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Regulatory Enforcement Against Organizational Insiders: Interactions in the Pursuit of Individual Accountability

Abstract

The UK Financial Conduct Authority has developed and implemented policies targeting individuals for regulatory noncompliance in the post-2008 crisis period. This article develops a tripartite framework that differentiates between individual-firm, regulator-individual, and regulator-firm interactions to capture the complexity of these enforcement proceedings. Drawing on interviews with stakeholders, administrative decision-making observations, and documentary analysis, it outlines the process of individualizing responsibility for noncompliance, and finds that this approach poses evidential and investigative challenges for the regulator as a result of individual and corporate responses. The evidence shows that individuals are more likely than firms to engage in an adversarial response to an investigation rather than to settle. At the same time, through an inverse process of 'corporatization' of the enforcement proceedings, firms may employ resources and strategies aimed at obscuring individual responsibility or binding together more closely the corporate and the individual case. The article concludes that the prospects of a successful outcome in investigating individuals depend not only on regulators' activities but also on corporate responses, and on which managers are considered assets to the firm and which may be thrown to the wolves.

Keywords: regulatory enforcement; regulatory interactions; individual accountability; managers; corporatization

1. Introduction

Recent movements in the control of business misconduct in different countries exhibit a growing trend of regulatory agencies investigating and holding to account individuals for corporate failings. The US Securities and Exchange Commission has argued that "individual accountability is critical to an effective enforcement program" (SEC 2017), a view reflected in the fact that over the past two years 73% of its actions involved charges against individuals. In 2017, the UK tax authority, Her Majesty's Revenue and Customs, fined 115 finance directors for accounting lapses, an increase of over 150% over the past five years (Marriage 2017).

Despite the rich scholarship on regulatory enforcement against corporate actors, key questions remain around how regulatory agencies develop and implement policies targeting individual actors for corporate noncompliance, and what are the ensuing responses. To contribute to the scarce empirical research on these questions, this article analyzes the adoption of an enforcement policy targeting organizational insiders in the UK financial markets by the Financial Conduct Authority (FCA),[i] and the types of regulatory interactions that develop in consequence.

The article develops an integrated tripartite framework that differentiates between individual-firm, regulator-individual, and regulator-firm interactions to capture the complexity of enforcement proceedings against individuals. Previous research on regulatory enforcement has focused either on regulatory dealings at the firm-level (Kagan & Scholz 1984; May & Winter 1999; Hawkins 2002) or at the individual-level (Gray 2006), but does not incorporate both, nor include the influence of internal firm-individual relations. Drawing on the integrated framework, the article argues that when regulators shift to pursuing individual accountability, their enforcement work becomes more onerous. This is both because individuals are more likely than firms to engage in an adversarial response to an investigation rather than to settle the proceedings, but also because regulators have to account for the responses by the employing firm and whether or not the firm decides to support the targeted individual. The article identifies the inverse process of 'corporatizing' the enforcement proceedings in which, for individuals of interest, firms employ resources and strategies aimed at obscuring individual responsibility or binding more closely the corporate and the individual case together, further affecting the regulator's use of resources, construction of proof and ability to impose a penalty.

The article proceeds as follows: I begin by examining the challenges in enforcement against individuals, and then set out the analytical framework which this article draws on. I then report the findings that, in the crisis aftermath, the FCA has developed an enforcement philosophy and accompanying investigative practices towards inspecting individuals, alongside their firms, for regulatory breaches, thus individualizing responsibility for noncompliance. The focus on individuals has changed the context and types of regulatory interactions within the enforcement proceedings, increasing complexity and challenges for the FCA. The remainder of the article uses the tripartite framework to examine the consequences from, and the responses to, the FCA's policy of individualizing responsibility, providing a more nuanced analysis of why enforcement cases against individuals are more resources-intensive, challenging, and contested.

1.1 Constructing individual accountability for noncompliance with regulation

Regulators often have the choice of targeting the company, an individual within the company or both for noncompliance with regulatory requirements (Hawkins 2002). Yet, empirical research has shown that in many regulatory regimes enforcement against individuals is not common in comparison to their corporate employers (Hawkins 2002; Zaring 2014; Tombs & Whyte, 2015). This enforcement gap is due to legal, evidentiary and resources-related difficulties in constructing proof of individual accountability. Individual legal liability is often structured in a way that shields managers behind the corporate form and organizational complexity, obscuring their responsibility. This opacity of organizational lines of accountability has impeded public and private enforcement against corporate insiders as both criminal law and criminological scholarship (Coffee 1981; Fisse & Braithwaite 1993) and corporate and securities law scholars (Langevoort 2007; Schwartz 2015) have highlighted the difficulties of attaching individual liability to the longstanding concept of enterprise liability for organizational misconduct.

Regulators face further evidentiary difficulties in unravelling accountability lines because of lack of cooperative witnesses and "amnesia among witnesses" (Braithwaite 1984; Fisse & Braithwaite 1988). For example, Hawkins (2002) reported reluctance by HSE inspectors to criminally prosecute individuals instead or alongside their firms due to both hesitance to target them as criminal offenders but also because of practical problems:

it is easier to collect evidence on the employer, especially since employees are reluctant to provide evidence which incriminates themselves or their fellow workers.

Enforcement priorities and resources-related challenges in practice also impact the gap in enforcement attention to individual accountability. Regulatory agencies suffer from enforcement overload so may prioritize firms as less risky and more profitable targets (Fisse & Braithwaite 1993). Firms have more common attitudes towards enforcement agreements and negotiated justice (King & Lord 2018; XXX forthcoming). Actions against firms are more fiscally sensible as organisations are better resourced to pay fines and there are greater prospects of recovery and compensation – as the profits from the wrongdoing commonly accrue to the firm (Coffee 1981, 2012). Large fines and fines against major firms also cater to regulators' reputational considerations (Langevoort 2007). For example, the documented absence of high-profile civil penalties for executives in the major financial institutions associated with the financial crisis has been explained by prioritizing enforcement settlements with firms as more cost-effective (Zaring 2014); staff risk-aversion (Schwartz 2015); and even agency politics in showing 'best value for money' to accountability bodies (Coffee 2012). However, in comparison to the rich scholarship on regulatory practices in targeting firms, we are yet to gain a deeper understanding of the challenges in enforcement against individuals; the impact of the regulatory interactions upon the enforcement outcomes (Black 2002; Pautz *et* al 2017) has been particularly overlooked.

1.2 The effects of target choice on regulatory relations: a tripartite framework of interactions

Enforcement activities take place in a complex web of “regulatory conversations” (Black 1998), interactions, and compromises, in which the meaning of regulation is shared, discussed and contested between the parties that claim a stake in the enforcement process: regulators, respondents and various professional intermediaries (Reichman 1992; Picciotto 2007; Williams 2012). This article proposes a tripartite analytical framework to account for how the individual and corporate actors may (separately) interact with regulators in actions against individuals, and how this impacts the regulatory process. It suggests that interactions in this context develop between three interested parties: regulators, targeted individuals, and their corporate employers. A tripartite framework of interactions expands current thinking on regulatory relationships in two important respects: it incorporates both targeted individuals and their firms as actors with vested interests in the ‘horizontal’ relationships between regulators and the regulated community, and it accounts for the influence of the ‘vertical’ interactions that develop within regulated firms.

Extant literature on regulatory dealings mainly focuses on the ‘firm’ as a regulatee, with the central regulatory relationship viewed as a dyadic one between organizational actors (Almond & Van Erp 2018). The more modest research on interactions involving organizational insiders has examined managerial and professionals’ responses to installing process-oriented regulation (Parker 2002; Gilad 2011); the implementation of regulation by “sociological citizens” within organizations (Haines 2011; Silbey 2011); and the role and responsibilization of frontline workers for securing compliance (Gray 2006; Almond

& Gray 2017; Pautz *et.* al 2017). However, individuals' responses to compulsory administrative powers, and the interactions that develop between them and regulators in the contentious enforcement process have not been systematically examined.

The "vertical interactions" between firms and their members (managers and employees) (Almond & Van Erp 2018) and the imbalances of power that underpin them also influence regulatory outcomes, but regulatory interactions models rarely take these into account (Gray & Silbey 2014). Firms may purposefully aid the diffusion of individual responsibility discussed above (Braithwaite 1984), but another frequently identified corporate tactic is the strategic transfer of guilt from the firm to certain individuals through "ritual scapegoating". This involves setting up internal lines of accountability so as to have a "vice-president responsible for going to jail" (Braithwaite 1984); apologetic speech (Hearita & Brown 2004); symbolic CEO dismissal (Boeker 1992); as well as offering an attractive individual sacrifice in the hope that enforcers will feel sufficiently satisfied and refrain from pressing charges against the firm or members of its managerial elite (Fisse & Braithwaite 1993; Parker 2002). Scapegoating involves dissociation by the firm from the individual, making them an easier enforcement target while others' culpability may be expunged. The role of firms in enforcement actions against their members must be accounted for, and the instances of dissociation from scapegoats but also other potential corporate responses should be subjected to further scrutiny.

2. Research design

The data in this study is drawn from a larger empirical project on the enforcement of financial regulation in the UK markets 2012-2018 that used a mix of different methods: a documentary analysis, series of interviews with current and former regulators, professional intermediaries and markets participants, and observations from the FSA Regulatory Decisions Committee decision-making (n=7), Tribunal hearings (n=2) and public industry events (n=12). The documentary analysis consisted of coding of final notices for the period 2008-2017 (N=625) and officials' speeches (N=76), secondary data analysis of enforcement performance accounts (2004-17), and analysis of parliamentary and policy documents.

In total, 61 in-depth, semi-structured interviews were conducted with 56 individuals in the period late 2012-2015 and in 2017-2018. All interviewees were guaranteed anonymity. The quotes in this article are represented under pseudonyms, indicating the profession of the respondent at the time of interview (e.g. Regulator; Lawyer (private practice); LawyerFR (lawyer and former regulator)). The informants were selected on the basis that they were knowledgeable about financial regulation, willing to talk (not organizationally constrained against talking with 'outsiders'), and representative of a range of viewpoints. This yielded a diverse sample of informants: twenty-five current and former FCA enforcement staff (nineteen of these were currently working in private practice so they were also interviewed regarding the legal advocacy employed on the defense side); fifteen regulatory contentious lawyers involved in FCA proceedings; seven managers or in-house compliance officers in sanctioned firms and three previously approved individuals; six 'knowledgeable' informants, for example, industry consultants.[ii] Most current and former FSA/FCA staff who were interviewed represented senior or experienced enforcement officials. Regulatory lawyers were interviewed as key stakeholders in the enforcement process in the financial markets (Black *et.* al 2007; Williams 2012). The flexibility of a semi-structured interview elicited a great variety of discussed issues and contributions within the few prepared questions on the enforcement regime and regulatees' responses.

3. The post-crisis regulatory context: shifts towards pursuing the individual protagonists

Under the Financial Services and Markets Act (FSMA) 2000, the FCA supervises all UK retail and wholesale financial services institutions in conduct of business matters, and has unprecedented enforcement powers to detect, investigate and sanction noncompliance by both firms and individuals. It has extensive information-gathering powers that can be exercised upon very low statutory thresholds: if it appears reasonable to the FCA, it can request documents and information from the investigation target and other persons or call individuals to interviews.[iii] There are also very low statutory thresholds to open a formal investigation on suspected noncompliance: if it appears to the Authority that circumstances suggest that the misconduct had occurred.[iv] Finally, the FCA possesses extensive sanctioning powers that can be used in an enforcement pyramid manner (Ayres and Braithwaite 1992): a private warning (a confidential reprimand); an unlimited fine; removal or suspension from performing certain functions, and/or a prohibition order preventing the individual from performing any functions in finance.[v] While the legal powers given to the FSA/FCA single it out as a powerful enforcement agency, how these are used in practice reflect shifts in regulatory priorities towards inspecting individual culpability and holding organizational insiders to account.

3. 1 Individualizing responsibility within the enforcement philosophy

The FSA, the FCA's predecessor, always had a focus on senior management in supervisory matters since its meta-regulatory regime devolved a significant degree of responsibility for interpreting and applying the regulatory rules to the firm itself (Gray & Hamilton 2006; Black *et*. al 2007). However, interview and enforcement data show that FSA enforcement actions against senior individuals were extremely rare with most of the enforcement targeting failures in firms and thus corporate responsibility. In the conduct sphere, the few cases in which enforcement action was taken against senior individuals generally involved individual misconduct such as market abuse or smaller firms in which the individual had a clear responsibility for the firm's failures.

The shifts in the Authority's enforcement philosophy started around 2007, initially through the development of its "credible deterrence" enforcement policy towards tackling market abuse and insider dealing (see speech by Cole, 2008). The key aims of the policy were to instigate prosecutions of insider dealing (an area where the FSA significantly lagged behind its US counterparts) and to instil a sense within the UK markets that real consequences can be expected for unfair market playing. As insider dealing is essentially an individualistic rather than an organizational crime, the focus on individual liability became a key integral element to the "credible deterrence" agenda:

> Until 2007 [the FSA] hadn't brought any cases against individuals under Principles 5, 6 or 7, the senior management principles. Hadn't used that at all! In the same way they'd hardly prosecuted anyone for insider dealing. Then, in came ['credible deterrence'] and changed everything up (Lawyer12).

In April 2007, the FSA took the first case against an individual under its Approved Persons Regime (APER) and by late 2008, one of its 'strategic priorities' was an increased focus on bringing actions against Significant Influence Functions holders – individuals at higher levels of corporate decision-making (Green 2015). The enforcement focus on individual responsibility across noncompliance areas was gradually strengthened in the aftermath of several regulatory and industry failures (XXX forthcoming): the crucial roles CEOs played in the failings of the banks in the 2008 crunch (Turner 2009), the mis-selling scandals that preceded and accompanied the crisis in the retail sphere (Gilad 2011), and the manipulation of the LIBOR benchmarks. These led to questions on the role of individuals in the disasters and to strong criticism of the regulator for the lack of significant enforcement actions against managers in the heavily penalized banks in public inquiries by the Treasury Select Committee (Treasury Committee 2012a, 2012b) and the Parliamentary Commission on Banking Standards (PCBS 2013) as well as in a specific review of the FSA's decision-making into enforcement actions against individuals following the failure of HBOS bank (the 'Green Report') (Green 2015).

Regulatory crises and ensuing political and public backlash often lead regulators to adopt pro-regulation stances that impose new or expanded regulatory requirements (Braithwaite 2008; Hutter & Lloyd-Bostock 2017). These contextual factors produced a "political licence" (Baldwin & Black 2016) for the FSA/FCA (and legislators) to continue the expansion of risk considerations from organizational systems towards individual judgments and to align the delegation of significant responsibilities to organizational insiders with a stronger regulatory oversight. Legislatively, this process culminated with the introduction of the Senior Managers and Certification Regime (SMCR) in March 2016 that replaced and expanded the previous APER.[vi] APER held senior managers liable for being knowingly concerned in the firm's noncompliance or for breaching Statements of Principle that regulated only senior managers' conduct. The SMCR added a further duty of responsibility that enables enforcement action against senior managers if noncompliance has occurred in their area of responsibility and they failed to take reasonable steps to prevent or stop the noncompliance. A requirement is also included that senior managers provide in advance a Statement charting their specific responsibilities within the firm when seeking approval from the PRA and FCA for that role and every year after this.[vii] The SMCR legislative intervention embodies the expanding state regulation of individual liability for supervision and governance failures and associated lack of reasonable care in the context of organizational wrongdoing. A corresponding trend, only in the corporate liability area, is the recent UK criminal justice legislation on corporate 'failure to prevent' offences. Aimed at overcoming legal challenges in bringing corporate prosecutions (Campbell 2018), these offences, conversely, focus on the corporate fault in failing to prevent bribery and the facilitation of tax fraud by its individual agents, shifting the onus to the firm to show that it had ‘reasonable’ or ‘adequate’ preventative governance procedures.[viii]

In the FCA enforcement context, actions against individuals emerged as a key enforcement priority (“whom to target and what to inspect for”) (May & Winter 1999): “there is a general perception within the FCA that if we really want to change behavior, fining firms probably isn’t enough, we need to act against some individuals” (Regulator01). Accompanying this was a process of new internal policymaking (see also speech by McDermott, 2013):

> Internally we developed policies on how in all the cases that would come forward we would be looking into finding the [individual protagonists]. That we’d need to consider all individuals and commence a formal investigation wherever we can (LawyerFR27).

The enforcement philosophy transformed from a framework of investigating firms into a framework of joint investigations into both individual and firm liability. This is coupled with internal requirements that investigators certify the extent of the investigation, who was considered and why, and why individuals were not referred for formal investigation (see also speech by Symington, 2017). Case teams could now expect questions around why individuals were not included in the investigations.

3. 2 Using administrative powers against individual targets in practice

Official statistical information on open investigations into managerial responsibility is difficult to find since there is no 'real-time' tracker of ongoing investigations, nor does the FCA publish such information in its Annual Enforcement Report. However, a recent Freedom of Information requested by the author reveals that as of April 2018, the FCA had opened a total of 518 investigations, out of which 14 under the SMCR, 130 into approved persons and 173 into individuals who are not senior managers, certified or approved persons. This means that investigations into individuals (a total of 318), represented 61% of all investigations,[ix] with the caveat that some of these involve only individual and not corporate misconduct (e.g. market abuse) (see also Allen & Overy 2017). Interviewees across the board confirmed that, in cases initiated against firms, enforcement teams actively try to establish the culpability of individuals through separate formal investigations.

These findings mark a shift in the FCA's use of post-detection discretionary powers on which misconduct to record and investigate, and a reinterpretation of the thresholds for commencing formal investigations. In the early post-crisis period, enforcement referral of individuals' cases was determined by applying tests of "importance" and "probability of success" or the likelihood of the case resulting in a penalty (Green 2015, p. 15). These probability-based calculations of success, and the need for assurances of positive results before an investigation is opened, meant that challenging cases against individuals were often dropped. For example, the narrow focus on the "winnable" case led enforcement staff to dismiss actions against senior bankers at the failed HBOS bank (Green 2015). The current approach to referral decisions reflects a movement away, along the lines of the public scrutiny and criticisms above, from the risk-averse 'winnable' case to the more risk-embracing attitudes of the 'wherever possible' case. In contrast to earlier days, when the case initially focused on the firm and individuals would be investigated only later if adequate evidence emerged, now “the trend is much more [that] the senior management are immediately under investigation” (LawyerFR07).

4. Consequences of the shifts towards pursuing individual accountability: complexity and regulatory interactions

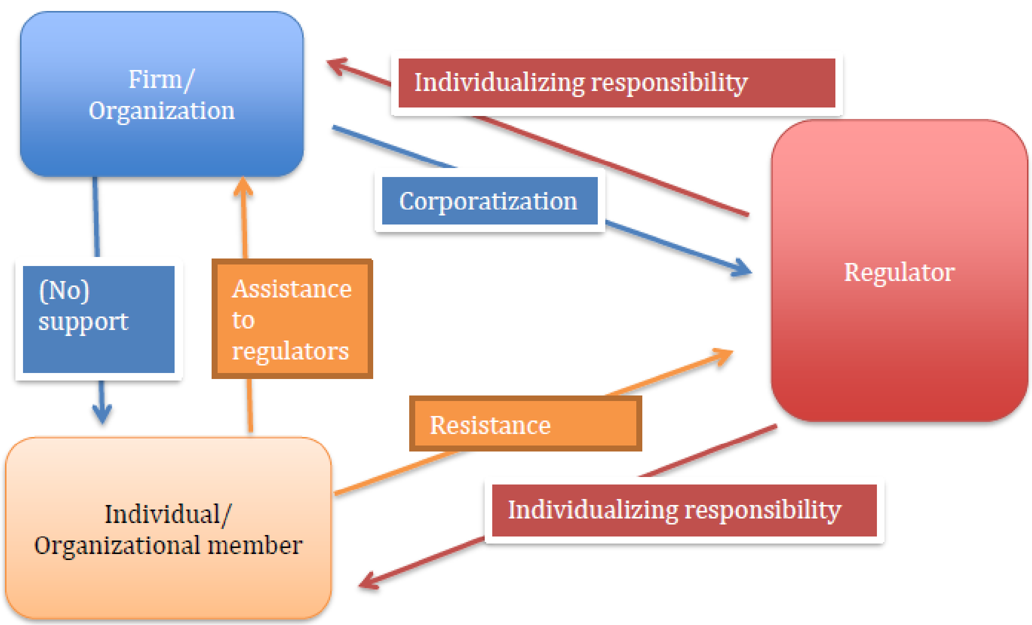
The FCA’s post-crisis response to noncompliance in finance has been to adopt and expand an enforcement philosophy and practices that indicate a shift from the organization as the unique or principal enforcement target towards individualizing responsibility for noncompliance. This shift may have practical consequences of piercing the ‘*de facto* corporate veil’ (Tombs & Whyte 2015, p. 174), that separates the corporate person and its human controllers, and overcoming the paucity of individual liability cases. It can also contribute towards deconstructing any sense of impunity by managers caused by the dominant enforcement attention to firms (Glasbeek 2002). However, there are significant difficulties in achieving successful cases against individuals. A senior regulator stated that “the challenges are at all levels” (Regulator02) as cases against individuals pose greater evidentiary difficulties, are more resources-intensive, contested and with more uncertain outcomes. Part of the evidentiary challenges FCA investigators face in tracing the decision-making lines echo the problems highlighted by Fisse and Braithwaite (1988) some thirty years ago and concern the complexity of organizational decision-making. In the enforcement of financial regulation, the difficulty of constructing proof directly depends on the type of target. It is easier to establish the case of a deviant firm mis-selling financial products or mishandling client assets. What is more difficult is establishing the hierarchy of decision-making and the level of culpability of senior and mid-level management, or answering the proverbial question ‘where does the buck stop?’ (Coffee 1981; Fisse & Braithwaite 1993). Finding evidence of an individual’s contribution to misconduct is especially challenging for the investigative team, specifically around the evidence on decision-making lines:

> The challenges are around us finding the evidence, they are around us working our way through the maze of decision-making that might happen within a firm (Regulator02).

Recent changes with the SMCR may make investigative work easier for misconduct committed after March 2016. This concerns the requirement that senior managers provide yearly Statements recording their specific and prescribed responsibilities within the firm. The regulatory obligation has clarified the duty of responsibility and who was ‘on the watch’:

> It is easier now to say *who* is responsible, to find individuals within the matrix of decision-making, to see who sits where and what they do in practice, as they never do what it says on their job description (LawyerFR27)

A second set of challenges emerges from how regulatees respond and adapt to the process of individualizing responsibility, also affecting the FCA's use of resources, construction of proof and ability to impose a penalty. Historically, the "regulatory conversations" (Black 1998) within FCA enforcement occurred predominately between investigators and firms, but the Authority's focus on targeting individuals, next to their firms, for organizational noncompliance has introduced tripartite relationships into the process: individual-firm; regulator-individual, and regulator-firm (Figure 1).



[Figure 1]

This increases the complexity and challenges of the enforcement work, with multiple vested interests and types of responses through which individuals and firms attempt to steer the enforcement case away from an adverse outcome. Firms are interested parties in the proceedings against their managers, and their decision as to whether to support them throughout the proceedings significantly affects both the individual's and the regulator's case. Cooperative relationships between individual and corporate actors may also prevent possible actions the individual can take against the firm in providing evidence to the regulators. In enforcement proceedings against individuals of interest, firms may employ 'corporatizing' strategies aimed at deflecting claims of individual responsibility or binding more closely the corporate and the individual case. The present research shows that if the firm decides to back the individual and join forces with them, that decision combined with the individual tendency to fight the enforcement case makes individuals much harder to target.

Connecting these horizontal and vertical interactions (Almond & Van Erp 2018), the remainder of this article uses the tripartite framework to map the physical (actors and techniques) and social (interrelationships, discourses, interests) geography (Black 2004) of enforcement actions against organizational insiders.

5. Individual-firm interactions

Many regulatory interactions occur in the absence of regulators (Almond & Gray 2017); in enforcement against individuals, these concern the initial internal or "vertical" interactions between the targets and their firm. Firms need to make an early decision on whether they will support their managers throughout the proceedings (Industry event, September 2015). Both the individual's fate and regulatory outcomes are crucially shaped by the internal dynamics of power, authority and variety of interests that influence this decision. The firm's support critically advantages the individual's position and resources, and by extension, increases the challenges put forward to regulators. Individuals under enforcement scrutiny are confronted with an 'asymmetry of resources', and if they are "dealing completely on their own self without a firm's support and financial resources, will be very significantly disadvantaged" (LawyerFR04). In the worst scenarios, the lack of corporate support may highly detriment the individual if they are used to deflect from the responsibility of the firm or of more senior organizational members.

The interview data showed that firms provide support to individual targets where: the seniority of the manager may threaten the future of the firm; there is a common defense; there is a need to control the individual for the benefit of the corporate case, or where the enforcement action may cause the firm serious reputational damage. The fates of smaller firms and their management are almost always bound together, especially since the Chief Executive and the firm might in effect be the same, so FCA threats against the manager crucially threaten also the firm's existence. In the coded enforcement decisions, almost all of the rare cases where firms challenged the FCA, jointly with their managers, concerned smaller firms where the regulator proposed to impose a prohibition order against the Chief Executive. The prohibition order effectively meant that the firm would no longer have adequate human resources to be authorized and would cease trading in finance.

In larger institutions, the position of managers is more complex, and corporate support for different managerial levels may be provided for different reasons. Firms are likely to support their CEOs due to a congruence in their identities (Gilad 2011), confusion as to where individual and corporate liabilities lie (Baldwin 2004) or the fact that the CEO is in control of the firm's responses:

> The more higher up, it is less likely that there is a conflict because the senior individuals would dictate the response of the firm. The CEO doesn't often find himself in conflict with the firm as he controls the strategy of the firm (LawyerFR08).

For lower than CEO managerial levels, interviewees commented that managers are supported in cases where there is a shared defense. The individual's position of responsibility and actions mean that the establishing of individual accountability would make the firm also liable as enforcement threats to the individual are attacks also on the firm's governance systems:

> The firm will support the individual if the firm will be guilty through *us* (Lawyer14, emphasis added).

> I act for the large institutions, there is normally no conflict between individuals. You don't have "I blame you, and you blame me". We have a common interest and you know the expression 'you either hang together or you hang separately' (Lawyer02).

> It happens frequently. The firm will decide that they accept the story and the motives of the senior manager, 'It's what we ourselves do. What is being alleged is not what we, as firm, or the individual accept, we don't agree with

> it. We are at one. This person has done what we would have done, we think he's right, our understanding is not your understanding' (FormerRegulator01).

In such cases the defense tactics are shared: the firm needs to show that there was no breach of the requirements to have compliant systems and controls (SYSC), and these include properly executed senior management responsibilities.[x] The firm's defense would be advanced along the lines that "there was no breach of the SYSC because the senior manager was acting in good faith" (LawyerFR27). For the individual, the ability to show that they had undertaken "reasonable steps" would negate individual culpability. Most contemporary "third-generation" regulatory regimes rely on managerial skill, will, and incentives to instill compliant systems in firms (Gunningham *et* al 2004), and with the development of special positions of insiders responsible for particular compliance areas (e.g. compliance officers, money laundering reporting officers, health and safety oversight employees) regulatory requirements have grown of individuals within the corporate context. With regulatory shifts towards targeting individuals for noncompliance in such regimes, it is more difficult to divorce the individual from the institution in which they are operating, particularly since the individual's 'reasonable steps' will be embedded within the extant processes, systems and controls put in place by the firm.

Firms also support individuals to strategically pre-empt them from any unfavorable actions such as assisting the regulators and giving evidence against the corporate case. There is a need for the firm and the senior manager to cooperate to "keep the senior manager in line as they can help the firm. The firm will therefore need to defend their actions, it needs to keep them in the fold" (LawyerFR27). Notions of 'keeping managers in the fold’ resonated throughout interviews, commonly justified by the need to prevent the individuals turning on their firms, or providing undermining insights on the firm’s systems and controls and its senior management: “it’s quite a dangerous situation for the bank to have an employee they’ve let go, who is now out of their control” (Lawyer10). Certain individuals are considered “assets” to the firm’s case, but an “asset” that may be mistrusted so strategies are devised to tightly control them and the flow of information:

> They want to keep them on a leash, so that they wouldn’t say something that would bring the firm in further trouble, God knows what else does the individual know! (Lawyer14)

> There is potentially a conflict of interest where there is the real risk that the individual might seek to blame the firm, or the firm blame the individual. In the majority of cases of retail mis-selling, or systems and controls, there is relatively lower risk of that, so what we will advise the firm and the individual is “the individual has got to be comfortable” (Lawyer02)

These corporate responses are diametric to classic ‘scapegoating’, so claims that firms commonly sacrifice or disassociate themselves from blameworthy individuals to obscure corporate responsibility and protect the corporate case may be one-dimensional. The need to preserve the corporate or more senior management interests is executed through a wider range of methods for damage control, including through cooperating with, or supporting, targeted individuals, even at the lower managerial levels. For the social control process, this means that the corporate control over the flow of information, picked up again below, limits the access of regulators towards “sympathetic witnesses” (Braithwaite 1984), making the charting of clearly defined accountability more difficult.

Finally, certain managers may be supported because a regulatory action against them may adversely affect the firm’s reputation. Enforcement actions against high-profile senior executives serve a ‘signal case’ (Gunningham *et* al. 2004) function as they resonate widely within the industry and attract significant press coverage. The development of the ‘individual protagonists’ enforcement priority has also meant that the Authority charts new territory in bringing precedent and high-profile cases, inevitably bringing their corporate employers also in disrepute:

> The bigger firms where you have a Board of several people, all of whom are independent, big entity or investment bank, they might well say ‘our reputation is on the line and we support, we agree with what the director has done. That is our understanding, that what he was doing was done generally in the market, that’s what everyone does and we support him.’ For them to cut the links with that person would be difficult (FormerRegulator01).

In the process of enforcing process-oriented regulation such as the FCA’s meta-regulatory regime, regulatory threats to (some) managers’ individual identities are considered a menace to the organization’s identity also. As put by one interviewee, “the firm is not going to fight alongside the individual if it thinks it can survive. They will fight if the regulatory action is going to take the firm down as well as the individual” (LawyerFR11).

This coupling of individual and organizational identities indicates that insiders can attain a certain clout and position of relative power within the organization, especially vis-à-vis regulatory inquiries. Yet, this position is precarious as the new regulatory 'dance' holds so long as the insiders represent an 'asset' that benefits and can be controlled for corporate self-preservation prerogatives. The clout may last as long as the regulatory threat to the firm, reverting then to a traditional disempowered or "commodity" employee status (Coffee 1981) in future internal interactions. This, on occasion, compels individuals to attempt to maintain close and informed relations with the firm so that they are not 'sold down the river' in case the firm can and wants to resolve the enforcement action without them (Lawyer14).

5.1 Access to corporate resources

Outside of the regulatory purview, corporate support consists of providing access to evidentiary and financial resources. The (de)construction of individual liability for financial noncompliance heavily depends on documentary evidence that belongs to the firm and individuals would be severely disadvantaged if the firm does not enable "documenting the case and access to information to support [the individual's] case" (LawyerFR05). Lack of access means that the individual's defense team must obtain documents indirectly through disclosure requests via the FCA - if they have already been acquired by the investigators. This increases the uncertainty and costs for the individual target.

Support by the firm also eliminates potential conflicts over claiming or waiving legal privilege over documents. As documents are privileged for the firm (Higgins 2010), only the firm can decide whether to claim or waive it. Either of these scenarios could be detrimental to the individual's case. In one example, the individual's defense team managed to obtain relevant documents, but because the firm hadn't waived privilege, it was unable to provide them as evidence even in a redacted form as the investigators "would not even touch it" (Lawyer14). The only exception where managers retain control over legally privileged material produced for the firm is in cases of joint legal interest privilege. These are the cases where individuals receive advice in both their personal and corporate capacity as company directors and officers, so they 'share' the privilege with the firm. As per *Ford*, a case specifically challenging FSA investigation powers, potential waiver of privilege by the firm still precludes the Authority from relying upon those documents in asserting individual liability. However, such situations are most likely to occur in smaller or tightly-controlled firms (*Ford*), and do not commonly arise in relation to complex financial institutions with multiple levels of decision-making, where the firm's refusal to wave privilege remains crucial.

Corporate financial support is crucial for the defense of many targeted insiders. FCA investigations are costly because of lost work hours to deal with the investigators and large legal fees: "the costs are enormous in dealing with the FCA through legal representation – lawyers don't come cheap!" (LawyerFR04). Often, support is provided by a pre-existing Directors & Officers Liability Insurance (D&O) or through an indemnity protection. These insurance contracts, funded by the firm, financially protect senior corporate officers from liabilities incurred when their corporate decision-making has led to a regulatory investigation, but they do not cover penalties (Finch 1994). The popularity of D&O contracts has grown after the crisis, mirroring the increased focus on managers

(Mukwiri 2017) and corporate crime enforcement. The insurer Marsh, for example, recorded an increase in its UK clients' D&O claim notifications: from 200-300 in 2005 to 1,300 in 2015 (Mukwiri 2017). Insurers are also designing products that can mitigate even earlier risks from adversarial regulatory interactions. For example, there are now offerings of LEAP (legal expenses additional protection) enabling access to legal advice whenever senior individuals have concerns about their personal position in regulatory interactions (Willis Towers Watson 2018).

The financing of individuals' defense costs enables access to legal advocacy provided by key, 'repeat player' (Galanter 1974) law firms and contentious regulatory lawyers. The move towards inspecting managers has increased the demand for advice by this specialized professional market. A lawyer commented that, whilst in the past their large law firm dealt predominately with firms, now its high-end services were increasingly sought after by individuals: "the stakes for individuals are getting higher, therefore more individuals are keen to pay [large] law firms' rates as they want representation by the most experienced firm" (LawyerFR01). The provision of financial support enables "professional embeddedness" (Reichman 1992) to attach not only to large firms but also to their managers. Professional embeddedness is a key part of firms' "regulatory authority" or the ability "to set the rules of the game…in regulatory negotiations" (Reichman 1992: 256). This regulatory authority "flows to those that can accumulate the greatest number of professional resources" (Reichman 1992, p. 258; Williams 2012) and can be purchased by contracting the big law firms: "I'll generally be acting for an individual where their firm is supporting them, paying their fees and ensuring that they've got legal representation, rather than for individuals who have disassociated from their institution and are paying their own fees" (LawyerFR04).

6. Regulator - individual interactions

The horizontal interactions between regulators and individual targets encompass the second element of the "social geography" (Black 2004) of proceedings against organizational insiders. Enforcement actions attract significant adverse consequences for individuals in financial markets. Prohibition orders exclude individuals from holding any or specific functions in financial organizations, e.g. Compliance Officer or a CEO, ending their careers (Dewing & Russell 2008). A financial penalty can also have career-limiting effects since it draws negative reputational consequences and may lead to dismissal and exclusion from a future role in finance:

> If you're dealing with an FCA disciplinary [case] it's still very serious, you can still lose your career. I've seen it in the context of people trying to come back into the industry. You have to justify and fight your way back in and it's a hugely emotional experience (LawyerFR12).

Targeted individuals will often have a "hugely emotional response because it's an attack on them personally" (LawyerFR12), and they also have a lesser need to account for the long-term impact on their relationship with the regulator. The contentious regulatory process can be imbued with emotions, producing comparable reactions to those caught up in the criminal justice system (Braithwaite 1989). The overall stance by individual targets is therefore more commonly one of resistance or adversarialism. This differs from the common approach by firms to adopt a cost-benefit analysis and settle enforcement cases (XXX forthcoming; see Figure 2 below):

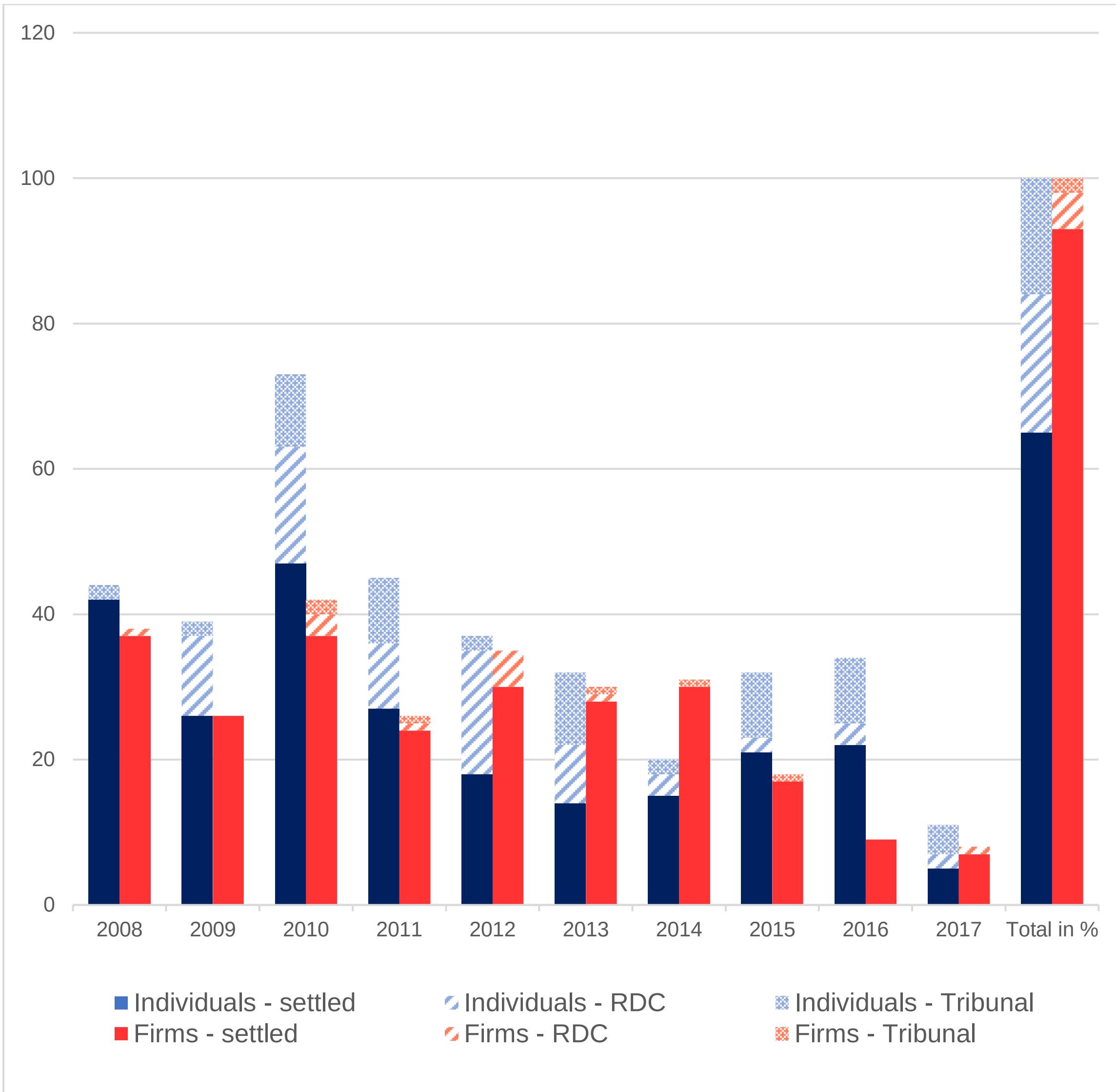
> Firms are looking at this from the perspective of, 'What's the damage limitation? Let's move on, deal with it and put it behind us.' Individuals are like, 'I don't want to accept this at all, there is no damage limitation. The only good outcome is for me to walk away from this without a disciplinary sanction' (LawyerFR07).

Enforcement staff experience a range of challenges by the individuals and their legal representatives during investigations and when they seek to impose a penalty: "cases against individuals are always very hard fought, individuals won't settle, they won't give it up, they have everything to lose, so they will fight the cases very hard" (Regulator02). During investigations, lawyers representing individuals adopt an overall more adversarial approach than they would do if "representing a company that just wants to settle on the best possible terms" (Lawyer01). Described by one interviewee as the 'hardball approach', lawyers are often more aggressive with the FCA, and more demanding of evidence of its claims (e.g. documents). Adversarial attitudes are also employed when the FCA is interviewing the targeted individual – a common evidence-gathering technique to establish the extent of his/her involvement, and levels of culpability. Individuals may be held to be in contempt of court if they do not appear at a compelled interview, but the FCA allows them to be accompanied by a legal adviser.[xi] Through the contribution of the targets and their legal advisors, these interviews are as much mechanisms for constructing proof (Baldwin 1993) as for deconstructing it:

> You would be far more intervening in a compelled interview. You would be a lot more vigilant about the questions, far harder about documents that you see in advance (Lawyer01).
>
> You'd ask for an advance disclosure, you prepare your client for the interview. There's compulsion to answer, so you cannot not answer the questions put to you. It's scary going to an FCA interview, and the FCA are not reacting to what you say. For example, they will ask, 'look at p. 4, how do you explain that trade??' Without looking at the whole document! Well, hang on, there is an explanation of this at p. 100! So, I have to intervene (Lawyer13)

For individual targets, therefore, the interview setting may be a coercive social environment (Baldwin 1993), the effects of which are managed by contentious regulatory lawyers – both through deconstructing the FCA's case and through alleviating the emotional responses by individual targets. Consequently, the degree to which targets are able to influence the enforcement proceedings is closely connected to their "professional embeddedness" (Reichmann 1992) and the ability to retain experienced regulatory lawyers. The process of fact (re)construction during interviews might also be a contributing factor in the regulator's difficulty in securing enforcement actions against senior individuals.

The greater adversarialism of individuals is also evidenced in the process of imposing penalties. Depending on the target's attitude, the FCA can impose a penalty through a two-tier process: executive settlements or the Regulatory Decisions Committee (RDC) proceedings – reserved for parties that do not settle.[xii] FCA actions can be further challenged externally before the Upper Tax and Chancery Tribunal or the High Court.



[Figure 2]

Figure 2 shows that, for firms, most formal enforcement outcomes are settled and negotiated; only 12 firms in the examined ten-year period challenged the FCA internally at the RDC[xiii] and only 6 firms at the Tribunal or at the High Court out of a total sample of 257 decisions on fines. Conversely, individuals settled the action with the FCA in only 65% of the decided cases, in 19% of the cases the penalty was challenged at the RDC, and in 16% further at the Tribunal. 86% of all cases decided through the RDC proceedings involved individuals, while individuals brought overwhelming 91% of the Tribunal cases. These challenges were brought by individuals from both large and small organizations, by prominent and more marginal actors.

For individuals, the RDC presents the last confidential chance to present their case and possibly avoid both the monetary and significant reputational damages associated with the public fine. However, contested cases are significantly costlier and resource-intensive for the FCA: they require disclosure (a very intensive and time-consuming exercise), preparing an investigation report and presenting the case to the RDC. If the case is further contested at the Tribunal, this will attract significant costs in staff time and in legal fees for external counsel whilst also being an uncertain remedy. Research has shown that regulatory agencies are perennially underfunded, with limited resources to oppose powerful corporations (Braithwaite 2008). The expansion of enforcement priorities over individuals and their adversarial responses further aggravate the resources problem, possibly leading to the effect of straining the social control of corporate crime overall (Fisse & Braithwaite 1993).

7. Regulator - firm interactions

The relationships that develop between regulators and the employing firm represent the third crucial component of enforcement actions against individual targets. The agenda towards inspecting individuals has complicated the enforcement process since, due to the joint investigations into both individual and firm responsibility, firms appear as relevant actors in regulatory interactions in dual roles: as targets themselves and as interested parties into the outcome for their manager. The enforcement focus on individuals exposes the firm also to risks of liability and reputational damages. This creates a reality in which various resources and strategies are employed by firms to avoid their managers being processed through investigations, to persuade the regulator that they should not be fined or prohibited if a breach is established or to receive more lenient treatment if this cannot be avoided. The provision of financial resources and access to documentary evidence occur outside of the regulatory purview, but firms can adopt more activist strategies in enforcement interactions with the regulator. These influences or attempts to claim "ownership" (Ermann & Lundman 2004) of the enforcement case enable 'corporatization' of the enforcement proceedings – the inverse process to the regulatory strive towards individualizing noncompliance. 'Corporatization' has often been used to designate the transformation of state bodies and governance modes into corporate-structured or corporate-driven (Braithwaite 2008). Here, I use 'corporatization' to mean the development and permeation of corporate strategies to influence the enforcement actions against individuals within the firm, to benefit the corporate and/or the individual's case. The outcome is that while regulators seek to individualize responsibility for corporate noncompliance and construct individual targets, this is counteracted by corporate strategies aimed at deflecting claims of individual responsibility or binding more closely the corporate and the individual case to enhance the manager's "regulatory authority" (Reichman 1992). These strategies involve controlling the flow of information, the provision of presentational support, and adversarialism.

7.1 Controlling the flow of information

Corporate strategies of controlling the flow of information involve the careful management of provision of information to the regulator through selectively withholding or divulging information to obscure the personal liability of certain individuals, notably through reports from internal investigations and 'scapegoating' rhetoric. Controlling the information traffic also includes attempts by lawyers to manage regulatory access to information for the benefit of the corporate case, similarly to the 'information-control' functions performed by white-collar criminal defense attorneys (Mann 1985).

Internal investigations are a very common practice in the corporate world to respond to internal or external allegations of misconduct (Copeland 2017). This is also the case in the UK financial markets where firms often undertake internal investigations to ascertain the facts of misconduct, commonly providing the investigation reports to the FCA (interview data). Due to resource constraints, the FCA may need to rely on these, at least as a starting point in determining what happened (speech by Steward 2017). Internal investigations have been described as "the greatest impediment" (Copeland 2017) to governmental efforts in corporate crime, and in the FCA context, despite the provision of information on noncompliance, they may obscure the extent of managerial responsibility. Reports are commissioned by, and prepared for, senior management so they may determine their scope; this may also aid the firm's case due to the joint defense over the firm's systems and controls and the manager's "reasonable steps". Enforcement staff have grown increasingly aware how information may be obscured or distorted when reports also investigate managerial involvement:

> I am yet to see an internal investigation report that has filleted the involvement of existing senior management in suspected misconduct. In these circumstances, the public interest requires a full and thorough investigation by the regulator (speech by Steward 2017).

Threats of legal proceedings give rise to defensive corporate practices (Haines 1997), and in cases of relevant individuals at risk of liability these are aimed at reducing the FCA's scrutinizing capacity, especially since the firm's organizational surveillance means that "when companies want clearly defined accountability they can generally get it" (Braithwaite 1984, p. 324). Instead of relying on internal investigation reports, regulators need to conduct own inspections, especially since *ENRC*, a recent landmark case on corporate privilege, limited the ability of enforcement agencies to demand the disclosure of documents generated during internal investigations as potentially privileged. *ENRC* extends to communications with third parties such as witness interview notes with (ex-)employees which may contain material on both individual and corporate culpability. However, the ability to take a scrutinizing approach is aggravated by the limited resources problem and may not be possible in every circumstance.

The control of the flow of information on the extent of individual liability consists also of scapegoating practices to deflect responsibility from senior individuals and sway regulatory investigations towards more powerless managers and employees. A high-profile example of such deflecting practices can be found in the testimony of Bob Diamond, the ex-CEO of Barclays Bank, who was called in 2013 to give evidence to the PCBS inquiry into the circumstances of the LIBOR scandal and the bank's internal chains of responsibility. Diamond blamed the manipulation on the twelve directly involved traders (PCBS 2013), at the time when the FCA's investigation into the entity was closed but its investigation into managerial and employee responsibility was still on-going.

Scholars have argued that such practices may be undertaken to deflect either from the responsibility of senior individuals or from corporate responsibility (Braithwaite, 1984, p. 308; Parker 2002). Yet, in the enforcement context, these two aims may often be indistinguishable since the allocation of blame to someone more junior may protect both the firm and certain senior individuals from adverse proceedings:

> The firm would say that this was a 'bad apple' and that it was a one-off, but that its SYSC were fine. The individual will then say that his practices were accepted by senior management, that they monitored him and didn't do anything to stop him (LawyerFR27).

> [The firm would say]: 'We want to turn over a new leaf and we want to dissociate ourselves from what he's done. We accept entirely that it was bad. That's not us. Just regard him as a bad apple in the crate and the rest of us are good' (FormerRegulator01).

Therefore, a firm may attempt to "distance itself from actions of individuals, by blaming or incriminating" (LawyerFR14) them, and constructing them as 'rogue traders', but this may serve as a defense for both the corporate and the individual's case. There may be a joint defense if it can be argued that the firm had good governance and compliance systems and that reasonable steps were taken by managers but that a lower-level individual had acted outside of both.

Attempts to manage regulatory access to information are undertaken during joint investigations to maintain a tight oversight over the individual's disclosures and potentially diminish any negative consequences for the firm. Lawyers for the firm attempt to closely oversee the exchanges between regulators and organizational insiders:

> The individual should always consider having his or her own solicitor to whom they can have a private conversation. But, for so long as possible we would like to represent both of them, or work very closely with the individual's lawyer, because otherwise you lose control of the case. An individual who is under investigation will often be the main protagonist, for example, the chief executive. It is hopeless representing the firm and another solicitor represents the individual, so you do not know what the individual is saying to the FCA (Lawyer07).

> There's mostly good cooperation and mostly because the bank still has an interest in making sure that the individual does well in his interview. It's still typically in the interests of the bank to continue to cooperate. Even if they've let him go, even if it's all separate lawyers, even if they think he's a crook. It is still typically in their interests for there to be a degree of cooperation and a degree of, where appropriate, sharing of material and resource (Lawyer15).

This can produce a process of “legal gamesmanship” (Williams 2012) as investigators may object to the firm’s lawyers also appearing in interactions with the individuals. For example, in one case discussed by a contentious regulatory lawyer, the FCA objected to the corporate lawyer also attending an investigative interview with the CEO where there were no conflicts of interest between the two parties. The ensuing clash led to an attempt to insist on joint attendance at the interview:

> The FCA says the lawyer for the firm cannot sit in on the individual. The individual is the Chief Executive of a large firm, who is also under investigation. The FCA has no power to stop it. So what we are going to do is we are going to turn up, and if the FCA asks us to leave we will say ‘no’, and the client will say ‘no, the interview will not proceed unless I can have my lawyer present and I wish to have the firm’s lawyer present.’ They are seeking to gain a procedural advantage of ensuring that [the FCA] and they alone know what is said. You must never let that happen (Lawyer07).

Regulators are sensitive to practices of controlling the flow of information, but they nevertheless mean that additional resources will have to be expanded to establish the ‘factual’ truth or to gain a procedural advantage.

7.2 Presentational support for individuals

Firms may show very visible support for investigated managers in their interactions with regulators thus binding more closely the firm and the individual and enhancing the manager's "regulatory authority" (Reichman 1992). The firm's support is important for presentational reasons: it sends a message to the regulator, especially through their presence at the RDC stage. For example, during one hearing on a proposed prohibition order, representatives of the firm attended the manager's hearing to show their support and strongly defended their propriety in submissions to the FCA: "The [firm's] assessment of *X's* fitness and propriety should carry more weight with the FCA. The firm's support showed their faith and confidence in *X* and spoke volumes for *X's* ability and calibre." If the case is further challenged at the Tribunal, the message of support goes out to the wider business community.

These messages resonate strongly within the industry, especially in high-profile cases where the FCA may establish regulatory precedents and enhance the negative reputation of the firm. One such veteran case, often raised by interviewees, is *Pottage* v *FSA*. This was the first time that the FSA had sought to fine a senior manager for inadequate supervision rather than for their own wrongdoing, testing the limits of managerial responsibility for their firm's systems and controls failings. The FSA had already fined UBS bank for allowing unauthorized trading at its Wealth Management branch, and was minded also to fine John Pottage, the CEO of the branch, for supervisory failings. The FSA/FCA alleged that Mr Pottage had breached APER Principle 7 in failing to undertake systematic review of risk management and governance upon his appointment. Ultimately, the Tribunal concluded that Mr Pottage's steps were reasonable, so fault was not established.

UBS showed support for their manager throughout the investigation and at the RDC and Tribunal stages: Mr Pottage was not suspended but relocated to work in the bank's headquarters in Switzerland; UBS funded his defense and provided access to information so that he could defend himself. This was considered unusual: "Pottage is in my experience unique, because Pottage was supported and paid for by UBS. He could, therefore, afford to go, and he challenged and he won. Individuals are not normally supported by their firms beyond the RDC level" (Lawyer02). The public support shown by UBS was considered an exception and it sent an important message of defiance to both the business community and the regulator, in the sense that the firm was also refusing to accept the regulator's claims that its internal supervisory procedures and steps required of its managers were flawed. While UBS settled its own case, it supported the adversarialism by its manager as the reputational damages from a lost precedent-setting case, and a new interpretation of the rules on supervisory procedures may have been considered greater costs.

7.3 Adversarialism

The most adversarial responses by firms described by interviewees to diminish or reduce the liability of their managers concern double enforcement actions when the FCA is minded imposing penalties on both the firm and a senior individual. Firms may be unwilling to settle the case unless the manager also receives a good deal. In such cases firms use their greater resources and position of power as a bargaining vehicle to diminish or reduce the manager's liability. One such example concerned a large corporation threatening to fight the case unless the outcome was also satisfactory for its senior manager:

> I was acting for the firm, [the Senior Manager] had separate representation, but we were all working incredibly close together. We would have settled the case months before if it had only been the firm, but we were not going to settle for the firm, unless the Senior Manager also got a good outcome (Lawyer14).

The importance of this case was that it may have become the first in which the FCA penalized an executive Board member of such a large financial institution. Even though the proposed penalty was well within the manager's payment abilities, the efforts of the firm were aimed at publicity damage control, aggravating the work of the enforcement team. Regulators anticipate greater adversarial responses and bartering over the penalties of senior managers within actions taken under the SMCR. Mark Steward, Head of Enforcement, commented in a speech that "firms may well be reluctant to spend high sums to resolve investigations where those resolutions do not also resolve cases against senior managers who may also be in our cross-hairs" (speech by Steward 2017).

8. Conclusion

Against a backdrop of recent movements towards holding managers to account for corporate failings, this article investigates regulatory enforcement against individuals in financial markets, proposing a tripartite analytical framework that differentiates between individual-firm, regulator-individual, and regulator-firm interactions to capture the complexity of these enforcement proceedings. The findings show that in the 2008-crisis aftermath, enforcement policy in the UK financial markets has shifted toward the pursuit of new objectives of individualized responsibility, and joint actions against firms and their managers for organizational noncompliance. The *"individual protagonist"* is a key priority across both the Authority's enforcement philosophy and practices 'on the ground' as evidenced in the use of discretionary enforcement powers towards immediately locating and investigating the involvement of relevant individuals in the firm's noncompliance.

The Authority's focus on targeting individuals introduces new complexities in the reflexive relationship between regulators and the regulatees and the "continual process of adaptation and re-adaptation by one party and then the other according to the responses received" (Hawkins & Hutter 1993, p. 203). The "physical geography" (Black 2004) of enforcement actions now involves a matrix of regulators, individual targets, corporate employers and professional intermediaries with multiple vested interests and responses through which individuals and firms attempt to steer the enforcement case. Individuals have much more to lose from an adverse FCA outcome, so they produce more adversarial responses to investigative and penalty powers. Access to financial resources, provided through corporate or D&O insurance funding, enables high-level defense and "professional embeddedness" (Reichmann 1992) to challenge the FCA during interviews and deconstruct proof, or at the RDC and the Tribunal, increasing enforcement costs. This also makes the outcome much less certain for the regulator, in contrast to actions against firms that are commonly settled and undisputed.

The internal relationships between the firm and the individual target, and whether the firm will decide to offer support throughout the proceedings, also crucially impact the enforcement process. For a range of strategically important reasons, either because of the benefits to its own case or because of managing reputational damages, the firm may decide to support or cooperate with targeted managers. In enforcement proceedings against individuals of interest, firms may employ inverse ‘corporatizing’ strategies aimed at deflecting claims of individual responsibility or binding more closely the corporate and the individual case. This is done through attempts to control the flow of information, presentational support and adversarialism, that individually or in combination affect the FCA’s use of regulatory resources, ability to construct proof or to impose a penalty. The fact that firms are prepared to fight for some managers further impacts the FCA’s ability to bring successful actions against senior individuals in finance.

The discussion presented here has theoretical and policy implications. The tripartite framework extends current models on regulatory interactions, capturing the effects of target choice upon varieties of interactions, discourses and strategies. It enables a more sophisticated account of the evidential and investigative challenges in the more uncertain, contested and resources-intensive enforcement proceedings against individuals. The framework also enables a better understanding of how authority, and the social and power relations that constitute institutional dynamics in organizations (Fligstein 2002; Gray & Silbey 2014), impact exchanges with external stakeholders. Unlike common notions in the scholarship, individuals are not always scapegoated, but some (even at below the CEO-level) may be supported as an asset to the corporate case, inviting activist or ‘corporatizing’ strategies by firms that shape regulatory outcomes. For example, next to regulators’ morality and risk-assessment considerations (Hawkins 2002), the firm’s ability to employ ‘corporatizing’ strategies may represent an additional factor to the empirical reality of greater enforcement responses against directors of small firms and marginal actors, than against large firms' insiders (Glasbeek 2002; Williams 2012).

The findings support the arguments that firms have "different selves" (Ayres & Braithwaite 1992), representing a complex structure of multitude of interests (Almond & Gray 2017) with multi-dimensional responses to regulation. Some commentators argue that the new SMCR is creating micro-constituents in firms (Chiu & Donovan 2017), and this is similar to previous discussions that APER enabled the FSA to have a "powerful apparatus for the individualization of corporate governance" in financial institutions (Dewing & Russel 2008). However, such discussion must not neglect the social reality of complex regulatory interactions and the launching of 'corporatization' strategies that seek to obscure the responsibility of these constituents. In attempts to bring enforcement actions for new types of noncompliance under the SMCR, regulators may encounter more resistance not only by the targeted managers, but also by their firms.

The discussion here will resonate with other jurisdictions and other industries where there has been a movement towards the social control of directors – notably in tax regimes, bribery (Chiu & Donovan 2017), and corporate fraud (Copeland 2017). The significance of this shift is not just of scholarly interest – the relocation of blame to organizational insiders may prove a fertile way away from 'fetishizing' the corporation in enforcement matters, and a greater deterrent for organizational noncompliance. However, the findings make us more sensitive to the effects of individualizing policies, and the reality that the prospects of a successful outcome in investigating individuals depend not only on the decision-making or activities by the regulator but also on the attitudes and responses of the corporate employer. If firms join forces with their employees, coupled with individuals' tendency to fight, the regulator's case is the much harder. The development of enforcement proceedings against individuals, alongside their firms, will depend on which managers are assets to the firm and supplied with resources, and which may be thrown to the wolves.

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Figures legend

Figure 1. Model of tripartite interactions in regulatory enforcement against individuals

Figure 2. Actions against individuals and firms 2008-2017: settled, contested at the RDC, contested at the Tribunal

[i] The FCA was originally established as the Financial Services Authority (FSA) to supervise both prudential and conduct of business matters. The financial crisis led to the breakup of the FSA in April 2013 into two new bodies: the Prudential Regulation Authority (prudential regulation) and the FCA (conduct regulation). This article also encompasses an examination of the enforcement activities of the FSA.
[ii] The 2017-18 interviews included respondents and follow-ups from the first two categories only.
[iii] FSMA 2000, Ch VI.
[iv] Ss 168(1)-(2), (4).
[v] FSMA 2000, Ch. VII.
[vi] Ss 66A(5)-(6), as amended by Financial Services (Banking Reform) Act 2013 and the Bank of England and Financial Services Act 2016. The SMCR also extended the disciplinary reach of the FCA's conduct rules to almost all staff in financial institutions.
[vii] Section 60(2A) FSMA.
[viii] Section 7 Bribery Act 2010; Ss 45-46 Criminal Finances Act 2017.
[ix] FOI5681, on file with the author.
[x] FCA Handbook Principle 3 and associated rules.
[xi] FCA Enforcement Guide 4.11-4.20
[xii] Chapter 6 Decisions Procedure and Penalties Manual.
[xiii] This represents only the portion of cases where the FCA was successful.