Blameless Shame?

3 Feb 2015

The forex scandal has seen huge fines imposed on some of the biggest banks. But, asks Aziz Rahman, are individuals likely to be held accountable? And, if so, what should they do?

When they finally came, the forex fines were by no means small. Six high-profile banks were ordered to pay a total of £2.6 billion for having such inadequate controls that their traders were able to manipulate currency markets for personal gain. Big numbers indeed. In fact, anyone knowing little about what had gone on may even feel a twinge of sympathy for the banks. After all, £2.6 billion is a lot to have to hand over, however big your pockets may be.

And yet many observers still feel that the punishment does not fit the crime because it is not punitive enough. Greater and more effective deterrents are required, they argue. But why is this? And if such people were to have their wish granted, what would it mean for those who came under investigation?

The argument that current deterrents are not up to the job is fairly easy to explain. In fact, many members of the public have joined the so-called experts in making the argument that the deterrents that have been or are currently being used fail to deter wrongdoing and do not reflect the scale of that illegal behaviour. The forex scandal comes hot on the heels of Libor, which itself came to our knowledge only a few years after the general economic collapse caused by the banks' catastrophic behaviour. Each episode seems to have developed out of the banks' search for the quick buck with no thought for any consequences other than the ability to claim bonuses and look good on paper.

On reading the investigation reports onto forex, it is hard to believe anything has changed since the banking-inspired calamity of 2008. Those at the centre of the forex wrongdoing smugly gave themselves names such as "the A team", "the three musketeers" and "the players" while deriding others as "numpties". The arrogance alone may lead many to believe that these people are worthy of individual punishment. But when you consider that the foreign currency markets are worth £3.5 trillion a day, it is possible that the scale of what illegality may have gone on will persuade even the bankers' most vociferous defenders that £2.6 billion in fines spread between six major banks is a punishment that falls short of the crime. Such behaviour, the Financial Conduct Authority (FCA) has revealed, went on for five years until October 2013 – long after the banks had claimed to be cleaning up their acts after Libor.

Those calling for tougher action will be heartened by the news that the Serious Fraud Office (SFO) is now investigating. The SFO investigation is, unsurprisingly, in its infancy. But the Chancellor has promised the SFO extra resources as it seeks to look closely at just what was behind the forex scandal.

The SFO investigation will be the first time that forex wrongdoing has been looked at in terms of the individuals involved. Until now, investigators have been concerned with which banks could be shown to have manipulated the rates: the focus was on the corporate wrongdoing as opposed to any particular individuals' misconduct. That has now all changed with the SFO's arrival.

It would be very surprising if those who were merrily signing off as "the A team", "the three musketeers" or any of the other names these groups gave themselves are not now aware that they may have some serious questions to answer. Without being privy to exactly what the SFO knows or does not know at this stage, it is likely that its main concern will be quite simple: how far up did this go? It will want to find out who was manipulating the markets, who they were working with and who stood to benefit. Just as importantly, they will be determined to find out who else was aware of what was going on and why they did not take steps to prevent it. As we speak, those banks that are paying out the £2.6 billion seem to be doing so while making the usual noises about there being a few rotten apples bringing shame upon them and claiming a determination to prevent it ever happening again. Much the same as they said after last decade's crash. And Libor. Whether they are as determined as the SFO is to see who is culpable remains to be seen. It is not beyond possibility that many of those who could be viewed as the banks' investigators may well end up under investigation themselves.

The investigation will, hopefully, shed light on most, if not all, of what has gone on in the manipulation of forex. Anyone who comes under investigation will have to do whatever they can to prove that they acted honestly. However complex and involved the investigations become, the issue of honesty will be at the heart of every aspect of the conduct of those under suspicion. The investigation, as the SFO's involvement suggests, is into fraud. Dishonesty is at the centre of fraud allegations. It has to be proved if there is to be a fraud conviction and the bankers who come under investigation will have to do all they can to prove they did not act dishonestly.

With forex, the issue will be whether the person under investigation had dishonest intent when they acted in the way they did. The way that ensured the rates were manipulated in their favour. Or was this not a manipulation at all? Can the person show that they acted in the way they did for a reason other than dishonesty and the desire to male an illicit gain? This is not an easy task, as the onus is on the defendant to try and prove their honesty both to investigators and – if it goes to trial – to a court. It is a task that requires access to legal advice from someone familiar and experienced in this particular field; who knows how to negotiate with the SFO and respond to their questions and allegations.

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The Court of Appeal ruled in the case of Ghosh (1982) that dishonesty was defined as "according to the ordinary standards of reasonable and honest people, what was done was dishonest" and that a jury has to be convinced that the defendant "must have realised that what he was doing was, by these standards, dishonest." As we said earlier, proving this in any case is no simple exercise. In any case relating to forex, the network of deals, traders and rate changes that will come under investigation will lead to many more questions than many, more straightforward, cases of fraud may provoke. This makes it imperative that anyone who is investigated by the SFO over forex has in place a legal team that knows how to – and is able to – go to all possible lengths to convince investigators and/or a jury of their client's honesty. The defendant has to show that they acted honestly but it is still up to the prosecution to prove its case beyond all reasonable doubt. And a skilled, experienced defence team can use a variety of strategies to overcome what may look, at first glance, like compelling prosecution evidence.

Explaining why a defendant worked in the way they did, judicious use of expert witnesses to support assertions that their client was acting ethically and professionally and citing examples of their work that have not aroused suspicion can help the defence team overcome suspicion and allegation. Such allegations will come thick and fast as the SFO looks to root out those it seeks to blame for the forex scandal. It is vitally important that anyone who feels they may be targeted seeks out the right legal help as early as possible to ensure they are given a fair legal hearing.

Many may feel they can rely on the lawyers who work for their banks. But this would be unwise. If the investigation goes deep into a bank – or further up the chain of command – it is likely that a clear conflict of interest would prevent the bank's lawyers representing its own staff. Leaving it late to find appropriate, expert and independent legal advice may prove costly for anyone sucked into the forex investigation.

For anyone under investigation in relation to forex, expert legal advice may prove to be the only currency of value.

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