by large firms (16%).
164. FCA fines given to directors of large firms included individuals formerly employed by Bradford & Bingley, Swinton Group, Towergate, One Call, Barclays, Braemer Shipping, Cathay International and GAM International and amounted to £2.3 million. Data taken from FCA press releases and decision notices.
165. 52 of the 58 published prohibitions against directors in the financial sector imposed by the FCA went to those in the SME sector.
166. See FCA fines imposed on the former Barclays chief executive Jes Staley in 2018 and 2023.
167. The FCA issued has issued two financial penalties to the former Barclays CEO Jes Staley in 2018 and 2023 (the second penalty has been referred to the Upper Tribunal). In response to a FOI request (FOI10318), the FCA stated it undertook an additional two *"supervisory actions"…"in relation to closed SM&CR investigations"* in 2018, but did not offer clarify what such actions consisted of. In a separate response to a similar FOI submitted by Bovill regarding FCA enforcement of the SM&CR, the FCA stated it had sent two compliance letters following an investigation under the SM&CR. https://www.bovill.com/smcr-investigations-halve-despite-extension-to-almost-50000-firms/#:~:text=SMCR%20investigations%20halve%2C%20despite%20extension%20to%20almost%2050%2C000%20firms,-28%20March%202022&text=NEWS%20RELEASE%3A%20Research%20from%20financial,in%202021%20than%20in%202020.

168. This included senior executives formerly employed by; Towergate Underwriting (x1), One Call Insurance Services (x1), GAM International (x1), Cathay International (x2), Swinton Group (x3).
169. Since 2013 the FCA has fined the following banks in relation to AML failings: Guaranty Trust Bank (UK) Limited (£525,000), EFG Private Bank (£4.2 million), Standard Bank (£7.6m), Barclays Bank (£72m), Sonali Bank (£3.2m), Deutsche Bank (£163m), Canara Bank (£896,100), Standard Chartered Bank (£102m), Commerzbank (£37.8m), Goldman Sachs (£48.3m), Credit Suisse (£147.1m), HSBC (£63.9m), Ghana International Bank (£5.8m), Gatehouse Bank plc (£1.58m), Santander UK plc (£107.8 m), Al Rayan Bank plc (£4m) and Guaranty Trust Bank (£7.6m). In total £777.3 million.
170. Commerzbank, HSBC, Ghana International Bank, Gatehouse Bank, Santander UK plc, Al Rayan Bank, Guaranty Trust Bank.
171. https://www.legislation.gov.uk/ukpga/2000/8/section/1D
172. https://www.handbook.fca.org.uk/handbook/DEPP/6.pdf https://www.fca.org.uk/news/speeches/penalties-remediation-and-our-general-principles#:~:text='The%20principal%20purpose%20of%20imposing,committing%20similar%20breaches%2C%20and%20demonstrating
173. https://www.nao.org.uk/wp-content/uploads/2023/12/Financial-services-regulation-Adapting-to-change.pdf
174. Data used in the table for 2021/22 is taken from correspondence between the FCA and Dame Margaret Hodge MP.
175. https://www.fca.org.uk/publication/final-notices/shay-reches.pdf
176. https://www.fca.org.uk/news/press-releases/upper-tribunal-upholds-fca-decision-fine-and-ban-former-keydata-executives
177. https://www.fca.org.uk/publication/corporate/our-approach-enforcement-final-report-feedback-statement.pdf
178. Data taken from fines section of FCA website.
179. Calculation based on Bank of England inflation calculator.
180. https://www.handbook.fca.org.uk/handbook/DEPP/6/?view=chapter
181. Data taken from the ‘fines’ section on the FCA website.
182. We have used the word “director” to refer to; (1) an individual with board-level responsibilities in a firm and/or performs governing functions, or (2) in the case of smaller firms and firms, an individual with an ownership stake, or an individual who exercises majority control over the firm.
183. The criteria for assessing a large firm is based on the definition in the Companies Act 2006.
184. Data taken from the ‘fines’ section of the FCA website.
185. These 26 individuals were formerly employed by; Bradford & Bingley plc, Cantor Fitzgerald, Swinton Group, St James’s Place Wealth Management plc, J.P. Morgan, Barclays, Credit Suisse, Aviva Investors, Towergate Underwriting, JPMorgan Chase, Bank of America/Merrill Lynch, Jefferies International, One Call Insurance Services, Barclays, Deutsche Bank, Royal Bank of Scotland, Braemar Shipping Services, Cathay International, Newton Investment Management, Stifel Nicolaus Europe, ConvaTec Group plc and GAM International Management.
186. Data compiled from figures taken from the ‘fines’ section of the FCA website.
187. This includes those performing the following governing functions: directors (CF1), non-executive directors (CF2), chief executives (CF3) and partners (CF4). See FCA Handbook for overview of FCA governing functions.
188. The directors were formerly employed by Bradford & Bingley, Swinton Group, Towergate, One Call, Barclays, Braemer Shipping, Cathay International and GAM International.
189. FCA fines given to senior executives formerly employed by Bradford & Bingley, Swinton Group, Towergate, One Call, Barclays, Braemer Shipping, Cathay International and GAM International amounted to £2.3 million. Data taken from FCA press releases and decision notices.
190. Data taken from ‘fines’ section of FCA website.
191. https://www.handbook.fca.org.uk/handbook/EG/9.pdf
192. Ibid.
193. Data taken from ‘fines’ section on the FCA website.
194. 58 out of 80 prohibition orders related to directors in a firm.
195. 52 of the 58 published prohibitions imposed by the FCA against directors in the financial sector went to those in the SME sector.
196. Figures taken from FCA annual reports.
197. https://www.fca.org.uk/news/press-releases/fca-and-pra-publish-decision-notices-given-former-ceo-who-paid-excessive-remuneration-his-wife
198. https://www.cliffordchance.com/insights/resources/blogs/regulatory-investigations-financial-crime-insights/2021/07/stuart-forsyth-v-financial-conduct-authority.html
199. https://www.fca.org.uk/news/press-releases/fca-publishes-decision-notice-against-markos-markou-lack-oversight
200. https://www.fca.org.uk/news/press-releases/fca-publishes-decision-notice-against-markos-markou-lack-oversight and https://assets.publishing.service.gov.uk/media/644b9a3dfaf4aa000ce1305d/Markou_v_FCA_final.pdf
201. https://www.fca.org.uk/publication/final-notices/julius-baer-international-limited-2022.pdf
202. Upper Tribunal decision. See para 41-50 on the law relating to integrity. https://assets.publishing.service.gov.uk/media/648836cab32b9e0012a96653/Seiler__Whitestone_and_Raitzen_v_The_FCA_Decision_for_release_to_Parties.pdf
203. https://assets.publishing.service.gov.uk/media/65537db8371898000dd2969d/Seller___Whitestone_vs_FCA_costs_decision_for_release__002_.pdf
204. https://www.ft.com/content/36805f6a-fd1a-48ea-9a33-5dee7ddb03d3
205. https://www.fca.org.uk/publication/decision-notices/diego-urra-2022.pdf
206. https://www.ftadviser.com/companies/2022/07/29/carillion-directors-take-fca-notices-to-court/
207. https://www.fca.org.uk/news/press-releases/fca-fines-metro-bank-plc-decision-notices-two-former-executives https://www.fca.org.uk/publication/decision-notices/david-arden-2022.pdf https://www.fca.org.uk/publication/decision-notices/craig-donaldson-2022.pdf
208. https://www.fca.org.uk/news/press-releases/fca-decides-fine-ban-james-staley
209. https://www.fca.org.uk/news/press-releases/fca-publishes-decision-notices-barclays-plc-and-barclays-bank-plc
210. https://www.fca.org.uk/publication/policy/guide-for-fca-solo-regulated-firms.pdf
211. https://www.handbook.fca.org.uk/handbook/SUP/10C/4.html.
212. https://www.handbook.fca.org.uk/handbook/SUP/10C/11.html
213. https://www.fca.org.uk/publications/policy-statements/ps19-20-optimising-senior-managers-certification-regime-and-feedback-cp19-4.
214. Data taken from FOI request (FOI9684) received in March 2023.
215. https://www.fca.org.uk/firms/senior-managers-certification-regime
216. Letter from the FCA to Dame Margaret Hodge, 30th November 2023.
217. Ibid.
218. These fines include; in 2016 Sonali Bank (£3.2m). In 2017 Deutsche Bank (£163m). In 2018 Canara Bank (£896,100). In 2019 Standard Chartered Bank (£102m). In 2020 Commerzbank (£37.8m), Goldman Sachs (£48.3m). In 2021 Credit Suisse (£147.1m), HSBC (£63.9m) Ghana International Bank (£5.8m). In 2022 Gatehouse Bank plc (£1.58m) 2022 Santander UK plc (£107.8 m). In 2023 Al Rayan Bank plc (£4m) and Guaranty Trust Bank (£7.6m).
219. Commerzbank, HSBC, Ghana International Bank, Gatehouse Bank, Santander UK plc, Al Rayan Bank, Guaranty Trust Bank.
220. https://www.bis.org/fsi/publ/insights48.pdf
221. https://www.bovill.com/uk-europe/only-34-investigations-and-one-enforcement-action-after-four-and-a-half-years-of-smcr/; https://researchbriefings.files.parliament.uk/documents/CBP-9168/CBP-9168.pdf
222. A rectified FOI was sent to Spotlight on Corruption by the FCA on 21/07/2023 (FOI8939). In correspondence, the FCA stated that it had *“identified that some of the information which we provided in our response to FOI8939 was incorrect.”*
223. FOI8939 received in July 2023.

224. Data taken from correspondence sent by the FCA to Dame Margaret Hodge MP. 30/11/23.
225. FOI8939 received in July 2023.
226. Ibid.
227. FOI received from the Bank of England 04/08/2023.
228. The FCA issued has issued two financial penalties to the former Barclays CEO Jes Staley in 2018 and 2023 (the second penalty has been referred to the Upper Tribunal). In response to a FOI request (FOI10318), the FCA stated it undertook an additional two "supervisory actions"..."in relation to closed SM&CR investigations" in 2018, but did not offer clarify what such actions consisted of. In a separate response to a similar FOI submitted by Bovill regarding FCA enforcement of the SM&CR, the FCA stated it had sent two compliance letters following an investigation under the SM&CR. https://www.bovill.com/smcr-investigations-halve-despite-extension-to-almost-50000-firms/#:~:text=SMCR%20investigations%20halve%2C%20despite%20extension%20to%20almost%2050%2C000%20firms,-28%20March%202022&text=NEWS%20RELEASE%3A%20Research%20from%20financial,in%202021%20than%20in%202020.
229. https://www.fca.org.uk/publication/final-notices/mr-james-edward-staley-2018.pdf
230. https://www.fca.org.uk/publication/decision-notices/james-edward-staley-2023.pdf
231. Ibid.
232. https://www.fca.org.uk/publication/decision-notices/stuart-malcolm-forsyth-decision-notice-2019.pdf
233. https://www.fca.org.uk/publication/final-notices/paul-steel-2023.pdf
234. https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/regulatory-action/final-notice-from-pra-to-former-tsb-bank-plc-cio.pdf
235. https://www.bankofengland.co.uk/news/2024/january/pra-action-against-former-ceo-of-wyelands-bank-plc-for-breach-of-pra-conduct-rules
236. FOI10318 received July 2023.
237. https://www.bovill.com/uk-europe/smcr-investigations-halve-despite-extension-to-almost-50000-firms/#:~:text=SMCR%20investigations%20halve%2C%20despite%20extension%20to%20almost%2050%2C000%20firms,-28%20March%202022&text=NEWS%20RELEASE%3A%20Research%20from%20financial,in%202021%20than%20in%202020
238. Data compiled from figures taken from the 'fines' section of the FCA website.
239. From a manual trawl of the FCA fining data we found instances of 30 individuals who were fined at the same as a firm in relation to the same alleged misconduct.
240. 12 individuals fined by the FCA following a corporate fine were formerly employed by large firms and included individuals working for; Deutsche Bank (x1), Royal Bank of Scotland (x1), Barclays (x1), Aviva Investors (x1), Towergate Underwriting Group (x1), One Call Insurance Services (x1), GAM International (x1), Cathay International (x2), Swinton Group (x3).
241. This included senior executives formerly employed by; Towergate Underwriting (x1), One Call Insurance Services (x1), GAM International (x1), Cathay International (x2), Swinton Group (x3).
242. FCA fines issued to these 18 firms worth £392.8 million is equivalent to 9.5% of £4.1 billion in total fines the FCA issued to firms between 2013-2022.
243. See FCA press releases for financial penalties given to 17 banks. In 2013 Guaranty Trust Bank (UK) Limited (£525,000), EFG Private Bank (£4.2 million). In 2014 Standard Bank (£7.6m). In 2015 Barclays Bank (£72m). In 2016 Sonali Bank (£3.2m). In 2017 Deutsche Bank (£163m). In 2018 Canara Bank (£896,100). In 2019 Standard Chartered Bank (£102m). In 2020 Commerzbank (£37.8m), Goldman Sachs (£48.3m). In 2021 Credit Suisse (£147.1m), HSBC (£63.9m) Ghana International Bank (£5.8m). In 2022 Gatehouse Bank plc (£1.58m) 2022 Santander UK plc (£107.8 m). In 2023 Al Rayan Bank plc (£4m) and Guaranty Trust Bank (£7.6m). In total £777.3 million.
244. https://www.fca.org.uk/publication/final-notices/steven-smith-2016.pdf
245. https://www.fca.org.uk/news/press-releases/fca-pra-fine-goldman-sachs-international-risk-management-failures-1mdb
246. https://www.fca.org.uk/publication/final-notices/gsi-2020.pdf
247. https://www.reuters.com/business/finance/hold-us-jury-reaches-verdict-ex-goldman-bankers-1mdb-corruption-trial-2022-04-08/. Previously in 2020 former Goldman banker Tim Leissner settled civil charges with the SEC in 2019. https://fcpablog.com/2019/12/16/tim-leissner-settles-fcpa-charges-with-sec/#:~:text=The%20former%20chairman%20of%20Goldman,records%20provisions%20of%20the%20FCPA.
248. https://www.fca.org.uk/publication/final-notices/credit-suisse-2021.pdf.
249. https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global
250. https://www.fca.org.uk/publication/final-notices/guaranty-trust-bank-uk-limited-2023.pdf
251. A December 2020 survey conducted by the PRA found that 95% of dual-regulated firms surveyed concluded that the regime had a positive effect on individual behaviour. https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/report/evaluation-of-smcr-2020.pdf?la=en&hash=151E78315E5C50E70A6B8B08AE3D5E93563D0168.
252. https://financialservicescultureboard.org.uk/assessment-results-2022/
253. https://www.ukfinance.org.uk/system/files/SMCR%20-%20Evolution%20and%20Reform.pdf
254. https://www.bis.org/fsi/publ/insights48.pdf
255. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147932/SMCR_Call_for_Evidence.pdf
256. https://www.gov.uk/government/collections/financial-services-the-edinburgh-reforms
257. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147932/SMCR_Call_for_Evidence.pdf
258. https://cms-lawnow.com/en/ealerts/2023/04/review-of-the-senior-managers-and-certification-regime-sm-cr; https://www.fca.org.uk/publications/discussion-papers/dp23-3-review-senior-managers-certification-regime
259. https://www.bis.org/fsi/insights48_summary.pdf
260. https://www.bis.org/fsi/publ/insights48.pdf
261. https://www.sec.gov/news/press-release/2022-206
262. https://www.sec.gov/news/speech/gensler-remarks-securities-enforcement-forum-102523#:~:text=Accountability%20also%20is%20about%20individuals,%2C%20association%20bars%2C%20or%20otherwise.
263. https://www.sec.gov/news/press-release/2022-206; https://www.sec.gov/news/speech/gensler-remarks-securities-enforcement-forum-102523#:~:text=Accountability%20also%20is%20about%20individuals,%2C%20association%20bars%2C%20or%20otherwise.
264. https://www.sec.gov/news/press-release/2023-152
265. https://www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm
266. https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf
267. https://webarchive.nationalarchives.gov.uk/ukgwa/20140402165429/http://www.oft.gov.uk/OFTwork/publications/publication-categories/reports/Evaluating/oft963
268. https://www.macfarlanes.com/what-we-think/in-depth/2023/court-imposes-compensation-order-on-disqualified-director/#:~:text=Under%20the%20CDDA%2C%20the%20court,forming%20or%20managing%20a%20company, https://www.gov.uk/government/publications/company-directors-disqualification-act-1986-and-failed-companies/company-directors-disqualification-act-1986-and-failed-companies.
269. https://www.thegazette.co.uk/insolvency/content/104182#:~:text=Upon%20disqualification%2C%20a%20director%20will,subject%20to%20any%20permission%20applications).
270. https://www.russell-cooke.co.uk/news-and-insights/news/rating-coronavirus-and-directors-disqualification-dissolved-companies-act-2021#:~:text=The%20Act%20amends%20the%20Company,been%20in%20an%20insolvency%20process.
271. https://www.macfarlanes.com/what-we-think/in-depth/2023/court-imposes-compensation-order-on-disqualified-director/#:~:text=Under%20the%20CDDA%2C%20the%20court,forming%20or%20managing%20a%20company.
272. Data taken from CMA annual reports.
273. See disqualification orders given to 16 directors formerly employed by; FP McCann Ltd, Area Sq. Limited, Cube Interior Solutions Limited, Fourfront Group Limited and Fourfront Holdings Limited. Fourfront Group, Bluu Solutions Ltd, Bluuco Ltd and Tetris Projects Ltd, H.J. Enthoven Ltd owned by the US firm Ecobat LLC, Associated Lead Mills Ltd, Lexon (UK) Ltd, Erith Contractors Limited and Erith Holdings Limited. See CMA press releases.
274. 28 out of 29 directors agreed to CMA undertakings.
275. https://www.catribunal.org.uk/cases/143211222-advanz-pharma-corp

276. The Digital Markets, Competition and Consumers Bill (DMCC), currently in report stage in parliament will significantly enhance the CMA's civil enforcement powers and expand its director disqualification powers. See: https://bills.parliament.uk/bills/3453
277. Data taken from Insolvency Service Enforcement Outcomes.
278. Ibid.
279. Calculation based on data from Insolvency Service Enforcement Outcomes. https://www.gov.uk/government/statistics/insolvency-service-enforcement-outcomes-monthly-data-tables-202223
280. See Insolvency Service press releases.
281. https://www.theyworkforyou.com/whall/?id=2023-06-14a.163.0&s=%22director+disqualification%22#g174.0
282. Ibid.
283. https://www.r3.org.uk/press-policy-and-research/policy-research/fraud/
284. https://hansard.parliament.uk/commons/2023-06-14/debates/09C2F226-9EAD-418D-AF2D-054E6C3286C4/InsolvencyLawAndDirectorDisqualifications
285. https://www.thegazette.co.uk/insolvency/content/104182#:~:text=Upon%20disqualification%2C%20a%20director%20will,subject%20to%20any%20permission%20applications).
286. https://www.thetimes.co.uk/article/city-watchdog-fails-to-act-on-director-bans-0d222wkzz
287. https://www.r3.org.uk/press-policy-and-research/policy-research/fraud/
288. Ibid.
289. https://www.gov.uk/company-director-disqualification
290. Company Director Disqualification Act, 1986, Section 9. https://assets.publishing.service.gov.uk/media/583ff903e5274a1303000040/daniel-aston-director-disqualification-undertaking.pdf
291. https://www.gov.uk/government/publications/cma-annual-report-and-accounts-2020-to-2021/annual-report-and-accounts-2020-to-2021
292. https://competitionandmarkets.blog.gov.uk/2019/05/22/director-disqualification-an-increasing-risk/
293. https://assets.publishing.service.gov.uk/media/5fa188238fa8f57f35ea09cb/CMA8_response_revised_guidance-_.pdf
294. https://assets.publishing.service.gov.uk/media/5c73d0e0ed915d3553eb4d77/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf
295. https://www.gov.uk/government/publications/cma-annual-report-and-accounts-2020-to-2021/annual-report-and-accounts-2020-to-2021
296. Data taken from CMA annual reports.
297. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf
298. https://www.gov.uk/government/news/demolition-company-director-disqualified-for-7-years-for-bid-rigging-and-compensation-payments
299. Data taken from CMA annual reports.
300. https://www.clearyantitrustwatch.com/2023/06/high-court-grants-director-partial-exemption-from-cma-disqualification-undertaking/
301. See disqualification orders given to 16 directors formerly employed by 1) FP McCann Ltd 2) Area Sq. Limited, Cube Interior Solutions Limited, Fourfront Group Limited and Fourfront Holdings Limited. Fourfront Group 3) Bluu Solutions Ltd, Bluuco Ltd and Tetris Projects Ltd, 4) H.J. Enthoven Ltd owned by the US firm Ecobat LLC 5) Associated Lead Mills Ltd 6) Lexon (UK) Ltd 7) Erith Contractors Limited and Erith Holdings Limited. See CMA press releases.
302. 15 out of 16 directors formerly employed by large firms were connected to the construction industry.
303. https://www.brickcourt.co.uk/images/uploads/documents/Fourfrount_Group_Ltd_2019_EWHC_3318_%28Ch%29.pdf
304. https://hsfnotes.com/crt/2020/07/08/cma-win-in-competition-director-disqualification-case/
305. https://www.gov.uk/cma-cases/pharmaceuticals-suspected-anti-competitive-agreements; https://riskandcompliance.freshfields.com/post/102gb6l/a-boost-for-the-cmas-pursuit-of-director-disqualifications-the-high-court-gran
306. https://www.catribunal.org.uk/cases/143211222-advanz-pharma-corp
307. Ibid.
308. https://www.gov.uk/government/statistics/insolvency-service-enforcement-outcomes-monthly-data-tables-202122/commentary-insolvency-service-enforcement-outcomes-202122; https://www.gov.uk/government/statistics/insolvency-service-enforcement-outcomes-monthly-data-tables-202223
309. https://www.gov.uk/government/statistics/company-insolvency-statistics-july-to-september-2023/commentary-company-insolvency-statistics-july-to-september-2023
310. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780091/Commentary_domain_update.pdf
311. Average calculated on the basis of figures published by the Insolvency Service in its enforcement outcomes data. https://www.gov.uk/government/statistics/insolvency-service-enforcement-outcomes-monthly-data-tables-202223
312. https://www.thetimes.co.uk/article/lex-greensill-capital-david-cameron-scandal-nzrrxjbw9
313. https://committees.parliament.uk/publications/6800/documents/72205/default/
314. https://www.gov.uk/government/publications/findings-of-a-review-into-the-development-and-use-of-supply-chain-finance-in-government
315. https://www.theyworkforyou.com/wrans/?id=2023-12-11.6145.h&s=%22greensill%22
316. https://www.ft.com/content/4df002e4-3d8f-4e7b-b67c-fd2ae44d91d4
317. https://www.sfo.gov.uk/2021/05/14/sfo-confirms-investigation-into-gupta-family-group-alliance/
318. https://www.r3.org.uk/press-policy-and-research/policy-research/fraud/
319. https://www.gov.uk/government/statistics/insolvency-service-enforcement-outcomes-monthly-data-tables-202223/guide-to-insolvency-service-enforcement-outcomes https://www.gov.uk/government/groups/insolvency-service-criminal-enforcement-team
320. https://assets.publishing.service.gov.uk/media/5ea03915e90e070498c55369/Commentary_-_Insolvency_Service_Enforcement_Outcomes_2019-20.pdf
321. https://www.gov.uk/government/statistics/insolvency-service-enforcement-outcomes-monthly-data-tables-202223/commentary-insolvency-service-enforcement-outcomes-202223
322. Ibid.
323. Under section 6 of the Company Directors Disqualification Act 1986 https://www.gov.uk/government/news/carillion-directors-disqualification-proceedings
324. https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/769/769.pdf
325. https://www.gov.uk/government/news/former-director-of-carillion-banned-for-11-years; https://www.gov.uk/government/news/second-carillion-director-disqualified
326. https://www.gov.uk/government/news/former-ceo-of-carillion-disqualified and https://www.accountancydaily.co/carillion-ceo-banned-over-ps200m-misstatement-accounts
327. https://www.law360.com/articles/1736763/axing-carillion-case-puts-watchdog-s-approach-in-spotlight-
328. See; Re Noble Vintners Limited [2019] EWHC 2806 (Ch); Secretary of State v Barnsby [2023] EWHC 2284 (Ch) and Insolvency Service press release: https://www.gov.uk/government/news/croydon-director-hit-with-13-year-ban-and-compensation-order
329. https://www.bis.org/fsi/publ/insights48.pdf
330. Addy, N. et al "Voluntary Adoption of Clawback Provisions, Corporate Governance, and Interlock Effects", J Account, Public Policy (2014), p.2; DeHaan, E., Hodge, F, & Shevlin, T. "Does Voluntary Adoption of a Clawback Provision Improve Financial Reporting Quality?", 2011, Contemporary Accounting Research, Vol 30(3), p.1056
331. https://www.thetimes.co.uk/article/alison-rose-former-natwest-boss-fights-to-keep-10m-bonuses-tdgxvmj2l
332. https://labour.org.uk/updates/press-releases/labour-will-empower-water-regulator-to-ban-bosses-bonuses-until-they-clean-up-their-filth/
333. https://ukpages.deloitte.com/rs/676-RGI-700/images/2022-Your-Guide-FTSE-100.PDF
334. https://www.rolls-royce.com/~/media/Files/R/Rolls-Royce/documents/investors/annual-reports/2016-annual-report.pdf

335. https://investors.natwestgroup.com/~/media/Files/R/RBS-IR-V2/results-center/18022022/natwest-group-annual-report-accounts-2021.pdf
336. https://www.parliament.uk/globalassets/documents/banking-commission/Banking-final-report-vol-ii.pdf, para 883
337. https://www.fca.org.uk/publication/policy/ps15-16.pdf
338. https://assets.publishing.service.gov.uk/media/5a7b90de40f0b645ba3c524e/gov_response_to_the_parliamentary_commission_on_banking_standards.pdf
339. https://www.fca.org.uk/publication/guidance-consultation/gc15-02.pdf
340. https://www.bankofengland.co.uk/prudential-regulation/publication/2023/december/strong-and-simple-framework-policy-statement
341. https://www.fca.org.uk/publication/policy/ps15-16.pdf
342. https://www.hrmagazine.co.uk/content/features/how-easy-is-it-to-claw-back-bonuses-from-senior-executives/
343. https://www.handbook.fca.org.uk/handbook/SYSC/19G/6.html#D302
344. https://www.fca.org.uk/news/press-releases/prudential-regulation-authority-and-financial-conduct-authority-announce-new
345. https://www.skadden.com/insights/publications/2023/02/variable-remuneration-and-ethical-behavior
346. https://www.frc.org.uk/getattachment/59a5171d-4163-4fb2-9e9d-daefcd7153b5/UK-Corporate-Governance-Code-2014.pdf https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf
347. https://www.theia.org/sites/default/files/2021-11/Principles%20of%20Remuneration%202022%20-%20Final.pdf
348. https://www.insolvencydirect.bis.gov.uk/freedomofinformationtechnical/technicalmanual/ch25-36/chapter31/part4B/part4/part_4.htm#31.4B.78 https://harperjames.co.uk/article/misfeasance-claims/
349. https://harperjames.co.uk/article/misfeasance-claims/
350. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674070/carillion-letter-sos-insolvency-service.pdf
351. https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1392/1392.pdf
352. https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/2018/2018.pdf
353. Ibid, paras 48 and 51.
354. https://www.allenovery.com/en-gb/global/blogs/employment-talk/fca-publishes-dear-remco-chair-letter-for-2022-2023
355. https://www.fsb.org/wp-content/uploads/P041121.pdf
356. https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/2018/2018.pdf
357. https://ukpages.deloitte.com/rs/676-RGI-700/images/2022-Your-Guide-FTSE-100.PDF
358. https://www.lseg.com/en/ftse-russell/indices/uk#:~:text=FTSE%20All%2DShare%20Index%20%2D%20representing,100%20and%20FTSE%20250%20indices.
359. https://ukpages.deloitte.com/rs/676-RGI-700/images/2022-Your-Guide-FTSE-100.PDF
360. https://assets.publishing.service.gov.uk/media/5a7b90de40f0b645ba3c524e/gov_response_to_the_parliamentary_commission_on_banking_standards.pdf, para 2.44
361. Ibid.
362. https://www.businessinsider.com/ubs-to-clawback-investment-banker-bonuses-50-2012-2?r=US&IR=T
363. https://www.theguardian.com/business/2019/oct/27/ppi-scandal-lloyds-bank-have-last-word
364. https://www.rolls-royce.com/~/media/Files/R/Rolls-Royce/documents/investors/annual-reports/2016-annual-report.pdf
365. Ibid.
366. https://www.petrofac.com/media/dbqbberz/petrofac-2017-annual-report.pdf
367. https://www.petrofac.com/media/ewdfj24o/petrofac-2019-annual-report.pdf
368. https://www.rolls-royce.com/~/media/Files/R/Rolls-Royce/documents/investors/annual-reports/2015-annual-report-v1.pdf
369. https://www.theguardian.com/business/2012/may/22/tesco-chief-turns-down-bonus
370. https://www.glencore.com/media-and-insights/news/2020-annual-report-of-glencore-plc
371. See Petrofac annual reports 2018, 2019 and 2020 available from: https://www.petrofac.com/media/download-centre/publications/
372. https://www.euronews.com/2019/04/02/airbus-ceo-enders-golden-parachute-excessive-french-finance-minister
373. https://www.fca.org.uk/news/press-releases/natwest-fined-264.8million-anti-money-laundering-failures#:~:text=National%20Westminster%20Bank%20Plc%20(NatWest,%2C%20today%20said%3A%20'%E2%80%A6.
374. https://investors.natwestgroup.com/~/media/Files/R/RBS-IR-V2/results-center/18022022/natwest-group-annual-report-accounts-2021.pdf, p 137
375. Ibid.
376. https://investors.natwestgroup.com/~/media/Files/R/RBS-IR-V2/results-center/17022023/nwg-annual-report-and-accounts.pdf
377. https://investors.natwestgroup.com/~/media/Files/R/RBS-IR-V2/results-center/18022022/natwest-group-annual-report-accounts-2021.pdf
378. https://ukpages.deloitte.com/rs/676-RGI-700/images/2022-Your-Guide-FTSE-100.PDF
379. https://www.theguardian.com/business/2019/oct/14/no-more-than-1m-will-be-recouped-from-thomas-cook-chiefs
380. https://assets.publishing.service.gov.uk/media/60523e338fa8f55d33815605/restoring-trust-in-audit-and-corporate-governance-command-paper.pdf
381. https://assets.publishing.service.gov.uk/media/627a57f88fa8f57d893d3008/Lobby_Pack_10_May_2022.pdf
382. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079594/restoring-trust-in-audit-and-corporate-governance-govt-response.pdf
383. https://www.frc.org.uk/consultations/corporate-governance-code-consultation/
384. https://www.frc.org.uk/getattachment/a92c8f2d-d119-4c4b-b45f-660696af7a6c/Corporate-Governance-Code-consultation-document.pdf
385. https://www.frc.org.uk/news-and-events/news/2023/11/statement-frc-policy-update/
386. https://www.frc.org.uk/news-and-events/news/2024/01/frc-revises-uk-corporate-governance-code/
387. https://www.bankofengland.co.uk/prudential-regulation/publication/2023/february/remuneration-enhancing-proportionality-for-small-firms
388. https://www.shlegal.com/news/pra-proposes-smaller-banks-will-no-longer-have-to-operate-clawback-on-key-staff-bonuses;
389. https://www.bankofengland.co.uk/prudential-regulation/publication/2023/february/remuneration-enhancing-proportionality-for-small-firms
390. https://www.imf.org/en/Blogs/Articles/2022/04/13/blog041322-sm2022-gfsr-ch3
391. https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/topics/banking-and-capital-markets/challenger-specialist-banks/ey-the-strong-and-simple-framework.pdf
392. https://www.british-business-bank.co.uk/wp-content/uploads/2023/02/J0189_BBB_SBFM_Report_2023_AW.pdf
393. https://kennedyslaw.com/en/thought-leadership/article/the-sec-incentive-based-compensation-clawback-rule-is-now-effective/
394. https://www.wfw.com/articles/final-clawback-rules/
395. https://www.hklaw.com/en/insights/publications/2022/09/sec-showing-its-claws-with-increased-focus-on-recouping-executive-comp
396. https://www.justice.gov/criminal-fraud/file/1571941/download
397. Ibid.
398. https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2023/10/clawbacks-pilot-program