Perspectives in Company Law and Financial Regulation

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PART II

Perspectives in financial regulation

SECTION 1

European perspectives

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Principles-based, risk-based regulation and effective enforcement

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Enforcement intensity may impinge on capital market competitiveness. It also has implications for the development of international securities regulation, which is increasingly likely to depend on determinations of equivalence as between different national (or regional) regimes.

The UK Financial Services Authority is not enforcement-led and, in tune with its principles-based, risk-based approach, it employs a range of compliance-promoting strategies. Its measured approach to enforcement divides opinion and particular controversy surrounds its application in relation to market abuse. This chapter reviews the Financial Services Authority's enforcement record in this difficult area and identifies challenges that lie ahead.

I. What does principles-based, risk-based regulation mean?

The essence of the distinction between rules and principles lies in their specificity.[1] At opposite ends of the spectrum lie: a 'rule' which is written

[1] A rich body of jurisprudence examines this distinction, whether it is meaningful, and the factors influencing the choice between a rule or a principle as the form in which a particular requirement is stated. It includes: J.B. Braithwaite, 'Rules and Principles: A Theory of Legal Certainty', *Australian Journal of Legal Philosophy*, 27 (2002), 47–82; F. Schauer, 'Prescriptions In Three Dimensions', *Iowa Law Review*, 82 (1997), 911–22; F. Schauer, *Playing By The Rules: A Philosophical Examination of Rule Based Decision Making in Law and Life* (Oxford: Clarendon Press, 1991); D. Kennedy, 'Form and Substance in Private Law Adjudication', *Harvard Law Review*, 89 (1976), 1685–1778; L. Alexander and K. Kress, 'Against Legal Principles' in A. Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (OUP, 1995), 279, reprinted in *Iowa Law Review*, 82 (1997), 739–86; J. Raz, 'Legal Principles and the Limits of Law', *Yale Law Journal*, 81 (1972), 823–54; R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 22–3.

in such detailed and precise terms that all questions about what conduct is permissible are settled in advance leaving only factual issues for later judgment; and a 'principle' (or 'standard') written in open-textured language that leaves open both specification of what conduct is permissible and judgment on factual issues.[2] Many, if not most, regulatory requirements will occupy the space between these endpoints showing more (or less) of the characteristics of a rule (or principle), being as Cunningham has put it, 'hybrids along a continuum'.[3] The combination of principles, rules and all points in between within a legal system can, in jurisprudential terms, be seen as a compromise between two social needs: 'the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case'.[4]

In recent years, principles-based regulation has come to mean more than just the form in which regulatory requirements are written. At the level of regulatory theory, it has been associated with a new style of governance that spans the public/private divide, where the regulator defines polices and goals, cooperates with the regulated industry in determining how those goals are to be achieved, and leaves room for industry to innovate whilst still being accountable for its actions.[5] New governance is said to be characterised by collaborative, pragmatic, open-ended methods and robust communication mechanisms between public and private actors.[6] In the UK financial services context, this extended concept of what principles-based regulation entails has been hardwired into the institutional culture of the Financial Services Authority (FSA), which emphasizes a style of supervision that focuses on outcomes rather than the details of the processes that regulated firms use to achieve them, and places considerable responsibility on senior management of firms to develop their own internal compliance policies (rather than being

[2] This definition is derived from L. Kaplow, 'Rules Versus Standards: An Economic Analysis', *Duke Law Journal*, 42 (1992), 557–629.

[3] L. Cunningham, 'A Prescription to Retire The Rhetoric Of "Principles-Based Systems"' in 'Corporate Law, Securities Regulation, and Accounting', *Vanderbilt Law Review*, 60 (2007), 1411–1493, at 1492.

[4] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 127.

[5] C.L. Ford, 'New Governance, Compliance, and Principles-Based Securities Regulation', *American Business Law Journal*, 45 (2008), 1–60.

[6] Ibid.

told what to do by the regulator).[7] This style of supervision is designed to foster open and cooperative, perhaps more grown-up, relationships between the regulator and those it regulates.

Risk-based regulation is said to 'complement' principles-based regulation.[8] Being risk-based in relation to supervision and enforcement implies prioritizing resources in areas that pose the biggest threat to the regulator's regulatory objectives.[9] Thus, in the enforcement context, the regulator may eschew the temptation to achieve easy gains by going after the 'low hanging fruit' and decide against taking formal enforcement action against less serious forms of misconduct in areas that are not strategically important. Working in combination with principles-based regulation, it may enable the regulator in some cases where a contravention has occurred to conclude that the issue can be resolved through open dialogue with the relevant parties or through a firm's internal disciplinary procedures, and that public disciplinary action to impose more severe penalties is not needed. The FSA explains its 'strategic' use of enforcement tools in these terms:

> We are selective in the cases we choose to investigate. Our considerations include: whether the misconduct poses a significant risk to our objectives; if it is serious or egregious in nature or both; if there is actual or potential consumer loss or detriment; if there is evidence or risk of financial crime; and whether it is an FSA priority to raise standards in that sector or issue.[10]

The regulatory model developed by the FSA has enjoyed high approval ratings for a considerable period of time. Within the UK, it fits squarely within the current government strategy of promoting 'better regulation': a risk-based, proportionate and targeted approach to regulatory inspection and enforcement is a central part of that agenda;[11] so too is the idea that regulations should be clear and simple.[12] Internationally, in

[7] J. Black, M. Hopper and C. Band, 'Making a Success of Principles-based Regulation', *Law and Financial Market Review*, 1(3) (2007), 191–206. For the FSA's own account of what it means by principles-based regulation: Financial Services Authority, *Principles-based Regulation: Focusing on the Outcomes That Matter* (2007).

[8] J. Tiner, 'Chief Executive's Report', *FSA Annual Report* (2006/7).

[9] R. Baldwin and J. Black, 'Really Responsive Regulation', *Modern Law Review*, 71 (2008), 59–94, at 65–68.

[10] Financial Services Authority, *Enforcement Annual Performance Account 2006/07*, para. 8.

[11] BERR, *Regulators' Compliance Code: Statutory Code of Practice for Regulators* (December 2007).

[12] 'The Five Principles of Good Regulation', Annex B to Better Regulation Task Force, *Regulation – Less is More: Reducing Burdens, Improving Outcomes* (2005).

a number of reports published in the United States in 2006/7, the UK's principles-based, collaborative regulatory environment and its measured approach to enforcement were singled out as positive features that appeared to enhance the competitiveness of its capital markets.[13] Ben Bernanke, the Chairman of Federal Reserve, added his voice to this favourable assessment with a speech in May 2007 urging US financial regulatory authorities to look at the UK as a model for the way markets might be better regulated.[14] Also in 2007, the Japanese Financial Services Agency was reported to have come out in favour of a shift towards a more UK-style principles-based regulatory model, to strengthen the country's competitiveness as a financial centre.[15]

The FSA's reputation was undoubtedly dented by the run on Northern Rock in late 2007, circumstances that according to one official report revealed that the FSA 'systematically failed in its regulatory duty to ensure that Northern Rock would not pose a systemic risk'.[16] The Authority is now on the back foot in defending itself against the view that principles-based regulation is flawed.[17] Whilst full-scale dismantlement

[13] McKinsey & Co, *Sustaining New York's and the US' Global Financial Services Leadership* (report commissioned by M.R. Bloomberg and C.E. Schumer, January 2007); Commission on the Regulation of US Capital Markets in the 21st Century, *Report and Recommendations* (March 2007); Committee on Capital Markets Regulation, *Interim Report* (November 2006).

[14] J. Grant, 'Bernanke Calls for US to Follow UK's "Principles-based" Approach', *Financial Times*, 16 May 2007, 1.

[15] M. Nakamoto, 'Tokyo Eyes Move Towards UK-style Financial Regulation', *Financial Times*, 25 October 2007, 7. See further Financial Services Agency, *Plan for Strengthening the Competitiveness of Japan's Financial and Capital Markets*, (December 2007), Pt III, provisional and unofficial translation at www.fsa.go.jp/en/news/2007/20071221/01.pdf (accessed March 2008).

[16] House of Commons Treasury Committee, *The Run on the Rock* (5th Report of Session 2007–8, HC 56-I, 56-II, January 2008).

[17] 'Northern Rock does not mean principles-based regulation is flawed. Indeed, we believe that a full analysis of the events will support our principles-based approach to regulation, and in particular the importance of both us and firms' management focusing on the consequences of their actions rather than rigid adherence to detailed rules.' C. Briault, 'Regulatory Developments and the Challenges Ahead', speech by FSA Managing Director, Retail Markets, Compliance Institute Annual State of the Nation Conference 30 January 2008. Text available at www.fsa.gov.uk/pages/Library/Communication/Speeches/2008/0130_cb.shtml (accessed March 2008).
Briault, who led the team overseeing Northern Rock, left the FSA 'by mutual consent' in April 2008. The FSA's internal audit report on Northern Rock supported the general risk-based approach and high-level, principles-based framework but found failings in the manner in which it had been applied: *FSA Moves to Enhance Supervision in Wake of Northern Rock* (FSA/PN/028/2008, 26 March 2008) (www.fsa.gov.uk/pages/Library/Communication/PR/2008/028.shtml, accessed 20 October 2008).

of the current system is not likely, the challenges of a changing economic climate give a new urgency to questions about its overall robustness.

II. Effective enforcement

A successful principles-based regulatory strategy that relies heavily on *ex ante* compliance-promoting strategies can reasonably be expected to produce fewer formal enforcement actions than a system that emphasizes the deterrent effect of *ex post* sanctions. Likewise, relatively little formal enforcement is consistent with a risk-based approach given that it implies that the regulator should concentrate on enforcement where it will have the greatest impact and should not pursue wrongdoers merely in order to generate more demonstration cases. The influential theory of responsive regulation moreover teaches that a crude polarization between persuasion and deterrence strategies is misconceived and that an escalation in enforcement intensity is a function of failure of lower-level compliance-promoting strategies.[18] It would thus be rash to extrapolate from a comparatively low level of formal enforcement activity by the FSA that non-compliance is endemic in the UK financial services sector. Not only would such an assessment arguably fail to capture fully the implications of the FSA's regulatory culture and style, it is also open to the criticism that it ignores other compliance-promoting factors that are at work in the UK, including the role played by other public oversight and enforcement bodies and the influence of a powerful institutional investor community, underpinned by certain legal powers for shareholders that can be more formidable than those found elsewhere.[19]

[18] The 'enforcement pyramid' developed by Ayres and Braithwaite has persuasion at its base and criminal penalties and other punitive sanctions at its apex: I. Ayres and J. Brathwaite, *Responsive Regulation* (OUP, 1992).

[19] The power for shareholders to remove directors from office by simple majority of those voting (Companies Act 2006, s. 168) is a powerful control mechanism. L.A. Bebchuk, 'The Myth of the Shareholder Franchise', *Virginia Law Review*, 93 (2007), 675–732 advocates a system for the US in which shareholders have more power to replace or remove directors and uses the example of the UK (which, he states, 'has long had such a system') to counter 'doomsday scenarios' painted by critics of his proposals.
That there is this wide range of public and private forces at work suggests that, in theoretical terms, it may be more appropriate to think of a 'three-sided' pyramid embracing control exerted by bodies other than State agencies: N. Gunningham and P. Grabosky, *Smart Regulation* (Oxford: Clarendon Press, 1998); Baldwin and Black, 'Really Responsive Regulation', (note 9, above). Baldwin and Black also emphasise the importance of taking account of the constraints and opportunities presented by institutional environments in shaping enforcement activities.

The fact that there is a complex interplay of public and private forces at work means that whilst it may be the case that, in some countries, formal enforcement intensity impinges significantly on market competitiveness (although this is highly debatable),[20] it does not follow that the UK would necessarily derive competitive advantages from a policy shift by the FSA in favour of more aggressive enforcement.[21]

This is not to suggest that the implications of principles-based, risk-based regulation for enforcement do not need to be taken seriously.[22] Some empirical work suggests that the utility of less specific forms of regulation decreases the more that enforcement depends on formal prosecution but that where the chosen regulatory strategy relies heavily on firms engaging cooperatively and collaboratively with the regulator in fashioning compliance procedures and practices, short simple requirements are more desirable than those focusing on precision and prosecutability.[23] Open-textured principles may put an enforcement agency into a position where its officers have to make difficult judgement calls on whether there is sufficient evidence to prove a breach of principles alone. However, the FSA is adamant that its move away from detailed, prescriptive rules to principles-based regulation does not undermine its ability to be tough in appropriate cases, has emphasized its willingness to take enforcement action based on breach of a principle alone, and has brought a number of cases on that basis.[24] And in much of the debate thus far around its principles-based regulation agenda, the FSA has had to defend itself not from accusations that this will mean a less tough

[20] J.C. Coffee, 'Law and the Market: The Impact of Enforcement', *University of Pennsylvania Law Review*, 156 (2007), 229–311. However, note Committee on Capital Markets Regulation, *The Competitive Position of the US Public Equity Market* (December 2007), which examines the erosion in US market competitiveness. This Report reviews closely a paper on listing premiums by C. Doidge, G.A. Karolyi and R.M. Stulz, 'Has New York Become Less Competitive in Global Markets? Evaluating Foreign Listing Choices over Time' (Fisher College of Business Working Paper No. 2007–03-012, July 2007), available at http://ssrn.com/abstract=982193) that (in an earlier version) is an important part of the evidence on which Coffee builds his enforcement matters thesis. The Committee identifies a number of concerns with the work.

[21] I. MacNeil, 'The Evolution of Regulatory Enforcement Action in the UK Capital Markets: A Case of "Less is More"?', *Capital Markets Law Journal* 2(4) (2007), 345–69.

[22] R. Baldwin, 'Why Rules Don't Work', *Modern Law Review*, 53 (1990), 321–37, at 328.

[23] *Ibid*. Note also M. Hopper and J. Stainsby, 'Principles-based Regulation – Better Regulation?', *Journal of International Banking Law and Regulation*, 21 (2006), 387–91, where the authors note that proving breach of a principle may be more challenging that establishing breach of a specific rule.

[24] See below.

approach to enforcement but from concerns coming from precisely the opposite direction and which reflect long-recognized and much debated fears about principles-based enforcement – that it may lead to over-zealousness and unfair *ex post* rule making because the open-textured nature of principles generates uncertainty and unpredictability that the enforcer may exploit to its advantage when judging conduct with the benefit of hindsight.[25]

Does the ability to bring action on a basis of breach of a principle alone promote effective, credible enforcement? What does being risk-based in relation to enforcement actually mean in sensitive areas where there are considerations pulling in different directions? These questions can be examined by looking at recent FSA enforcement activity cases relating to market misconduct. Market misconduct, in the form of insider trading, has been the focal point of recent comparative discussion of enforcement intensity, with the UK appearing to come out badly by comparison to the US on some measurements, to the extent that it has been suggested that the existence of significant listing premiums on the major US exchanges and none on the London Stock Exchange may be attributable to 'the failure of the UK to effectively enforce its own insider trading restrictions'.[26] This comment needs to be handled with care because there is evidence of a listing premium in fact being available on markets other than the major US exchanges, including on the London Alternative Investment Market (AIM), which often bears the brunt of comments about weak enforcement in the UK.[27] However, even though the links between enforcement of insider trading in the UK and competitiveness may not be fully understood, there are other grounds for focusing on market misconduct cases to examine the effectiveness of principles-based, risk-based enforcement in the UK.

Maintaining confidence in the financial system and reducing financial crime are fundamental, symbiotically related, regulatory objectives.[28] It

[25] Major critiques of rulemaking though enforcement are: R.S. Karmel, *Regulation by Prosecution: The Securities and Exchange Commission Versus Corporate America* (New York: Simon & Schuster, 1982); H.L. Pitt and K.L. Shapiro, 'Securities Regulation by Enforcement: A Look Ahead at the Next Decade', *Yale Journal on Regulation* 7 (1990), 149–304. A recent resurgence in principles-based enforcement in the US has been noted: J.J. Park, 'The Competing Paradigms of Securities Regulation', *Duke Law Journal*, 57 (2007), 625–89.

[26] Coffee, 'Law and the Market', (note 20, above), 240.

[27] Committee on Capital Markets Regulation, *The Competitive Position of the US Public Equity Market* (December 2007) makes the point about the AIM listing premium.

[28] Financial Services and Markets Act 2000, s. 3 and s. 6.

is thus crucial from a public interest perspective for the FSA to prioritize market cleanliness and to accommodate within its measured risk-based approach to the imposition of penalties or other formal sanctions a credible commitment to cracking down on insider dealing and other forms of deliberate misconduct.[29] Although a risk-based approach implies that some instances of even deliberate wrongdoing may not be prioritized because they are too low-level to have strategic repercussions, this has to be balanced against the danger that tolerance could lead to some forms of malpractice becoming so widespread that their cumulative effect is strategically dangerous.[30] Recent research on market cleanliness that involves measuring price movements preceding market announcements by FTSE 350 issuers and price movements prior to takeover announcements makes rather uncomfortable reading for the FSA in that the measurements suggest that the incidence of informed trading prior to takeover announcements is not lower than it was before the upgrading of the regulatory framework by the Financial Services and Markets Act 2000, and even increased slightly in part of the post-2000 period.[31] Whilst the fact that it has supported the publication of this work reflects well on the credibility of FSA's commitment to transparency and to devising well-informed regulatory solutions,[32] the substance of the data prompts obvious questions about whether the FSA has yet struck the right balance so that

[29] D. Mayhew and K. Anderson, 'Whither Market Abuse (in a More Principles-based Regulatory World)?', *Journal of International Banking Law and Regulation*, 22(10) (2007), 515–31.

[30] Baldwin and Black, 'Really Responsive Regulation', (note 9, above).

[31] B. Dubow and N. Monteiro, *Measuring Market Cleanliness* (FSA Occasional Paper No 23, March 2006): research on FTSE 350 issuers' announcements up to 2004 suggested no change in market cleanliness that could be related to the timing of the new statutory powers; research on takeover announcements indicated a small but statistically significant increase in informed price movements prior to takeover announcements in the period up to 2004. N. Monteiro, Q. Zaman and S. Leitterstorf, *Measuring Market Cleanliness* (FSA Occasional Paper No 25, March 2007) revised the technical methodology and updated the findings to take account of 2005 market data. The new FTSE 350 analysis indicated that the measure of informed trading was very low in the years 2004 and 2005 and was statistically significantly lower than in the period 1998–2000 before FSMA was introduced, which could suggest that markets had become cleaner. Results for the takeovers analysis still showed a significant increase in the measure of informed trading between 2000 and 2004, as reported in the first paper; there was a decline in the measure between 2004 and 2005, but the level of the measure remained high (23.7% of takeover announcements in 2005 were preceded by informed price movements, compared to 32.4% in 2004) and it was not lower than it was in 2000 before FSMA came into force.

[32] M. Hopper and J. Stainsby, 'Measuring Market Abuse: Cleaning Up?', *Practical Law for Companies*, 17(4) (2006), 6–7.

actors who are unlikely to respond to the incentives embedded within strategies that rely on cooperation and dialogue or who are outside its reach because they are not part of the regulated community are held in check effectively through strong deterrence mechanisms. [33]

Do high-intensity enforcers perform better? According to a study conducted by the *Financial Times* of trading data for the top 100 US and Canadian deals since 2003, suspicious trading occurred ahead of 49 per cent of all North American deals. This study employed different methodologies from that used in the UK surveys and the results are therefore not directly comparable. Furthermore, since the headline figure does not distinguish between the US (an outlier in terms of enforcement intensity) and Canada, too much significance should not be attached to the fact that the percentage of suspicious trades is somewhat larger than that identified in the UK. Yet, even with these caveats, the survey does indicate that devising effective enforcement strategies to stamp out improper informed trading is a problem that is not exclusive to the UK.[34]

III. Pursuing market misconduct through criminal prosecutions: preliminary general comments

It has been argued that because securing convictions on complex charges that involve financial market malpractices is notoriously difficult, criminal prosecutors may for strategic reasons choose to focus on relatively straightforward aspects of wrongdoing, such as document shredding, or frame their charges in narrow terms of basic fraud.[35]

[33] As Sally Dewar, then director of the FSA's markets division, acknowledged: 'The figures for takeover announcements, although moving in the right direction, remain a cause for particular concern. There will be no let up in our efforts to tackle the problems in this area'. Quoted in J. Quinn, 'Insider Trading Hits One in Four Deals', *Daily Telegraph,* 8 March 2007, 1 (City section).

Similar quantitative research on market cleanliness conducted by the Netherlands Authority for the Financial Markets on the effects of the Market Abuse Directive has shown that implementation of the Directive has resulted in a cleaner and more well-informed market: 'Netherlands Publishes Study on Effects of Market Abuse Directive', *Company Lawyer*, 29 (2008), 19.

[34] V. Kim and B. Masters, ' "Suspicious Trading" Ahead of 49% of North American Deals', *Financial Times*, 6 August 2007, 19.

[35] D. McBarnet, 'After Enron Will "Whiter than White Collar Crime" Still Wash?', *British Journal of Criminology*, 46 (2006), 1091–109. A. Alcock, 'Five Years of Market Abuse', *Company Lawyer*, 28 (2007), 163–71, notes: 'Even when prosecutions for market misconduct were pursued, the authorities preferred to use more general charges like conspiracy

There is a downside to this strategy in that it can mean that the enforcement strategy fails to send out official messages about issues of concern in relation to complex practices.[36] From a principles-based perspective, even a successful criminal case may thus be a 'missed opportunity' to use enforcement as a mechanism for deepening real learning about the root causes of compliance failures.[37] Another drawback of a prosecution strategy is that, if it is pursued in an imbalanced way, this is likely to inculcate the regulated community with a sense that the system of oversight is adversarial, punitive and legalistic, which may, in turn, mean that people are less willing to engage in open dialogue and cooperation, thereby making it harder for voluntary compliance strategies to operate effectively.[38] Furthermore, the imposition of disproportionate criminal sanctions may give rise to perverse incentives for wrongdoers to engage in more egregious forms of misconduct.[39] This implies that optimal stringency in enforcement may well lie somewhere below maximum stringency.[40]

IV. Criminal prosecutions in relation to insider dealing and other forms of market abuse

Insider dealing is a criminal offence under Part V of the Criminal Justice Act 1993 and the FSA has power to prosecute (in England and Wales).[41] Other bodies with power to prosecute in respect of insider dealing are the Department for Business, Enterprise and Regulatory Reform,[42] the

to defraud by rigging a market or provisions of the Theft Act for fear of the technicalities of the specialist crimes.' But note K.F. Brickey, 'Enron's Legacy', *Buffalo Criminal Law Review*, 8 (2004), 221–76, who argues that the vast majority of post-Enron corporate fraud prosecutions did not focus on peripheral issues.

[36] McBarnet, 'After Enron', (note 35, above).

[37] On the importance of 'enforcement learning': Ford, 'New Governance', (note 5, above).

[38] Baldwin and Black, 'Really Responsive Regulation', (note 9, above).

[39] Law Commission, *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties* (Consultation Paper No 153, 1998), para. 3.81.
See also R.A. Booth, 'What is a Business Crime?' (November 2007). Available at SSRN: http://ssrn.com/abstract=1029667 (arguing for reliance on the criminal law only when all else fails).

[40] Ayres and Brathwaite, *Responsive Regulation*, (note 18, above), 52.

[41] Financial Services and Markets Act 2000, s. 402.

[42] As between the Department for Business and the FSA, the FSA is the primary enforcer and the Secretary of State's powers will be used only rarely in cases which it would be inappropriate for the FSA to investigate: Department of Trade, *Companies in 2003–2004*, 22.

Crown Prosecution Service and the Serious Fraud Office. General guidelines are in place to establish principles to assist these bodies in deciding which of them should act in cases where there are overlapping powers.[43]

Between 1987 and 1997 there were thirteen successful convictions relating to insider dealing.[44] However, not all of those cases were upheld on appeal. From 1997 to February 2006 criminal proceedings were brought against fifteen individuals, of which eight were successful.[45] Among the successful cases were one in 2005 where the former compliance officer of an investment firm was jailed for five years and a 2004 case where a proofreader at a financial printers pleaded guilty to leaking inside information and was imprisoned for twenty-one months.[46] All of the completed cases to date were brought by prosecuting authorities other than the FSA. In January 2008 the FSA brought its first criminal prosecution; the case is ongoing at the time of writing.

Misleading statements and practices can also be pursued through the criminal law: Financial Services and Markets Act 2000, section 397 (previously the Financial Services Act 1986, section 47). The FSA and the Department for Business are among the bodies that have power to institute proceedings under this section.[47]

The Department of Business (more accurately its predecessor the Department of Trade and Industry but this paper will use the Department's current name) has brought a number of prosecutions under this section over the years.[48] In the most recently reported case, the CEO of a company admitted to trading on OFEX (now PLUS Quoted) was sentenced to eighteen months' imprisonment and disqualified from holding the office of director for ten years (reduced to seven years on appeal).[49] His offence took place in an interview with a journalist during which he made a number of statements and forecasts about the company which were false. The Department also recently used this section to

[43] Financial Services Authority, *Enforcement Guide*, Annex 2.

[44] C. Conceicao, 'The FSA's Approach to Taking Action Against Market Abuse', *Company Lawyer*, 28 (2007), 43–45.

[45] On 13 February 2006, the Department of Trade and Industry issued a Written Answer to House of Commons Parliamentary Question No. 2005/3120 from Austin Mitchell MP (*Hansard,* vol. 442, col. 1635W), which sought information regarding the (a) prosecutions and (b) successful prosecutions for insider trading since 1997.

[46] R. Burger and E. King, 'An Inside Job?', *New Law Journal*, 158 (2008), 390.

[47] Financial Services and Markets Act 2000, s. 401.

[48] For an overview see *Palmer's Company Law* (London: Thompson, looseleaf), paras. 11.138–11.145.

[49] *R* v. *O'Hanlon* [2007] EWCA Crim 3074.

prosecute financial journalists who bought shares they were about to tip in their newspaper column. In this case custodial sentences of between three and six months were imposed on two of the defendants and a community service order was made against the third.[50] In 2005 the FSA secured convictions in its first criminal prosecution under the section against the CEO (and Chairman) and CFO of a company listed on the London Stock Exchange who had issued a false trading statement to the market. However, the FSA's success in this case was later tempered when the original custodial sentences of three and a half years and two years were reduced on appeal to eighteen months and nine months, respectively, and the defendants also appealed successfully against confiscation orders.[51] In February 2008 the FSA secured a conviction and a fifteen-month prison sentence against an unauthorized stockbroker, on a number of charges under the Theft Acts, the Financial Services Act 1986 and Financial Services and Markets Act 2000, with a further thirty-four offences taken into consideration. He was also disqualified from being a company director for five years.[52]

The FSA has been quite open at a senior level in acknowledging the difficulties in prosecuting insider dealing and other forms of market abuse: the absence usually of a smoking gun and the need therefore to rely heavily on circumstantial evidence; practical problems in presenting complex and often highly technical evidence to a jury; and the challenge of persuading a jury that they can be satisfied to the criminal standard that the elements of the crime, in particular that the accused knew that he had inside information and dealt on that basis, are present.[53] For a risk-based regulator that emphasizes efficiency in its choice of enforcement options and which has limited resources, such considerations militate strongly against bringing a criminal case, notwithstanding that it is only a criminal prosecution that offers the possibility of 'the showcase effect of getting business leaders behind bars'.[54] The FSA is not pursuing an idiosyncratic line in adopting a measured approach in relation to criminal enforcement of insider dealing and other forms of market abuse: general principles applicable to all criminal prosecutors in the

[50] *R* v. *Hipwell* [2006] EWCA Crim 736.
[51] *R* v. *Bailey, Rigby* [2005] EWCA Crim 3487 and [2006] EWCA Crim 1653.
[52] FSA/PN/011/2008.
[53] M. Cole, 'Insider Dealing in the City'. Speech by FSA Director of Enforcement, 17 March 2007. Text available at www.fsa.gov.uk/pages/Library/Communication/Speeches/2Cole (accessed March 2008).
[54] McBarnet, 'After Enron', (note 35, above), 1100.

UK provide that the prosecutor must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' and, if not, it must drop the prosecution.[55] However, there are suggestions that the FSA is at a particular disadvantage because the range of covert investigative powers available to it is less extensive than that available to other bodies.[56] Senior FSA officials have indicated that it is hampered by not having power to offer immunity from prosecution to whistleblowers or to enter into plea bargains.[57]

There is a perception that the 'fear factor' is missing from financial regulation in the UK because the FSA has not made sufficient use of criminal sanctions.[58] The very low incidence of successful prosecutions certainly presents the FSA and the UK's financial regulatory system more generally with at least a credibility problem that needs to be addressed, including by giving the FSA the appropriate range of powers that it needs to operate effectively as a criminal prosecutor in such a complex area. The FSA itself acknowledges a need to escalate its deterrence-oriented work and that the criminal law has a meaningful role to play in this, albeit as part of a 'multi-pronged' approach and not as the exclusive or even, necessarily, the primary tool.[59] Considerations identified in this section suggest that this is a defensible and pragmatically sensible stance: the well-known difficulties of securing convictions; the need for care not to lose the benefits of a principles-based approach though unwarranted over-reliance on aggressive and adversarial prosecution-oriented strategies; and the continuing elusiveness, notwithstanding advances in empirical research, of the additional degree of criminal enforcement intensity that *might* causally make all the difference in deterrence terms.

[55] CPS, *Code for Crown Prosecutors*.

[56] C. Conceicao, H. Hugger and S. Riolo, 'Deciphering the FSA's Declining Caseload', *European Lawyer*, 73 (2007), 10–11.

[57] L. Saigol and P.T. Larsen, 'FSA Boss Admits Defeat', *Financial Times*, 3 July 2007, 18, reporting on speech by John Tiner, then the FSA's CEO. Brickey, 'Enron's Legacy', (note 35, above), 264 notes that all but four of the seventy-three defendants who pleaded guilty in federal fraud prosecutions between 2002 and 2004 became cooperating witnesses.

[58] 'But while these [market surveillance] tools may help Mr Sants and his team at the FSA, they are unlikely to enhance the fear factor. When he leads one of these dealers away in glinting handcuffs in front of an array of photographers, then terror might finally sink into the City's psyche': L. Saigol, 'City Must Join Insider Trading Fight', *Financial Times*, 23 April 2007, 19.

[59] M. Cole, 'The FSA's Approach to Insider Dealing'. Speech by FSA Director of Enforcement, FSA, American Bar Association, 4 October 2007. Text available at: www.fsa.gov.uk/pages/Library/Communication/Speeches/2007/1004_mc.shtml (accessed March 2008).

This conclusion derives support from the first-ever report on the FSA's performance by the UK National Audit Office, published in 2007, which concluded that there was no need for the FSA to increase significantly the proportion of its resources spent on combating financial crime (although there was room for it to improve the effectiveness with which it used the current level of resources).[60]

V. Administrative enforcement of the market-abuse regime

The Financial Services and Markets Act 2000, Part VIII contains provisions that enable the FSA to impose unlimited financial penalties on, or to censure publicly, those who engage in market abuse or who encourage such behaviour, including persons who are not part of the regulated community. The FSA can also apply for an injunction restraining market abuse or seek restitution. The administrative regime was introduced to complement the criminal law and to cover a wider range of serious misconduct.[61] According to one senior FSA official: 'It was anticipated that a civil process with the accompanying benefits like a civil burden of proof, a jury not being required, the ability to settle, a quicker process with non-custodial outcomes and the ability to have a specialist Tribunal for difficult issues of fact and law would result in more successful actions against insider dealing.'[62] However, this is not exactly how things have turned out.

Charges under Part VIII are often described as 'civil' offences but it is clear that proceedings are regarded as 'criminal' for the purposes of safeguards in respect of human rights under the European Convention on Human Rights (such as the admissibility of statements made to investigators).[63] When it was first enacted, there was considerable discussion as to whether the standard of proof under Part VIII was criminal (beyond reasonable doubt) or civil (on a balance of probabilities) as

[60] National Audit Office, *The Financial Services Authority: A Review under Section 12 of the Financial Services and Markets Act 2000* (2007).

[61] Joint Committee on Financial Services and Markets, *Draft Financial Services and Markets Bill: First Report* (HL Paper 50-I, HC 328-I, 1999, vol I) para. 255; Alcock, 'Five Years', (note 35, above).

[62] Cole, 'Insider Dealing in the City', (note 53, above).

[63] *Davidson and Tatham* v. *FSA*. That this would be the case was anticipated during the Parliamentary passage of the Financial Services and Markets Bill, and ECHR-related safeguards were added: s. 174(2) (admissibility of statements); s. 134 (legal assistance scheme).

this matter is not dictated by the Convention. Decisions of the Financial Services and Markets Tribunal have since established that the standard is properly described as the balance of probability,[64] but that the concept requires some refinement in its application because there is, in effect, a sliding scale that implies that: 'The more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.'[65] The Tribunal has indicated that where the charge is 'grave', in a practical sense it may be difficult to draw a meaningful distinction between this standard and the criminal standard.[66]

The FSA concluded its first Part VIII case in 2004 and by 2007 it had brought sixteen successful cases with total fines in the region of £19.5 million.[67] Eleven of these cases related to the misuse of information, three related to false and misleading impressions and two were distortion cases.[68] The £17 million fine imposed on Shell/Royal Dutch in 2004 for misstating its proved reserves stands out as the single biggest fine to date. In relation to insider dealing, the FSA's most notable success thus far under Part VIII came in 2006 in proceedings against Philippe Jabre, a hedge fund manager, who was fined £750,000 for market abuse and breach of the FSA Principles for Approved Persons.[69]

However, in 2006 the FSA also suffered a high-profile setback in *Davidson and Tatham*, where the decision of its Regulatory Decisions Committee that Davidson and Tatham had engaged in market abuse in relation to spread betting activity to create a misleading impression of the demand for, and value of, shares to be admitted to trading on AIM was overturned by the Financial Services and Markets Tribunal. The Tribunal also awarded costs against the FSA, which, by implication, constituted a finding that the FSA had acted unreasonably because the Tribunal has power to make costs orders only in exceptional circumstances.[70] The Tribunal, which has an original, rather than purely supervisory, jurisdiction and

[64] *Mohammed* v. *FSA* (2005); *Davidson and Tatham* v. *FSA* (2006); *Parker* v. *FSA* (2006).

[65] *H* (*Minors*) (*Sexual Abuse: Standard of Proof*), *Re* [1996] 1 All ER 1 at 16, *per* Lord Nicholls.

[66] *Parker* v. *FSA* para. 35.

[67] Conceicao, 'The FSA's Approach', (note 44, above), 44.

[68] Ibid.

[69] His firm, GLG Partners LP, was also fined £750,000 for breach of Principles.

[70] Financial Services and Markets Act 2000, sch. 13, para. 13. For comment on this case, see A. Hart, '*Paul Davidson and Ashley Tatham v FSA* [2006] – The Case and its Implications', *Journal of International Banking Law and Regulation*, 22 (2007), 288–92; C. Band and M. Hopper, 'Market Abuse: A Developing Jurisprudence', *Journal of International Banking Law and Regulation*, 22 (2007), 231–9.

which can therefore determine itself on the basis of the evidence available to it whether there is market abuse and, if there is, what the appropriate penalty should be, disagreed with the FSA both with regard to the interpretation of the factual position and on certain of the requirements needed to satisfy the statutory tests that were in force at that time.[71]

There is room to believe that the *Davidson and Tatham* experience dented the FSA's confidence in relying on its Part VIII powers as an enforcement tool. Alcock has pointed out: 'Whether coincidental or not, there have been no further market abuse cases reported since the costs decision in *Davidson* and *Tatham* and it could be that the FSA may become more cautious about all but the most straightforward cases of insider dealing or deliberate lying to the market.'[72] Whilst the *Jabre* case was completed in 2006, it was one of only two market abuse cases under Part VIII that year and it related to activities that took place several years before.[73] In 2007, furthermore, there was no successful market abuse case apart from one instance where the FSA obtained an injunction to freeze the proceeds of suspected market abuse.[74] At a senior level, the FSA has been quite candid in admitting that concessions in respect of ECHR protections and the application of a near-to-criminal standard of proof have not made its life easy:

> It was anticipated that a civil process with the accompanying benefits like a civil burden of proof, a jury not being required, the ability to settle, a quicker process with non-custodial outcomes and the ability to have a specialist Tribunal for difficult issues of fact and law would result in more successful actions against insider dealing … We have found, in reality, that a number of the same evidential challenges face us for civil cases.[75]

[71] As discussed in the articles in the previous note. The Tribunal agreed that the behaviour was in relation to qualifying investments traded on a relevant market (shares trading on the grey market prior to admission to AIM). However, the Tribunal disagreed on whether the behaviour would be likely to be regarded by a regular user of AIM as a failure to observe the standard of behaviour reasonably expected of persons in such a position in relation to the market. The Tribunal's view was that, given that there was no regulatory obligation to disclose the behaviour, market abuse had not taken place.

[72] Alcock, 'Five Years', (note 35, above).

[73] Conceicao, Hugger and Riolo, 'Deciphering', (note 56, above).

[74] *Ibid*. Details of this action are not publicly available, a fact which has been criticized from a transparency of justice perspective: Mayhew and Anderson, 'Whither Market Abuse', (note 29, above).

[75] S. Dewar, 'Market Abuse Policy and Enforcement in the UK': speech by FSA Director of Markets Division, BBA and ABI Market Abuse Seminar, 22 May 2007. Text available at www.fsa.gov.uk/pages/Library/Communication/Speeches/2007/0522_sd.shtml (accessed March 2008).

It is against this background that the shift to enforcement on the basis of principles alone is to be assessed. Principles-based enforcement is more limited in scope than enforcement under the criminal law or the administrative regime for market abuse because it can only be pursued against those who are within the regulated community. On the other hand, it has the advantage of appearing to circumvent high burdens of proof and other legal requirements that makes it hard to succeed on other bases. However, whatever its relative merits, principles-based enforcement must operate within the rule of law and therefore actions taken and sanctions imposed must be proportionate and fair.

VI. Sanctions in respect of breach of principles

The FSA Handbook contains certain specific sets of principles, including those that apply to regulated firms (Principles for Businesses), persons performing certain functions (Principles for Approved Persons), listed entities (Listing Principles) and sponsors (Principles for Sponsors). In addition, the FSA is shifting to a more principles-based approach to regulation throughout its activities, although it continues to recognize the need for prescriptive rules in particular areas and sometimes (i.e. where this is necessary to implement EC Law) it has no option but to adopt that form.[76]

Of forty disciplinary cases in 2006/07, twelve (30%) were based on principles alone and almost all of the remaining cases were based on a combination of principles and rules.[77] These included in the area of market protection: *Citigroup Global Markets Limited* (2005) (the 'Dr Evil' trades in European government bonds, £13.96 million financial penalty); *Deutsche Bank AG* (2006) (proprietary trading while book-build exercise in progress, £6.36 million financial penalty); *Pignatelli* (2006) (individual disseminating information believed to be inside information, £20,000 financial penalty); *Casoni* (2007) (selective disclosure of information, £52,500 financial penalty). All of these cases were settlements with the FSA, under executive settlement powers introduced in October 2005.

From a risk- and efficiency-based perspective the incentives to settle that are now built into the FSA's enforcement framework, whereby

[76] Financial Services Authority, *Principles-based Regulation: Focusing on the Outcomes That Matter* (2007), para. 2.2 and para. 3.1.

[77] Financial Services Authority, *Enforcement Annual Performance Account 2006/07*, para. 10.

the amount of a financial penalty is discounted by between 30% and 10% depending on when in disciplinary proceedings settlement is reached, have advantages because settlements support prompt redress in consumer-related cases, send timely messages to the industry and achieve swift and effective outcomes, with associated cost savings.[78] Between 1 April 2006 and 31 March 2007, thirty-four cases were concluded by executive settlement and the FSA's expectation for the future is that 'most' cases will settle via executive settlement.[79] However, the quality of the messages sent to the market though this process is open to question because settlement notices show signs of being heavily negotiated compromises, which diminishes their clarity and precedent value.[80] There is an echo here of the concern noted in relation to criminal proceedings of how strategic choices with regard to enforcement options may constitute missed opportunities for the transmission of clear signals and for the deepening of regulatory learning.

Does principles-based regulation and enforcement satisfy the rule of law? Lord Bingham, the distinguished Law Lord, has identified eight sub-rules into which the rule of law can be broken down.[81] Of these, the two that have particular relevance in this context are: the law must be accessible and so far as possible intelligible, clear and predictable; and questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion. Principles have at least superficial merits in terms of accessibility and intelligibility – they offer scope for slimming down voluminous and complex rule books that are a barrier to entry and to compliance[82] – but they are more vulnerable with regard to certainty and predictability. The European Court of Human Rights has made the point: 'a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[83] And, with regard to the second sub-rule, Lord Bingham himself has observed: '[t]he

[78] Financial Services Authority, *Enforcement Annual Performance Account 2006/07*, para. 29.

[79] *Ibid*, paras. 27–31.

[80] Mayhew and Anderson, 'Whither Market Abuse', (note 29, above); Band and Hopper, 'Market Abuse', (note 70, above).

[81] Lord Bingham, 'The Rule of Law', *Cambridge Law Journal*, 66 (2007), 67–85.

[82] A.M. Whittaker, 'Better Regulation – Principles vs. Rules', *Journal of International Banking Law and Regulation*, 21 (2006), 233–7.

[83] *Sunday Times* v. *United Kingdom* (1979) 2 ECHR 245, 271, 149.

broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law'.[84]

The outcomes-oriented focus of principles-based regulation and the onus that it places on firm to develop their own compliance strategies expose it to the charge that it provides little in the way of legal certainty.[85] However, a counterargument is that principles, when taken together with the shared sensibilities between the regulator and regulated on what it is expected in particular situations that are fostered by the collaborative and cooperative style implied by principles-based regulation, can deliver more legal certainty than detailed rules in complex situations.[86] This shared understanding can also serve to constrain the wide discretion that less precisely formulated requirements may appear to give to those responsible for overseeing their application and enforcement. With regard to predictability, again there are competing arguments: one of the regularly cited benefits of principles is that their flexibility minimizes the scope for 'creative compliance' practices that thrive by exploiting the gaps left by rigidly prescriptive detailed rules; but the risk of hindsight basis in enforcement decisions, which may fall to be taken in a politically-charged atmosphere where they relate to high-profile problems, is a consideration that pulls in the opposite direction as it implies a high risk of *ad hoc* enforcement arbitrariness.[87] The FSA is, of course, fully aware of its responsibilities as a public body and, unsurprisingly therefore, regularly acknowledges the fundamental nature of the requirement for predictability – '[i]n order for consequences legitimately to be attached to the breach of a principle, it must be possible to predict, at the time of the action concerned, whether or not it would be in breach of the principle'[88] – but there is a risk that

[84] Lord Bingham, 'The Rule of Law' (note 81, above), 72.

[85] C. Band and K. Anderson, 'Conflicts of Interest in Financial Services and Markets. The Regulatory Aspect', *Journal of International Banking Law and Regulation*, 22 (2007), 88–100. This view is supported by academic writing on legal theory: Raz, 'Legal Principles', (note 1, above).

[86] Braithwaite, 'Rules and Principles', (note 1, above). See further the ideas of 'interpretative communities' and 'regulatory conversations developed by Black, in particular: J Black, *Rules and Regulators* (Oxford: Clarendon Press, 1997).

[87] J. Patient, 'Treating Customers Fairly: the Challenges of Principles Based Regulation', *Journal of International Banking Law and Regulation*, 22 (2007), 420–25; Black, Hopper and Band, 'Making a Success', (note 7, above).

[88] Whittaker, 'Better Regulation', (note 82, above) (the author is the FSA's chief lawyer). To similar effect: Financial Services Authority, *Enforcement Annual Performance Account 2006/07*, para. 10; Financial Services Authority, *Principles-based Regulation: Focusing on the Outcomes That Matter* (2007), para. 3.2.

its actual practice will fall short of this standard. Its emphasis on 'guidance' as a predictability-enhancing mechanism is also potentially problematic.[89] The range of materials that is to be regarded as guidance in this context is so broad that it can reasonably be asked whether in reality this will provoke a tension with meeting accessibility and intelligibility goals because people will still need to consult a large volume of paperwork to understand the FSA's thinking on any particular point.[90]

Other potential certainty/predictability problems flow from the fact the open-textured nature of principles allows for different interpretations, which raises the possibility of inconsistent decisions between the FSA and the Financial Services and Markets Tribunal or the Financial Ombudsman Service (which can award compensation to consumers on the basis of its own opinion as to what would be fair and reasonable in the circumstances of the case). The inter-relationship of 'outcomes'-oriented principles and enforcement is also unclear in certain key respects: e.g. as to the basis for determining whether a firm has failed to achieve a particular outcome, and as to the relevance of fault in that determination.[91]

VII. Risk-based regulation and European supervisory convergence

The European market integration agenda is another source of tension for the development of principles-based, risk-based regulation. Risk-based regulation is not embraced wholeheartedly across Europe: for example, the FSA's policy of only investigating instances of suspected market abuse where justified on a risk-based assessment is almost unique among European regulators.[92] The FSA has made it clear that it will strongly resist any tendency for European regulation to fetter its legitimate discretion of action, particularly in the areas of monitoring and enforcement, or to compromise its ability to pursue risk-based supervision.[93] At the moment, it is clear that notwithstanding considerable efforts to

[89] Financial Services Authority, *Principles-based Regulation: Focusing on the Outcomes That Matter* (2007), para. 3.1 outlines the wide range of FSA material that is to be regarded as 'guidance' in this context. Industry guidance also has a role in enabling firms to determine how best to meet FSA expectations under principles-based regulation: ibid.

[90] Hopper and Stainsby, 'Principles-based Regulation', (note 23, above).

[91] Black, Hopper and Band, 'Making a Success', (note 7, above).

[92] Conceicao, 'The FSA's Approach', (note 44, above).

[93] J. Tiner, 'Principles-based Regulation: The EU Context'. Speech delivered at APCIMS Annual Conference Hotel Arts, Barcelona, 13 October 2006. Text available at www.fsa.gov.uk/pages/Library/Communication/Speeches/2006/1013_jt.shtml.

harmonize the supervisory powers available to national authorities, some differences remain and that, furthermore, a significant degree of continuing disparity is found in how the authorities actually exercise their powers,[94] with enforcement of market abuse singled out as an area where there are particularly noticeable differences between Member States.[95] However, pressure is undoubtedly building for greater consistency in pan-European oversight and enforcement of EC laws[96] and this puts in doubt the extent to which the FSA can maintain its distinctive, risk-based, stance.

VIII. Conclusion

A recent paper exploring the possible links between competitiveness and enforcement intensity refers to the FSA's 'relative distaste for enforcement'.[97] Coffee, the paper's author, is not the first to ponder the low level of formal enforcement in the UK in relation to insider dealing and other forms of market misconduct. Indeed, quite independently of the Coffee article, the FSA itself has recognized the need to make a greater inroad into this difficult area and is employing a number of compliance-promoting and enforcement strategies with this aim in mind. It has also invested significantly in upgrading its fraud-detection system (Surveillance and Automated Business Reporting Engine (Sabre)), which uses complex software with a view to monitoring transactions and detecting insider trading and other market abuses as they occur.

The FSA's first successful prosecution for insider dealing is likely to have a strong symbolic value. Yet, whilst it is clearly desirable for the FSA to be a credible prosecuting body (and it should be equipped with all of the powers that investigating and prosecuting bodies need to operate effectively), there are many good reasons why criminal sanctions should play only a limited role in the UK's overall risk-based, compliance-promoting strategy. The part played by principles-based enforcement may prove to be more controversial. Whether principles-based enforcement will enable the FSA to take effectively tough action and, if it does,

[94] CESR, *An evaluation of equivalence of supervisory powers in the EU under the Market Abuse Directive and the Prospectus Directive A report to the Financial Services Committee (FSC)*, (CESR Ref: 07–334), para. 9.

[95] ESME Report, *Market Abuse EU Legal Framework and its Implementation by Member States: A First Evaluation*, (2007), 19.

[96] N. Moloney, *EC Securities Regulation,* 2nd edn (OUP, 2008) ch 12.

[97] Coffee, 'Law and the Market', (note 20, above), 311.

how this will be balanced against the need for fairness and proportionality are key issues for which responses will need to be hammered out on the anvil of practical experience. Managing the tension between distinctive features of the British approach and the strong forces now pushing in favour of greater consistency in pan-European oversight and enforcement of EC laws will also be one of the main challenges that lies ahead.