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Agency over technocracy: how lawyer archetypes infect regulatory approaches: the FCA example

Trevor Clark[a], Richard Moorhead[b], Steven Vaughan[c] and Alan Brener[d]

[a]Lecturer, School of Law, University of Leeds, UK; [b]Professor of Law, Law School, University of Exeter, UK; [c]Professor of Law and Professional Ethics, Faculty of Laws, University College London, UK; [d]Lecturer, Faculty of Laws, University College London, UK

ABSTRACT

In this article, we look at the contested role of in-house lawyers in regulated organisations in the financial sector. A recent Financial Conduct Authority consultation on whether to designate the head of legal of banks, insurance companies and other financial firms as 'Senior Managers' and the decision which flowed from it, reflected a flawed view of lawyers as a neutral technocracy of mere legal technicians; we show how the FCA's decision is potentially damaging to the public interest and failed to take into account that in-house lawyers are often important decision-makers and influencers within their organisations. We put the case for an alternative view; that in-house lawyers are professionals, with agency that requires them to act in accordance with ethical norms and means they should be made more accountable for their conduct.

KEYWORDS

In-house lawyers; financial regulation; Financial Conduct Authority ; legal ethics; professionalism; role orientation; standard conception; accountability

1. Introduction

According to Susan Koniak, 'without lawyers, few corporate scandals would exist and fewer still would succeed long enough to cause any significant damage.'[1] In this article we consider one critical site of such scandals, and look at the proper role of an in-house lawyer in a regulated organisation in the financial sector. The lawyer's role more generally continues to be ambiguous and contested.[2] Broadly, there are two conflicting perspectives. The first sees lawyers as mere advisers – legal technicians who are morally and ethically neutral and unaccountable for their activities. A recent Financial Conduct Authority (FCA) consultation on whether to designate the head of legal of banks, insurance companies and other financial firms as 'Senior Managers', and the decision which flowed from it, serves as an exemplar of this first perspective.[3]

CONTACT Trevor Clark t.g.clark@leeds.ac.uk

[1]Susan P Koniak, 'Corporate Fraud: See, Lawyers' (2003) 26 *Harvard Journal of Law & Public Policy* 1. See also, Eli Wald, 'Lawyers and Corporate Scandals' (2004) 7 *Legal Ethics* 54.

[2]Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Bloomsbury Publishing 2014) 3; Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge University Press 2011) 68.

[3]The FCA's consultation comprises three FCA papers, DP 16/4, CP19/4, and PS 19/20, 'Overall Responsibility and the Legal Function: DP16/4' (*FCA*, 26 September 2016) <https://www.fca.org.uk/publications/discussion-papers/overall-

By signalling that in-house lawyers who work in the organisations it oversees are mere legal technicians, the FCA's decision is both misconceived, failing to take into account that in-house lawyers are often important decision-makers and influencers within their organisations, and potentially damaging to the public interest. In-house lawyers will, for example, be deeply involved, in financial services firms, in the development of products and services, the negotiation and execution of transaction documentation, outsourcing arrangements, customer complaints handling, investigations into all manner of areas, corporate acquisitions and disposals and so on. It is difficult to think of an aspect of the business where the legal team is not involved.

We put the case for the second view; that in-house lawyers are professionals, with agency that requires them to act in accordance with ethical norms and means they should be made more accountable for their conduct. Our argument is as follows. First, we situate this debate in the wider context of the general and welcome trend towards ethical business and ethical lawyering. In light of this, we put the case for robust ethical infrastructure within regulated organisations. We then outline the capacity for harm presented by in-house lawyers in the financial sector. We describe the FCA's consultation; its process, substance, and outcome, and demonstrate how it exemplifies the contested 'standard conception' view of lawyering as a neutral technocracy. We then switch gears, drawing on evidence to demonstrate that lawyers working within large business organisations are often important decision-makers. We examine the theoretical and public interest arguments which support lawyers adopting a more ethical stance, including the compelling arguments for enhanced lawyer accountability. We then consider the challenges which exist to an in-house lawyer's independence, authority and status, and how external accountability can bestow increased authority and trust upon in-house lawyers. Finally, we show how 'strawman' theories as to how lawyers *should* behave – one of which is reflected in the FCA's consultation – are out of step with how lawyers *actually* behave.

2. The case for enhanced ethical culture

In this section we situate our arguments in the general and welcome trend towards ethical business and lawyering. According to Chris Hodges and Ruth Steinholz, 'it is now accepted in business management that companies perform best if they have clear ethical values and behave in accordance with these values, involving all stakeholders.'[4] In the financial sector, an independent body, the Financial Services Culture Board (formerly the Banking Standards Board), has been established to promote high standards of behaviour and competence in the UK banking industry, by setting behavioural standards, accrediting training standards, defining metrics and requiring banks to make public

responsibility-and-legal-function> accessed 16 July 2018; 'CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function' (*FCA*, 22 January 2019) 10 <https://www.fca.org.uk/publications/consultation-papers/cp19-4-optimising-senior-managers-certification-regime-and-feedback-dp16-4> accessed 7 February 2019; 'PS19/20: Optimising the Senior Managers & Certification Regime and Feedback to CP19/4' (*FCA*, 22 January 2019) 2 <https://www.fca.org.uk/publications/policy-statements/ps19-20-optimising-senior-managers-certification-regime-and-feedback-cp19-4> accessed 6 May 2020.

[4]Christopher Hodges and Ruth Steinholtz, *Ethical Business Regulation, A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart Publishing 2017) preface.

disclosures against those metrics, among other things.[5] There is some evidence the Senior Manager & Certification Regime (SMR) has itself contributed to a strengthening of ethical culture in the financial sector.[6] And there is a welcome trend towards more ethical business lawyering in private practice settings. Large corporate law firms, for example, now claim to have placed ethics and values at the heart of their organisational strategy.[7]

In-house lawyers working in the financial sector must also be given the tools to support them in acting ethically. Their actions will often be non-deliberative, being significantly influenced by their own personal characteristics[8] and their environment.[9] In the past, the mistake of policymakers has been to consider that corporate wrongdoing is down to 'bad apples' rather than a 'bad barrel'.[10] In the US, the logic for legislation such as Part 205 of the Sarbanes-Oxley Act [11] – inspired by corporate scandals such as Enron and Worldcom in the early 2000s – was that misconduct is down to individuals who are pre-disposed to misconduct.[12] It is often not the venality of managers, including the head of legal, that causes, facilitates or masks wrongdoing in the corporate context, but rather the psychological pressures created by their situation.[13] So in-house lawyers, under pressure to 'be commercial', may sign off on decisions or practices that are unethical or even illegal.[14] This became particularly relevant for financial institutions in the global financial crisis, notwithstanding many had large in-house legal and compliance departments, run by experienced heads of legal.[15]

Whilst it may not be possible to completely remove these cognitive and other pressures, it may be possible to mitigate them. A regulated organisation's policies and procedures should not assume unethical behaviour is simply down to an individual's character (so called 'rogue traders' for example), but rather treat ethics as a 'design problem', creating an environment that promotes and rewards ethical

[5]'FSCB / Financial Services Culture Board' (*Financial Services Culture Board*) <https://financialservicesculturebord.org.uk/> accessed 10 June 2021; Bob Ferguson, 'The Personal Accountability of Bankers' (2015) 9 *Law and Financial Markets Review* 40, 44.

[6]UK Finance, 'SMCR: Evolution and Reform' (2019) 62 <https://www.ukfinance.org.uk/system/files/SMCR%20-%20Evolution%20and%20Reform.pdf> accessed 30 June 2020.

[7]'Our Corporate Soul – Defining the Values of a Law Firm' (*Legal Business*, 29 October 2019) <https://www.legalbusiness.co.uk/analysis/our-corporate-soul/> accessed 1 November 2019. Large law firms continue to battle misconduct by their lawyers. See for example, 'Freshfields to Tackle Misbehaviour with New Conduct Committee' <https://www.thelawyer.com/freshfields-to-tackle-misbehaviour-with-new-conduct-committee/> accessed 6 June 2020. Barney Thompson, 'Lawyer to Face Tribunal over Role in Weinstein Gagging Clause' (3 April 2019) <https://www.ft.com/content/ca547778-562d-11e9-91f9-b6515a54c5b1> accessed 6 June 2020.

[8]Alice Woolley and W Bradley Wendel, 'Legal Ethics and Moral Character' (2010) 23 *Georgetown Journal of Legal Ethics* 1065; Donald Langevoort, 'Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk and the Financial Crisis' [2011] Georgetown Law Faculty Working Papers <http://scholarship.law.georgetown.edu/fwps_papers/154>.

[9]Robert L Nelson and Laura Beth Nielsen, 'Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations' (2000) 34 *Law & Society Review* 457, 472, 487; Loughrey (n 2) 237; Alice Woolley and W Bradley Wendel, 'Legal Ethics and Moral Character' (2010) 23 *Georgetown Journal of Legal Ethics* 1065.

[10]Linda K Treviño, Jonathan Haidt and Azish E Filabi, 'Regulating for Ethical Culture' (2017) 3 (2) *Behavioural Science & Policy* 57; Sung Hui Kim, 'The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper' (2005) 74 *Fordham Law Review* 997.

[11]Part 205 requires attorneys who 'appear and practice before the Commission' in the representation of an issuer to report within the company 'evidence of a material violation' of U.S. federal or state securities law, a material breach of fiduciary duty arising under U.S. federal or state law or similar.

[12]This is the 'neo classical economic view of organisational corruption', Yuval Feldman, 'Using Behavioral Ethics to Curb Corruption' (2017) 3 *Behavioral Science & Policy* 86.

[13]Kim (n 10) 108.

[14]Donald Langevoort, 'Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk and the Financial Crisis' [2011] *Georgetown Law Faculty Working Papers* 3 <http://scholarship.law.georgetown.edu/fwps_papers/154>.

[15]Ibid.

behaviour.[16] Regulated organisations in the financial sector have a menu of options available to them when considering how best to construct ethical infrastructure to encourage ethical behaviour.[17] However, we focus here on the question of whether more can be done to ensure effective ethical leadership of the legal function of regulated organisations. Senior leaders – including the head of legal – are critical to establishing an ethical culture as they set the tone, send messages and act as role models.[18] Including the head of legal in the SMR would have supported this goal. It appears that the SMR has resulted in many Senior Managers taking more notes of meetings and other interactions, taking the Senior Manager Conduct Rules into account before making decisions, seeking attestations and assurances from their direct reports, and attending regular training on the SMR and its associated rules.[19] Early indications are that the SMR has broadly had a positive effect on the culture, behaviours, and processes of regulated organisations in the financial sector, and brought a greater focus on good governance.[20] However, in a recent study, UK Finance reported that whilst the SMR had focussed the minds of Senior Managers, they could not find evidence that it had had a similar effect on others within the organisation.[21] By implication, this includes the (excluded) legal function.

3. The context: the capacity for harm

The financial sector is one of the largest contributors to the U.K. economy, whilst at the same time, as was seen in the global financial crisis, posing a systemic risk to it.[22] There has been significant growth in the number of lawyers that are employed in this sector.[23] Many of the largest in-house legal departments are to be found in banks and other financial institutions, which in some cases are the size of a large law firm.[24] HSBC has the largest in-house legal department of any FTSE 100 company, employing over 1,100 lawyers, and Barclays' and Lloyds' legal teams also feature in the top ten largest in-house legal teams.[25] This growth

[16]Nicholas Epley and David Tannenbaum, 'Treating Ethics as a Design Problem' (2018) 3 BSP <https://issuu.com/behavioralsciencepolicyassociation/docs/05_bsp_epley> accessed 9 August 2018.
[17]For examples, see Ibid 74, 80.
[18]Linda K Treviño, Jonathan Haidt and Azish E Filabi, 'Regulating for Ethical Culture' (2017) 3(2) *Behavioural Science & Policy* 57.
[19]UK Finance (n 6) 23.
[20]Ibid 3, 10. Albeit there has only been one enforcement to date, 'FCA and PRA Jointly Fine Mr James Staley £642,430 and Announce Special Requirements Regarding Whistleblowing Systems and Controls at Barclays' (*FCA*, 11 May 2018) <https://www.fca.org.uk/news/press-releases/fca-and-pra-jointly-fine-mr-james-staley-announce-special-requirements> accessed 28 June 2020; Richard Moorhead, 'FCA Senior Manager's Regime: A One Word Response – Barclays?' (*Lawyer Watch*, 29 January 2019) <https://lawyerwatch.blog/2019/01/29/fca-senior-managers-regime-a-one-word-response-barclays/> accessed 6 February 2019.
[21]Ibid 3, 10.
[22]In 2018, the financial services sector contributed £132 billion to the UK economy, 6.9% of total economic output. Chris Rhodes, 'Financial Services: Contribution to the UK Economy' (2019) <https://researchbriefings.files.parliament.uk/documents/SN06193/SN06193.pdf> accessed 30 June 2020. On systemic risk, and how lawyers may contribute to it in the financial services sector, see Joanna Gray, 'Lawyers and Systemic Risk in Finance: Could (and Should) the Legal Profession Contribute to Macroprudential Regulation?' (2016) 19 *Legal Ethics* 122.
[23]In-house lawyers now make up one-fifth of the solicitors' profession in England and Wales, 'Annual Statistics Report 2018 – The Law Society' <https://www.lawsociety.org.uk/support-services/research-trends/documents/annual-statistics-report-2018/> accessed 30 June 2020.
[24]*The Lawyer*, 'UK 200: The Top 100 Report 2015' (*The Lawyer | Legal insight, benchmarking data and jobs*) <https://www.thelawyer.com/knowledge-bank/white-paper/uk-200-the-top-100-report-2015/> accessed 10 July 2018.
[25]*The Lawyer*, 'HSBC Tops Inaugural In-House Legal Team Rankings as FTSE 100 Lawyers Break 10,000 – The Lawyer | Legal Insight, Benchmarking Data and Jobs' <https://www.thelawyer.com/issues/online-december-2015-2/hsbc-tops-inaugural-in-house-legal-team-rankings-%E2%80%8Bas-ftse-100-lawyers-break-10000/> accessed 1 August 2018.

is attributable to a number of factors, including an effort by regulated organisations to reduce expenditure on external counsel in the face of a significant increase in the regulatory burden placed on them by complex post-financial crisis reforms. This increased scale has enhanced the influence of the head of legal within regulated organisations.[26]

Incidents of misconduct in the corporate and financial services sectors often involve the passive acceptance by, and sometimes even the active participation of, in-house lawyers.[27] Although cases where ethical misconduct by in-house lawyers has become subject to public scrutiny are relatively scarce,[28] the examples we have in the financial sector show that their role commonly extends beyond the mere giving of technical legal advice. For example, in-house lawyers at Standard Chartered Bank assessed the lawfulness of sanctions busting, formulated strategies for enforcement proofing, helped organise and implement that strategy, reviewed the effectiveness of due diligence, and advised on the risk of that strategy to the risk audit committee of the institution.[29] Misconduct by in-house lawyers working in the financial sector comes in a variety of forms; including tolerance of, and even the facilitation of, an elevated appetite for risk-taking within the organisation,[30] facilitating and/or covering up illegality,[31] and exploiting ambiguity in legal, accounting and other rules.[32] And in-house lawyers often perform a broader and influential, but subtle, role within the organisation, in facilitating misconduct.[33]

4. The FCA's SMR consultation

As foreshadowed above, this article shows how an FCA consultation relating to the SMR and its outcome was based on a stereotypical, and flawed, view of lawyers. In order to do this, it is first necessary to examine the scope and legislative purpose of the SMR,[34] which has much broader application than simply looking at lawyers, and the nature of the consultation, which was concerned with the management of the legal function; both in terms of its substance and process, and the FCA's subsequent decision.[35]

The SMR is a relatively recent (2016) governance measure introduced following the global financial crisis and a number of high-profile financial scandals including the manipulation of benchmark indices and the widespread mis-selling of payment

[26]Within a large organisation in the financial sector there may be various heads of legal, especially where it has significant geographical or organisational scope.

[27]For examples, see Richard Moorhead, Steven Vaughan and Cristina Godinho, *In-House Lawyers' Ethics, Institutional Logics, Legal Risk and the Tournament of Influence* (Hart 2018) 3–5; Richard Moorhead and Rachel Cahill-O'Callaghan, 'False Friends? Testing Commercial Lawyers on the Claim That Zealous Advocacy Is Founded in Benevolence towards Clients Rather than Lawyers' Personal Interest' (2016) 19 *Legal Ethics* 30, 30–31.

[28]Moorhead and Cahill-O'Callaghan (n 27).

[29]Richard Moorhead, 'On the Wire' (2012) 75(27) *New Law Journal* 1080 <https://www.newlawjournal.co.uk/content/wire> accessed 6 July 2018.

[30]Moorhead, Vaughan and Godinho (n 27) 15–20.

[31]For an example of possible facilitation by lawyers in private practice, see David Kershaw and Richard Moorhead, 'Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession' (2013) 76 *The Modern Law Review* 26.

[32]Doreen McBarnet and Christopher Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *The Modern Law Review* 848. Joan Loughrey, 'Accountability and the Regulation of the Large Law Firm Lawyer' (2014) 77 *The Modern Law Review* 732; Loughrey (n 2); Moorhead, Vaughan and Godinho (n 27) 3.

[33]As we show in Section 6.

[34]The legislation underpinning the SMR is The Financial Services (Banking Reform) Act 2013, Part 4.

[35]'Overall Responsibility and the Legal Function: DP16/4' (n 3); 'CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function' (n 3).

protection insurance (PPI).[36] Compliance with the SMR is overseen by the FCA as the principal regulator of conduct in the financial services sector. The ultimate objective is to strengthen governance standards in banks, insurance companies and other financial firms through a culture of individual responsibility and accountability.[37] A number of functional roles are pre-designated for inclusion within the SMR, ranging from the chief executive officer and the other executive directors, and the non-executive chairs of the organisation's various governance committees, to the heads of the internal audit, compliance and risk function respectively.[38] Further, each regulated organisation must designate a series of individuals as a 'Senior Manager' with overall responsibility for each of the organisation's businesses and activities, in order to create a network of accountable senior managers across each component part of the organisation, such that they can each be charted on a comprehensive 'responsibilities map'.[39]

A Senior Manager must be approved by the FCA – or, for certain systemically important institutions, the Prudential Regulation Authority (PRA) – prior to appointment[40] and is subject to the Senior Manager Conduct Rules. These rules require, among other things, that the Senior Manager must disclose appropriately any information of which the FCA (or the PRA) would reasonably expect notice. The Senior Manager must also delegate only to an appropriate person, and oversee the discharge of the delegated responsibility effectively; and is bound by a duty of responsibility which can lead to personal liability, where they are found not to have taken 'steps that are reasonable for a person in their position to take in order to prevent a regulatory breach from occurring.'[41] In Section 7 we explain why these requirements, which do not feature in the 'lesser' certification regime, are critical to the effective accountability and ethical leadership of the head of legal.

Perhaps unsurprisingly given the introduction of potential personal liability through fines and bans for its senior executives and managers, the SMR was met with trepidation by the financial sector when it was introduced.[42] As well as opposition to the introduction of potential personal liability, there were concerns that financial institutions would find it more difficult and costly to attract and retain those filling SMR posts.[43]

Initially, the FCA intended that whoever had overall responsibility for the management of the legal function, unless covered by another functional role, such as the head of compliance, should be designated as a Senior Manager.[44] This was notwithstanding

[36]Changing Banking for Good – Parliamentary Commission on Banking Standards' <https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/2704.htm> accessed 3 July 2018.

[37]'Changing Banking for Good – Parliamentary Commission on Banking Standards' (n 36). For an account of how the criminal law had proved largely ineffective in addressing individual banker misconduct associated with the global financial crisis, see Ferguson (n 5).

[38]'SUP 10C.4 Specification of Functions – FCA Handbook' <https://www.handbook.fca.org.uk/handbook/SUP/10C/4.html> accessed 6 August 2020.

[39]'Overall Responsibility and the Legal Function: DP16/4' (n 3) 2.2–2.5, 3.20; 'SYSC 4.7 Senior Management Responsibilities for UK Relevant Authorised Persons: Allocation of Responsibilities – FCA Handbook' <https://www.handbook.fca.org.uk/handbook/SYSC/4/7.html?date=2016-03-07> accessed 19 May 2020.

[40]The Financial Services (Banking Reform) Act 2013, Part 4.

[41]'Overall Responsibility and the Legal Function: DP16/4' (n 3) 3.18.; 'COCON 2.2 Senior Manager Conduct Rules – FCA Handbook' <https://www.handbook.fca.org.uk/handbook/COCON/2/2.html?date=2016-03-21> accessed 7 February 2019.

[42]UK Finance (n 6).

[43]See for example, 'Bankers "Terrified" at New Regulations | Financial Times' <https://www.ft.com/content/324faf9e-e54f-11e5-a09b-1f8b0d268c39> accessed 23 May 2020; Ferguson (n 5) 44.

[44]'Overall Responsibility and the Legal Function: DP16/4' (n 3) 2.13. We refer to this role as the head of legal, although often this role might be accorded a different title, such as general counsel, legal director or chief legal officer.

that the legislation underpinning the SMR did not expressly require this.[45] The FCA started to doubt its own assumptions in apparent response to confusion in the sector as to whether the SMR covered the legal function in the first place,[46] and some outright hostility to inclusion from some regulated organisations.[47] It published three papers as it consulted and developed its own thinking.[48] It is important to examine who was influencing the FCA towards doubt.

The majority of the 24 'non-confidential respondents' to the FCA's formal call for feedback were representatives of segments of the financial sector.[49] This is perhaps an expression of the pre-existing opposition to the SMR we noted previously. But five were bodies representing the interests of segments of the legal profession.[50] Advocacy by the legal profession (and the FCA's engagement with the profession on the issue) appears to have been a significant factor in both the FCA's decision to initially launch the FCA's consultation, and its ultimate decision to reverse its opening position.[51] Not for the first time two of the 'legal' respondents, the City of London Law Society (or CLLS, which represents the large City of London law firms) and the Law Society (which represents solicitors in England and Wales) presented a narrow interpretation of the role of lawyers in seeking to oppose, or to obtain, regulatory change in order to protect the interests of their members.[52] Here the submissions made by legal profession 'trade' bodies – for example, the submissions of the Law Society,[53] and the GC100 (an association of general counsel and company secretaries working in FTSE 100 companies)[54] – placed particular emphasis on perceived challenges to legal professional privilege should in-house lawyers be brought within the SMR. These arguments appear to have been influential in the FCA's consultation, as they are cited in each of the three papers issued by the FCA in the consultation.[55]

[45]Ibid 1.7, 2.13.
[46]Ibid 1.4.
[47]'Overall Responsibility and the Legal Function: DP16/4' (n 3).
[48]'PS19/20: Optimising the Senior Managers & Certification Regime and Feedback to CP19/4' (n 3) 2.4.
[49]See Annex 1, 'PS19/20: Optimising the Senior Managers & Certification Regime and Feedback to CP19/4' (n 3).
[50]These were the Association of Corporate Counsel, the City of London Law Society, The Association of General Counsel and Company Secretaries of the FTSE 100 (commonly referred to as the 'GC100', The Law Society of England & Wales, and the Law Society of Scotland. The Solicitors Regulation Authority (SRA) also submitted a response. The authors also submitted a response, the only public response not from a body representing the interests of either the financial sector or of practicing lawyers, Trevor Clark and others, 'A Response to the Financial Conduct Authority's FCA's Consultation Paper CP19/4 on the Senior Manager and Certification Regime' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3368896 <https://papers.ssrn.com/abstract=3368896> accessed 17 April 2019. The FCA's final ruling did not address the authors' specific arguments and was generally lacking in principled reasoning, Trevor Clark, 'GCs to Be Excluded from SMR : Unsurprising but Worrying' (*Lawyer Watch*, 2 August 2019) <https://lawyerwatch.blog/2019/08/02/gcs-to-be-excluded-from-smr-unsurprising-but-worrying/> accessed 20 May 2020.
[51]The FCA said it was especially keen to hear the views of 'legal professional bodies', 'Overall Responsibility and the Legal Function: DP16/4' (n 3) 1.15, 1.17; 'CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function' (n 3) 1.4.
[52]For examples of the CLLS and the Law Society seeking to influence regulation see Loughrey (n 2) 48–49; Janine Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Hart Publishing 2002). Chris Perrin, 'City of London Law Society, Letter to the Review of the Regulation of Corporate Legal Work' (8 January 2009) <http://www.citysolicitors.org.uk/storage/2013/07/Hunt-Review-Final-Signed-Copy.pdf>.
[53]'Risk of Conflict of Interest If Legal Function Is Included in SMR – The Law Society' <http://www.lawsociety.org.uk/news/press-releases/risk-of-conflict-of-interest-if-legal-function-is-included-in-smr/> accessed 16 July 2018; 'Optimising the Senior Managers and Certification Regime – Law Society Response – The Law Society' (15 April 2020) <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/optimising-smcr-regime/> accessed 25 May 2020.
[54]Mary Mullally, 'GC100 Repsonse to FCA Discussion Paper DP16/4: Overall Responsibilty and the Legal Function' (11 January 2017); Mary Mullally, 'GC100 Response to FCA Consultation: CP19/4 Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function ("CP19/4")' (23 April 2019).
[55]'CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function' (n 3) 3.20.

But it is unclear how much corporate and financial entities value in-house privilege and rely on it in practice, at least until they are subject to a regulatory investigation.[56] For example, those entities typically call in external lawyers to conduct internal investigations.[57] Privilege is, however, valued by lawyers themselves, giving them an advantage over other professions, such as accountants, in the market for legal services.[58]

Taking one step back, privilege is itself problematic.[59] For example, whilst the policy justification for advice privilege is to encourage *individuals* to fully and frankly disclose all facts when seeking advice, Andrew Higgins has argued this justification does not apply to *corporations*, where developments in corporate law and governance in the UK have created plentiful further incentives for a company and its offices to do so.[60] And privilege is also problematic in practice.[61] In a corporate context, individuals are never totally protected by advice and litigation privilege, because only the business can waive that privilege.[62] And some of the boundaries of litigation privilege, including who constitutes the client, create challenges for firms in relying on privilege.[63]

Our own discussions with compliance officers in the sector suggest privilege is not, overall, conducive to a good corporate culture. To be effective, financial services regulation requires a degree of trust between the regulator and the regulated firm.[64] Claiming privilege can be detrimental to such trust. Financial services regulation in the U.K. is not an adversarial, court-based contest, but rather depends upon a shared public interest understanding between regulator and firm. The head of legal has a central role to play in achieving this common objective. Since regulators may not demand the disclosure of documents generated for the dominant purpose of litigation, privilege can operate as an obstacle to in-house lawyers properly performing their legal and professional duties within firms, shielding misconduct from regulatory and legal scrutiny, and potentially encouraging adversarial defensiveness.[65] The ability to waive privilege can be an important way of achieving regulatory cooperation, helping to ensure that internal legal advice is weighed appropriately.[66] It is reasonable to expect firms to 'come clean' where there is an alleged breach of regulation and to investigate it responsibly and the waiver of privilege has become a feature of regulatory investigations by the Serious

[56]Max Walters 4 April 2019, 'SFO Chief Attacks "Blanket of Privilege" Tactics' (*Law Society Gazette*) <https://www.lawgazette.co.uk/law/sfo-chief-attacks-blanket-of-privilege-tactics/5069870.article> accessed 25 June 2020.
[57]Aleksandra Jordanoska, 'Regulatory Enforcement against Organizational Insiders: Interactions in the Pursuit of Individual Accountability' (2021) 15 *Regulation & Governance* 298, 310.
[58]R (on the application of Prudential plc & anr) v Special Commissioner of Income Tax & anr [2013] UKSC 1, Loughrey (n 3) 59.
[59]See Lord Phillips in *Three Rivers DC v Bank of England (No 6)* [2004] 3 All ER 168 (CA) at 182. UCL, 'Legal Professional Privilege: A Conversation with Lord Neuberger' (*UCL Faculty of Laws*, 28 June 2018) <https://www.ucl.ac.uk/laws/events/2018/nov/legal-professional-privilege-conversation-lord-neuberger> accessed 16 February 2019; Andrew Higgins, 'Legal Advice Privilege and Its Relevance to Corporations' (2010) 73 *The Modern Law Review* 371. Clark and others (n 50).
[60]Higgins (n 59) 372.
[61]Clark and others (n 50).
[62]Higgins (n 59).
[63]'House of Lords – Three Rivers District Council and Others (Respondents) v. Governor and Company of the Bank of England (Appellants) (2004)' <https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm> accessed 9 February 2019. See, however, the *obiter* comments in 'Serious Fraud Office (SFO) v Eurasian Natural Resources Corp. Ltd [2018] EWCA Civ 2006 (5 September 2018)' <https://www.bailii.org/ew/cases/EWCA/Civ/2018/2006.html> accessed 9 February 2019.
[64]Clark and others (n 59).
[65]Boon (n 2) p.341; Higgins (n 59) p.393; Jordanoska (n 57).
[66]Higgins (n 59).

Fraud Office (SFO), for example, where it is taken as evidence of full cooperation by the person or entity under investigation.[67]

Those 'legal' trade bodies engaging in the FCA's SMR debate generally advanced a view that the legal function in a regulated organisation is primarily an advisory one, and further emphasised the risk of inclusion in the SMR conflicting with a solicitor's duties of loyalty to the client. Those bodies did not, however, refer to the broader ethical and public service duties that solicitors owe under the SRA Code of Conduct and Principles.[68] These are fundamental omissions. It is striking that representatives of the legal profession seek to diminish the importance of the head of legal's role. While other professions in financial services, such as chartered accountants and actuaries, may be held to account under the SMR, the head of legal of a regulated organisation appears to have been placed in the ranks of mere 'consigliere'. However, as we will show, this is neither true nor merited.

The FCA finally issued its ruling on the matter in a policy statement, PS 19/20, in January 2019, announcing that the head of legal would not be required to be included in the SMR accountability regime, reversing its original position.[69] Given the scale, importance and influence of the legal function within many of the organisations regulated or supervised by the FCA and/or the PRA, excluding the head of legal from the SMR creates a sizeable gap in the coverage and accountability of the SMR.[70] However, for the purposes of this article, we concentrate on how the FCA's consultation was founded on a false premise, that the lawyers who work within large business organisations are mere legal technicians.

5. The FCA's stance exemplifies the (contested) standard conception view of lawyering

According to the FCA, respondents had expressed strong support for excluding the head of legal from the SMR,[71] and a majority perceived the SMR as presenting insoluble challenges to the independence of the legal function.[72] It appears the FCA was heavily influenced by the view that the primary role of in-house lawyers in regulated organisations is to provide legal advice,[73] and concluded that potential personal liability would make in-house lawyers reluctant to provide full and frank advice, conflicting with the solicitor's 'obligation to act in the best interests of the client'.[74] And, in what appears to have become the critical issue in persuading the FCA to reverse its initial

[67]'Serious Fraud Office (SFO) v Eurasian Natural Resources Corp. Ltd [2018] EWCA Civ 2006 (5 September 2018)' (n 63); Moorhead, Vaughan and Godinho (n 27) p.223. 'Fighting Fraud and Corruption in a Shrinking World' (*Serious Fraud Office*, 3 April 2019) <https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/> accessed 8 April 2019.

[68]Which applied at the time of the consultation. These are now found in the SRA's Standards and Regulations issued in November 2019.

[69]'PS19/20: Optimising the Senior Managers & Certification Regime and Feedback to CP19/4' (n 3).

[70]The FCA acknowledged this, Ibid 2.24.

[71]Ibid 2.13.

[72]Ibid 2.2, 2.12.

[73]'Overall Responsibility and the Legal Function: DP16/4' (n 3) 1.5.

[74]'CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function' (n 3) 3.20–3.21.

position, the FCA reported that more than half of respondents had raised concerns over the ability of in-house lawyers to offer legally privileged advice; for example, if the head of legal of a regulated organisation felt it necessary to disclose privileged material to demonstrate they had taken 'reasonable steps'.[75] Counterbalancing public interest concerns, not least the public interest objectives of the SMR itself, together with the public interest in supporting lawyers to act ethically, were not given any consideration.[76] In particular, the FCA did not acknowledge that solicitors have wider professional and ethical duties beyond those to their client.

The FCA took a relatively binary approach, considering only two aspects of the head of legal's role, that of 'legal advisor' and of 'manager';[77] and – with respect to management – initially emphasised the capacity for harm presented by 'systemic failings in the management of the legal function'.[78] However, the FCA ultimately reported that 'most respondents argued that the legal function is purely advisory and doesn't make management decisions' narrowing its consideration of lawyer roles in the financial sector to just one category – the legal technician.[79] In adopting this view it appears the FCA was captured by advocacy from the legal profession, and did not seek a comprehensive understanding of the broader and influential role actually performed by in-house lawyers in the financial sector.

Consequently, both the FCA's consultation, and the decision which flowed from it, serve as an exemplar of the 'standard conception', a view of lawyers grounded in moral philosophy.[80] When considering the proper role of lawyers, moral philosophers have sought to answer questions such as 'is it possible to be a good person and a good lawyer?'[81] The standard conception of the lawyer's role offers a convenient pathway to answering this question positively. It features three principal components: zealous advocacy (often referred to as the principle of partisanship), neutrality, and non-accountability.[82] Partisanship envisages lawyers putting the client first, and ahead of public interest duties.[83] As zealous advocates, partisan lawyers fully represent their clients, bounded only by compliance with the law and professional codes.[84] Some specific professional duties can be seen as evidence of partisanship; for example, the duties to maintain client confidentiality and to avoid conflicts of interest.[85] The related principle of

[75]'Overall Responsibility and the Legal Function: DP16/4' (n 3) 1.14, 2.13; 'CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function' (n 3) 3.17–3.19.
[76]Clark and others (n 59).
[77]'CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function' (n 3) 3.23.
[78]'Overall Responsibility and the Legal Function: DP16/4' (n 3) 3.23.
[79]'CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function' (n 3) 3.23.
[80]Boon (n 2) 4.
[81]Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' [2004] *Monash University Law Review* 49, 49, 51; Moorhead and Cahill-O'Callaghan (n 28) 32.
[82]For a defence of this perspective, see Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities Symposium on the Lawyer's Amoral Ethical Role' (1986) 1986 American *Bar Foundation Research Journal* 613. Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role* (Ashgate 2009).
[83]See for example the comments of Lord Hunt, 'The Hunt Review of the Regulation of Legal Services' (The Law Society 2009) <https://www.lsc.qld.gov.au/__data/assets/pdf_file/0016/260035/The-Hunt-Review-of-the-Regulation-of-Legal-Services-NZ-Dec-2009.pdf>. Quoted in R Moorhead, 'Precarious Professionalism: Some Empirical and Behavioural Perspectives on Lawyers' (2014) 67 *Current Legal Problems* 447, 464–5.
[84]Moorhead and Cahill-O'Callaghan (n 28) 31; Parker (n 81) 56.
[85]Tim Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 *Legal Ethics* 24, 27.

neutrality, where lawyers do not judge their clients, being morally unaccountable for the assistance that they give them,[86] then allows lawyers to assert an amoral position.[87]

Broadly, two core arguments have been advanced in defence of the standard conception and its lack of emphasis on the ethical dimensions of the lawyer's role.[88] First, that it enables lawyers to defend an individual's rights against the state; second, that it facilitates a pluralism of views as to what is morally right and wrong,[89] with the function of law being to mediate between these different views.[90] An individual's right to representation is seen as a social good, uncomplicated by the lawyer's own moral perspective, enabling murderers and rapists, as the examples in the literature often comprise, to be represented, and requiring the state to prove its case.[91]

This view of lawyering is flawed, since, as other work in this area has shown us, lawyers who adhere to this model are more likely to acquiesce in, or possibly facilitate or participate in, ethical misconduct.[92] The reasons as to why this might be are varied.[93] The principle of neutrality allows lawyers to advise on matters that they may disagree with on moral grounds, legitimising amoral decision-making.[94] Crucially, it is seen as for the client to decide, based on the lawyer's advice, what action to take, whilst the lawyer accepts no responsibility for that action.[95] Those who defend the standard conception often do so in the name of client autonomy.[96] But partisanship is difficult to justify on this basis where the client is a corporate entity.[97] One reason is the lawyer is part of that entity, as both agent and client (see below). And if the basis for neutrality is respect for the individual as an autonomous moral person, it is hard to see how it applies where the client is a company (or another legal form of large business organisation) as it is not a moral person; although it is represented by managers, the lawyer's duties are owed to the corporate entity.[98]

As a minimum, in-house lawyers in the financial sector should be encouraged to be, and supported in being, what Christine Parker describes as 'responsible lawyers'; a view of lawyers that stresses the lawyer's autonomy from the client.[99] Here the focus is placed on the lawyer's role as protector of the rule of law. In this way the standard conception is tempered by the need to ensure the 'integrity of and compliance with the spirit of the law.'[100] Where the law offers more than one reasonable interpretation lawyers should exercise their judgment, and engage in a moral dialogue with their client; they should not simply act in accordance with the interests and

[86]For a detailed discussion of this topic, see Donald Nicolson and Julian Webb, *The Lawyer's Amoral Role and Lawyer Immorality* (Oxford University Press 2000) 165. A lawyer's role as zealous advocate is espoused by the ABA's Model Rules in the US, see American Bar Association, 'Model Rules of Professional Conduct: Preamble & Scope'. See also Loughrey (n. 2) 65.
[87]Moorhead and Cahill-O'Callaghan (n 28).
[88]Kershaw and Moorhead (n 31) 44.
[89]Moorhead and Cahill-O'Callaghan (n 28) 32. Charles Fried notably advanced a rather different argument, see Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85 The Yale Law Journal 1060.
[90]Dare (n 85) 27.
[91]Tim Dare (n 82). Daniel Markovits, *A Modern Legal Ethics* (Princeton University Press 2011).
[92]Loughrey (n. 2) 236. Moorhead and Cahill-O'Callaghan (n 28).
[93]See generally, Moorhead, Vaughan and Godinho (n 27).
[94]Loughrey (n 2) 66–67; Richard Moorhead and Victoria Hinchley, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 Journal of Law and Society 387.
[95]Loughrey (n 2) 66. Boon (n 2) 24–25.
[96]Parker (n 81) 52; Moorhead and Cahill-O'Callaghan (n 28).
[97]Joan Loughrey, 'Accountability and the Regulation of the Large Law Firm Lawyer' (2014) 77 *The Modern Law Review* 732.
[98]Ibid 741.
[99]Parker (n 81).
[100]Ibid 56.

instructions of their client.[101] Lawyers who do more strongly emphasise such public interest professionalism have been shown in other work to also demonstrate a stronger ethical inclination which is likely to act as something of a prophylactic against wrongdoing.[102]

Arguments that lawyers in a pluralist society should not intervene in decisions as to what is right or wrong, would be more persuasive were it not the case that transactional lawyers shape and even create law, and do not just give effect to legal rules.[103] A particular problem in the financial sector is what Doreen McBarnett and Christopher Whelan have referred to as 'creative compliance', where lawyers take advantage of mistakes, loopholes and grey areas in the law and in contracts.[104] Creative compliance was a significant contributor to the collapse of Enron and to the global financial crisis, where law was seen as a 'regulatory obstacle' to be structured around, rather than as a social good where the spirit, and not just the letter, of the rule should be observed.[105] Lawyers have also helped facilitate tax avoidance.[106] As David Kershaw and Richard Moorhead have noted, 'zeal provides a space within which lawyers can "get creative"'.[107] The risk is that the standard conception is seen to confer moral legitimacy to this practice by in-house lawyers in the financial sector.[108]

The standard conception therefore offers a convenient theoretical justification for potentially unethical behaviour by commercial lawyers, allowing them to see their professional ethics as consistent with both their own and their client's commercial interests.[109] Unlike in the criminal defence context,[110] the law created by commercial lawyers, whether in private practice or in-house, is not often mediated by courts or other public and/or political institutions.[111] The institutional checks which limit adversarial zeal in courts do not regularly exist in the transactional context; here there is no neutral umpire to scrutinise the claims made by lawyers on behalf of their clients.[112] It is therefore concerning that the FCA adopted this contested view of lawyers, and that the CLLS, Law Society, GC100 and others advocated this contested view in such positive terms.

6. The FCA's stance conflicts with the actual role played by many in-house lawyers in the financial sector

Whilst the standard conception has been challenged on moral grounds, with scholars putting the case for the increased moral accountability of lawyers,[113] abstract theories

[101]Eli Wald and Russell G Pearce, 'Beyond Cardboard Lawyers in Legal Ethics Review Symposium' (2012) 15 *Legal Ethics* 147, 158.
[102]Moorhead, Vaughan and Godinho (n 27) 193.
[103]Loughrey (n 97) 744.
[104]McBarnet and Whelan (n 32). David Luban also gives the example of delay tactics in litigation, David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press 1988) 75.
[105]Loughrey (n 97) 63, 71.
[106]Doreen McBarnet, 'It's Not What You Do but the Way That You Do It: Tax Evasion, Tax Avoidance and the Boundaries of Deviance' in David Downes (ed), *Unravelling Criminal Justice: Eleven British Studies* (Palgrave Macmillan UK 1992); Tanina Rostain and Milton C Regan (eds), *Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry* (MIT Press 2014).
[107]Kershaw and Moorhead (n 31) 45.
[108]Loughrey (n 2) 62.
[109]Kershaw and Moorhead (n 31) 45.
[110]Loughrey (n 97) 740; Kershaw and Moorhead (n 31) 47; Markovits (n 91).
[111]Loughrey (n 2) 63; Kershaw and Moorhead (n 31) 26.
[112]Moorhead (n 83) 463–4; Kershaw and Moorhead (n 31) 47.
[113]See for example, Luban (n 104) 31. William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press 2009) 54–62; Eli Wald and Russell G Pearce, 'Beyond Cardboard Lawyers in Legal Ethics Review Symposium'

of lawyering grounded in moral philosophy, do not necessarily reflect the practical realities of an in-house lawyer's everyday experience.[114] It is important to distinguish what Steven Vaughan and Emma Oakley have referred to as 'descriptive' and 'normative' ethics; where normative theories, at best, provide a 'strawman against which we can assess the conduct of lawyers'.[115]

The FCA's narrow view of in-house lawyers in the financial sector as mere providers of legal advice conflicts with the actual role that in-house lawyers are performing in the financial institutions it oversees. We do not understate the importance of the role of in-house lawyers in the financial sector as legal advisers, and key commercial and risk decisions within regulated organisations will regularly be taken based on that advice.[116] But the FCA did not take into account the way in which the role of in-house lawyers in the financial sector has expanded to often encompass elements of governance, compliance, business, strategy, and ethics.[117] By way of illustration, a survey in the US suggests that general counsel may spend as much as 35% of their time advising the executives on strategic matters,[118] and in-house lawyers in the UK banking sector have helped to formulate the responses of their organisations to a series of pressing strategic matters, including the LIBOR transition, Brexit, the ESG (environmental, social and governance) agenda, and the Coronavirus pandemic.[119]

Beyond involvement in strategic and governance matters, in-house lawyers in the financial services sector also play a more subtle role as influencers, for example, in 'blessing' transactions.[120] An in-house lawyer's expertise is increasingly required early in the process of a transaction, and at the end, to 'sign off' on the transaction.[121] In-house lawyers also commonly have primary responsibility for producing and executing the legal documentation that the organisation enters into, as a case involving criminal charges against four Barclays executives demonstrates.[122] This organisational context has become critical and enhanced the influence of in-house lawyers in large business organisations. The relationship of in-house lawyers with their client is unlike that of the private practice lawyer, increasing their influence well beyond the mere provision of legal advice. As Richard Moorhead and others observed, this is because 'in-house lawyers are both part of and serve that client. They are dependent and constituent, servant and agent. Further, the more senior those in-house lawyers are in the

(2012) 15 Legal Ethics 147. W Bradley Wendel, Lawyers and Fidelity to Law (Princeton University Press, 2010)' (2012) 15 Legal Ethics 147, 151.

[114]Ted Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics' (1984) 1984 *Wisconsin Law Review* 1529; Wald and Pearce (n 147) 152.

[115]Steven Vaughan and Emma Oakley, '"Gorilla Exceptions" and the Ethically Apathetic Corporate Lawyer' (2016) 19 *Legal Ethics* 50, 50, 53–54.

[116]Hugh P Gunz and Sally P Gunz, 'The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of in-House Counsel' 39 *American Business Law Journal* 241.

[117]Moorhead, Vaughan and Godinho (n 27) 68.

[118]'2017 Chief Legal Officer Survey, Altman Weil, Inc.' <http://www.altmanweil.com/CLO2017/> accessed 11 July 2018.

[119]Ana De Liz, 'GC2B: The in-House Banking Sector during Lockdown' (*The Lawyer | Legal Insight, Benchmarking Data and Jobs*, 18 June 2020) <https://www.thelawyer.com/gc2b-the-in-house-banking-sector-during-lockdown/> accessed 26 June 2020.

[120]Gray (n 22) 126. A further example is illustrated by Kershaw and Moorhead (n 31). See also Loughrey (n 2) 68; Loughrey (n 97) 742.

[121]'The Head of Legal and the Board – Legal, Regulatory & Compliance Professionals Practice Publishes Third Issue of "Experts"' *Egon Zehnder Insights*, 2011.

[122]Caroline Binham, 'Barclays Banker Worried Fees Could Be Viewed as "Bungs"' (*Financial Times*, 30 January 2019) <https://www.ft.com/content/85178bf6-2481-11e9-b329-c7e6ceb5ffdf> accessed 5 February 2019.

organisation, the more they become part of the organisation's directing mind.'[123] In-house lawyers are likely to exert influence over management owing to their understanding of the organisation and their personal networks within it.[124]

Perhaps most significantly, given the systemic risk posed by large financial organisations, the legal department increasingly plays a major role in identifying, quantifying, mitigating and managing the organisation's exposure to legal risk, encompassing compliance failures, violations of the law, and other events which have a legal consequence.[125] It is critical that in-house lawyers play a prominent role in a regulated organisation's decision-making in order that it may satisfy one of its core regulatory requirements: having rigorous governance and risk management processes and systems.[126] In the financial services sector, the FCA has recently intensified its focus on governance, evidenced by a dramatic growth in the number of its governance related investigations.[127] A regulated organisation's ability to respond rapidly to misconduct when it occurs (including active cooperation with the regulator) can mean a better regulatory outcome, and the legal function will commonly play a key role in this process.[128] In-house lawyers in the financial sector therefore help ensure their organisations are cooperative and transparent so far as dealings with the FCA and other regulators are concerned.[129]

Notwithstanding this influential role played by in-house lawyers in the financial sector, the FCA nevertheless presented them in its SMR publications as mere legal mechanics, simply implementing their corporate client's wishes, as opposed to embedded professionals who are an integral part of the organisation's risk, governance and decision-making processes. The difference is crucial given the public interest in ensuring effective management of risk and the prevention of wrongdoing in those organisations. This public interest objective requires that in-house lawyers in the financial sector are supported and encouraged to act with more appropriate levels of responsibility when managing risk and potential wrongdoing within their organisation.[130]

7. The arguments for increased accountability

Traditional notions of professionalism, which have embedded within them the idea of public service,[131] are often presented by the legal profession when fending off demands for increased regulation and/or market liberalisation.[132] Lord Neuberger has put the case for professionalism forcefully:

[123]Moorhead, Vaughan and Godinho (n 27) 7, 68.
[124]Loughrey (n 2) 70.
[125]Moorhead, Vaughan and Godinho (n 27) 105.
[126]Under the Basle III regime, enacted in the UK pursuant to The Capital Requirements Regulations 2013.
[127]'Governance Standards Have Become FCA's Focus' (*Financial Times*, Letters, 13 August 2018).
[128]Ben W Heineman, *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension* (Ankerwycke 2016) 152.
[129]Moorhead, Vaughan and Godinho (n 27) 5.
[130]Richard Moorhead, 'FCA Senior Manager's Regime: A One Word Response – Barclays?' (*Lawyer Watch*, 29 January 2019) <https://lawyerwatch.blog/2019/01/29/fca-senior-managers-regime-a-one-word-response-barclays/> accessed 6 February 2019.
[131]Loughrey (n 2) 48.
[132]For examples, see Donald Nicolson and Julian S Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press 1999) 53; Ibid 56.

> the legal profession is not merely another form of business, solely aimed at maximising profit … lawyers owe specific duties to the court and to society, duties … which may require lawyers to act to their own detriment, and to that of their clients.[133]

Lawyers' status as professionals is seen as cemented by a 'bargain' with the state.[134] On this view, the privileges they enjoy should be applied for the public good, rather than merely lawyers' own interests, or those of their powerful corporate clients.[135] Although in England and Wales the privileges enjoyed by the solicitors' branch of the profession have eroded over time they still feature a degree of self-regulation and retain (unlike other professions doing comparable work) legal professional privilege.[136] As we set out above, the submissions made by the Law Society and the GC100 in the FCA's consultation seek to protect this latter privilege in particular.[137]

A central concern in recent years has been the evasion of responsibility by senior managers in financial services firms. They are perceived to have accepted the perks of office, including high levels of remuneration, whilst being evasive about being held to account. There was, and remains, a sense of public anger that senior executives of banks have not been held to account for the events leading up to the global financial crisis and the austerity measures that followed.[138] The danger is that if financial sector regulators are perceived not to act against those that provided counsel it might aggravate this public anger when the next financial scandal is revealed. Such a significant unresolved social wound threatens social cohesion and may contribute to a prolonged period of political and media vigilantism against the financial sector.[139]

Professional codes of conduct applicable to in-house lawyers in the financial sector emphasise the ethical aspects of their role. As the over-whelming majority of in-house lawyers working in organisations overseen by the FCA are solicitors, we focus here on the Solicitors Regulatory Authority's (SRA) Code of Conduct and Principles.[140] Under the Principles, as well as acting in the best interests of each client, each solicitor must also act in a way that upholds the public's trust and confidence in the solicitors profession, and with independence, honesty and integrity.[141] Integrity denotes a higher moral standard than honesty, requiring a 'moral soundness, rectitude and steady adherence to an ethical code'.[142] Where the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a

[133]Lord Neuberger of Abbotsbury, 'Lord Upjohn Lecture 2012: Reforming Legal Education' (2013) 47 The Law Teacher 4. See also Moorhead (n 83) 450–1; Eliot Freidson, *Professionalism, The Third Logic: On the Practice of Knowledge* (University of Chicago Press 2001) 217.

[134]Boon (n 2) 4; Loughrey (n 2) 59. Richard Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (First edition, Oxford University Press 2015) 21.

[135]Magali Sarfatti. Larson, *The Rise of Professionalism: A Sociological Analysis / Magali Sarfatti Larson* (University of California P, University of California Press 1977); Freidson (n 133); Moorhead, Vaughan and Godinho (n 27) 5–6.

[136]Loughrey (n 2) 58.

[137]'Risk of Conflict of Interest If Legal Function Is Included in SMR – The Law Society' (n 53); Mary Mullally, 'GC100 Repsonse to FCA Discussion Paper DP16/4: Overall Responsibilty and the Legal Function' (11 January 2017); Mullally (n 54).

[138]See for example, 'Diamond Misjudged Public Anger over Bankers' (2 May 2013) <https://www.ft.com/content/2f869726-b33b-11e2-b5a5-00144feabdc0> accessed 6 July 2020.

[139]Alan Brener, 'Developing the Senior Managers Regime' in C Russo, R Lastra, and W Blair (eds), *Research Handbook on Law and Ethics in Banking and Finance* (Edward Elgar Publishing 2019) 280.

[140]Boon (n 2) 28.

[141]<https://www.sra.org.uk/solicitors/standards-regulations/principles/> accessed 3 June 2020.

[142]Lord Justice Rupert Jackson in SRA v Wingate Evans [2018] EWCA Civ 366 citing and approving previous authority, Hoodless v Financial Services Authority [2003] UKFSM FSM007.

trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests.[143] To be considered competent, a solicitor must be able to apply the ethical concepts which govern their role and behaviour as a lawyer, recognise ethical issues when they arise and exercise effective judgement in addressing them, and identify the relevant SRA principles and rules of professional conduct and follow them.[144] Solicitors must also be able to resist pressure to condone, ignore or commit unethical behaviour.[145]

The problem is that corporate lawyers tend to have a poor understanding of these professional duties, and may even be prone to believe (wrongly) that public interest duties do not apply to them, given they act for corporate clients and not individuals.[146] Further, professional codes cannot cover all the possible elements of an ethical dilemma since they are mostly vague and broad in scope, and sometimes even conflict with each other (eg the duty to the client versus the rule of law and the administration of justice).[147] As Vaughan and Oakley have noted, the SRA's Principles 'are so abstract that they cease having a deontological character – as duties – and start to take on the character of "virtues" … this may mean that, unless expressed as rules to be obeyed, they are unlikely to have any direct purchase.'[148] Loughrey argues that 'the regulatory framework is both unnecessary and insufficient … it fails to hold transactional lawyers to account for significant regulatory risks that they present … '.[149] For this reason, additional measures which support lawyers in thinking and acting ethically – so that they consider the question 'is this conduct ethical?' and not merely, 'is this conduct within the professional rules?'[150] serve to supplement these professional regulatory frameworks.

8. The positive benefits that would have flowed from the inclusion of the head of legal within the SMR

Having criticised the technocratic standard conception of the lawyer's role inherent in the FCA approach, we now switch gears to show how the inclusion of heads of legal in the SMR would have bestowed positive benefits; specifically, in encouraging and supporting ethical decision-making by in-house lawyers and by contributing to the good governance of their organisations.[151] We start by considering empirical work which has shone a light on the ethical pressures facing in-house lawyers, and challenges to their independence, status, and authority.

[143] <https://www.sra.org.uk/solicitors/standards-regulations/principles/> accessed 3 June 2020. Although the SRA's 2011 Handbook (as updated) applied when the FCA conducted its SMR consultation, we have cited the language used in the SRA's standards and regulations introduced in November 2019, which is broadly similar.
[144] 'Statement of Solicitor Competence' (24 March 2015) <https://www.sra.org.uk/solicitors/resources/cpd/competenstandrce-statement/> accessed 26 June 2020.
[145] Ibid.
[146] David B Wilkins, 'Some Realism about Legal Realism for Lawyers: Assessing the Role of Context in Legal Ethics' in Leslie C Levin and Lynn M Mather (eds), *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press 2012) 31–32. Moorhead and Hinchley (n 94); Vaughan and Oakley (n 115).
[147] Loughrey (n 97) 765; Moorhead, Vaughan and Godinho (n 27).
[148] Vaughan and Oakley (n 115) 56.
[149] Loughrey (n 97) 743.
[150] Wald and Pearce (n 113) 149.
[151] Loughrey (n 2) 70.

In-house lawyers in large business organisations often face severe challenges to their professional independence given the embedded nature of their role within their client.[152] They are increasingly expected to be 'commercial' and to 'add value', whilst battling a perception that they are 'deal blockers'.[153] In-house lawyers can confuse the commercial objectives of their employer with their own professional obligations.[154] As Moorhead and others noted: 'A collapsing of the client-professional divide negates claims to professionalism if the professional simply emulates what the client wants without regard to the public interest the profession protects.'[155] The involvement of in-house lawyers in corporate and financial scandals is evidence of the presence of such conflicts, and empirical research has demonstrated how ethical pressure is often experienced by them.[156]

Moorhead and others have also shown how some in-house lawyers fail to recognise the potential for conflict when it occurs; and those that do face a choice whether or not to deal with it in an ethical manner.[157] In-house lawyers may switch between these positions depending on the context; for example, whether they said 'no' when faced with pressure to be seen as 'commercial' in the face of potential misconduct depended on their ability to maintain their status in the 'tournament of influence' within the organisation.[158] In-house lawyers adopted a 'cultivated posture of helpfulness' encouraging subservience; unpopular advice was given but was also often 'camouflaged, restrained or diluted'.[159]

The FCA cited feedback it had received that the inclusion of the head of legal in SMR would undermine the independence of the head of legal and have a 'chilling effect' on the advice given by in-house lawyers in regulated organisations.[160] This was on the basis that personal liability might make in-house lawyers more considered in their advice, and mean they were less likely to ask searching questions and take proper account of public interest issues.[161] Further, feedback the FCA said it had received suggested inclusion may lead to the advice of the head of legal not being sought at all, with greater reliance on outside counsel.[162]

Evidence from existing empirical research in fact supports the reverse of this position.[163] The enhanced accountability of lawyers, whether in the form of reporting obligations, personal liability or otherwise is just as likely to lead to more proactivity and diligence by in-house lawyers.[164] Research in the U.S. with respect to lawyers' reporting requirements to the Securities and Exchange Commission under the Sarbanes-Oxley Act shows a *reduction* in markers of legal risk, such as claims and investigations from

[152]Moorhead, Vaughan and Godinho (n 27) 7, 63.
[153]Ibid 68.
[154]Nelson and Nielsen (n 9); Loughrey (n 2) 54.
[155]Moorhead, Vaughan and Godinho (n 27) 8.
[156]Nelson and Nielsen (n 9) 483; Moorhead, Vaughan and Godinho (n 27) 67.
[157]Moorhead, Vaughan and Godinho (n 27) 65.
[158]Ibid 67.
[159]Ibid 69.
[160]'CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP16/4 – Overall Responsibility and the Legal Function' (n 3) 3.21.
[161]Ibid 3.20.
[162]Ibid 3.20–3.21.
[163]See the debate between Hamermesh and Kim on this issue: Lawrence A Hamermesh, 'Who Let You into the House?' (2012) 2 *Wisconsin Law Review* 359; Sung Hui Kim, 'Inside Lawyers: Friends or Gatekeepers?' (2016) 84 *Fordham Law Review* 31.
[164]Moorhead, Vaughan and Godinho (n 27) 222–3.

financial regulators, where in-house lawyers have obligations to regulators.[165] Imposing reporting obligations on in-house lawyers may serve to increase the communication with in-house lawyers and make managers more likely to seek advice *ex ante* in order to avoid *ex post* findings of wrong doing.[166] Further, there is little evidence that the obligation to report suspicious transactions under anti-money laundering legislation in the UK has had a negative impact on the flow of information between manager and lawyer.[167]

Reliance cannot simply be placed on the agency of the individual lawyer to ensure ethical conduct, without the need for any, or diminished, external accountability through regulation or otherwise.[168] As we have noted, a core purpose of the SMR is to foster a culture of accountability within regulated organisations, and we do not see why in-house lawyers should be excepted from this objective, presuming a form of 'lawyer exceptionalism'.[169] An in-house lawyer, who typically only has one client, the organisation, has limited accountability as things stand. Perceived poor service, for example, could result in poor appraisal feedback, barriers to promotion, and ultimately, the loss of employment. But the head of legal will often be hired by, report to and be susceptible to having their employment terminated by, the chief executive officer (CEO) or another executive.[170] This accountability is unlikely to positively encourage ethical behaviour by in-house lawyers; it may have the opposite effect, incentivising them to bow to internal pressure from managers to act 'commercially', which can sometimes be a proxy for acting unethically, to maintain a positive relationship with managers.[171]

Effective external accountability requires that the in-house lawyer is required to explain and justify their conduct to a third party;[172] with the potential to face an enforcement process, resulting in sanctions.[173] The FCA ultimately decided that the head of legal should merely be caught within the lesser certification regime. Although this provides for a degree of accountability, and the FCA has frequently taken enforcement action under this framework, this is not in our view sufficient.[174] There are a number of practical consequences of excluding the head of legal from the SMR and relying simply on the certification regime.[175] First, the head of legal would not need to be pre-approved by the FCA or have regular interactions with the FCA to discuss the performance of their functional responsibilities.[176] Next, the head of legal would not be required to comply with the Senior Manager Code of Conduct, including the duty to notify the FCA of misconduct.[177] Finally, the head of legal would not be subject to the duty to take 'reasonable

[165]Adair Morse, Wei Wang and Serena Wu, 'Executive Lawyers: Gatekeepers or Strategic Officers?' (2016) 59 *The Journal of Law and Economics* 847. Ibid 204–22.
[166]Loughrey (n 2) 241. John C Coffee, 'The Attorney as Gatekeeper: An Agenda for the Sec' (Social Science Research Network 2003) SSRN Scholarly Paper ID 395181 <https://papers.ssrn.com/abstract=395181> accessed 2 August 2018.
[167]Ibid 243.
[168]Loughrey (n 97) 739.
[169]Ibid 734, 739. Loughrey cites Deborah Rhode's chapter in Kieran Tranter and others, *Reaffirming Legal Ethics: Taking Stock and New Ideas* (Routledge 2010). Sung Hui Kim, 'The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper' (2005) 74 *Fordham Law Review* 97.
[170]Moorhead, Vaughan and Godinho (n 27) 73.
[171]Loughrey (n 97) 737.
[172]Ibid 736; Marc T Moore, 'The (Neglected) Value of Board Accountability in Corporate Governance' (2015) 9 *Law and Financial Markets Review* 10, 13.
[173]Ibid 14.
[174]Jordanoska (n 57) 302.
[175]'Overall Responsibility and the Legal Function: DP16/4' (n 3) 3.18. Clark and others (n 59).
[176]'COCON 2.2 Senior Manager Conduct Rules – FCA Handbook' 2.1, 2.2, 4.1, 4.2 <https://www.handbook.fca.org.uk/handbook/COCON/2/2.html?date=2016-03-21> accessed 7 February 2019.

steps' to prevent the occurrence of regulatory breaches. Each of these are core components of the SMR in creating effective accountability.

As we have already noted, the external accountability of in-house lawyers to professional regulators, which enforce professional ethics and conduct rules, is currently insufficient as a means of encouraging in-house lawyers to participate in and therefore enhance the good governance and ethical leadership of regulated organisations.[178] External accountability is critical because it acts as a constraint on unethical conduct, countering cognitive bias that may otherwise obstruct informed and reflective decision-making; meaning they are more likely to spot potential ethical problems rather than simply interpreting a set of circumstances in a manner that benefits them.[179] And external accountability would help to bestow much needed legitimacy upon in-house lawyers. Marc Moore, when proposing greater accountability for board directors to shareholders in the corporate governance context, has argued that accountability engenders 'a general and manifest quality of perceived propriety or "rightness".'[180]

Instead, the FCA's decision to not include in-house lawyers in the SMR further insulates in-house lawyers in the financial sector from accountability. The risk is that they continue to surrender their professional autonomy, having ceded their discretionary powers to managers/executives, undermining the legitimacy of their decision-making and the range of other discretionary activities in-house lawyers are routinely involved in within the organisation.[181] This lack of accountability therefore damages the authority of in-house lawyers within the organisation.[182] Moorhead and others found that the status of in-house lawyers is not always as clearly established as it should be to support them in properly performing their professional and legal duties.[183] The exclusion of the head of legal from the SMR risks further undermining that status and authority. Inclusion, on the other hand, would have sent a strong signal, both internally and externally, that the head of legal leads an activity which is critical to the organisation.

9. Conclusion

We have shown how the FCA's decision to exclude the head of legal from the SMR was based on a view of lawyers which is flawed. It is defective both from a theoretical perspective, since it portrays in-house lawyers as neutral legal technicians, who should be unaccountable for their conduct, and from a practical standpoint, since it fails to comprehend the significant levels of responsibility and influence in-house lawyers actually carry in regulated organisations in the financial sector. In squandering this opportunity to reinforce the ethical infrastructure of regulated organisations in the financial sector through the strengthening of the independence, authority and influence of in-house

[177]'COCON 2.2 Senior Manager Conduct Rules – FCA Handbook' (n 176).
[178]See Section 7.
[179]Loughrey (n 97) 746, 756.
[180]Moore (n 172) 13.
[181]Here we are applying an argument Marc Moore has advocated in respect of director accountability to shareholders of corporate entities. Ibid 11.
[182]Moorhead, Vaughan and Godinho (n 27) 70.
[183]Ibid.

lawyers, the FCA has both undermined the purposes of the SMR and fallen out of step with the positive broader trends towards both ethical business and ethical lawyering.

Disclosure statement

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