SME Alliance Ltd – Written evidence (SCG0032)

The witness thanks the House of Lords Financial Services Regulation Committee for the opportunity to contribute to this Call for Evidence.

Key points:

1. The constraint in this Call for Evidence on the crucial topic of the survival and stability of the UK economy post Brexit, and the roles of Treasury, Bank of England (including PRA), various public and public purse protection bodies and arrangements, to five sides of A4, font 12, is not workable.

2. The principle of competition applies to certain types of market, not others. Financial services are commodity supplies, inherently thin margins, with little or no room for one operator to distinguish themselves from another, not least because they are all part of one essentially global market and counterparties. Unless each operator conforms to what the rest are doing, for better or worse, they will not survive. Ephemeral operators proliferate. Accountability goes with them.

3. The nation's primary objective is, or ought to be, national security. The relevant principles for economic prosperity thereafter include (i) economic stability (avoiding a run on the banks; known path where bank or insurer is failing; predictability, including banks paying depositors on demand and not severally "de-banking" their customer bases, seeminglya fashion for at least two decades, reflecting the leverage those ultimately benefitting believe they have over the authorities, courts, Parliament, facilitators) and (ii) confidence in markets. This includes importantly, market notifications including on a timely basis (such as reporting on third party financial dependence; circumstances of fundamental uncertainty; knowledge of fatalities which have come home to roost but which have not been booked in cost of sales or notified).

4. The seminal work of the House of Lords Economic Affairs Committee, report 15 March 2011, "Auditors: Market concentration and their role" is essential reading to inform this Committee and to provide a base line from which to start. The conclusions have not been challenged: that those reporting as statutory auditors were in a position to predict the "financial crisis" but chose not to. The exclusion of auditors from this Call for Evidence as key operators responsible is unhelpful. The Office of Fair Trading already made a referral after investigation to the Competition Commission; both were shut down, together with the lead prosecutors, the Office of Fair Trading. The gap remains. The Financial Reporting Council, Department of Business, made Calls for Evidence on the subject of Corporate Governance, Audit Committees, Chairmen of these, Ethics, but has omitted to publish some replies, for no apparent good reason (with a compendium of work of Parliament, ICAEW, reports commissioned etc). HoL Committee is left to make FoI requests to secure these.

5. Operators in the market have prioritized protection of their reputation over market correction obligations or co-operation in curtailment of wrongdoing ('turning over a new leaf"). They have been prepared to use the highest courts in the land to whitewash the consequences of their nefarious activities. In the example below on 16 February 2022, judiciary in the Supreme Court, out of the blue, announced in a judgment against a financial publisher, that on 17 December 2020, a panel of the Supreme Court, compromising unidentified members, granted permission.

JUDGMENT GIVEN ON 16 February 2022, Heard on 30 November and 1 December 2021: Bloomberg LP (Appellant) v ZXC (Respondent) Hilary Term [2022] UKSC 5, On appeal from: [2020] EWCA Civ 611 Before Lord Reed, President Lord Lloyd-Jones Lord Sales Lord Hamblen Lord Stephens
1. Introduction

1. The central issue on this appeal is whether, in general, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.

2. The appellant, Bloomberg LP ("Bloomberg"), is an international financial software, data and media organisation headquartered in New York. Bloomberg News is well-known for its financial journalism and reporting.

3. The respondent, ZXC ("the claimant"), is a citizen of the United States but has had indefinite leave to remain in the UK since 2014. He worked for a publicly listed company which operated overseas in several foreign countries ("X Ltd") and became the chief executive of one of its regional divisions but was not a director.

4. The claimant brought a claim for misuse of private information arising out of an article ("the Article") published by Bloomberg in 2016 relating to the activities of X Ltd in a particular country for which the claimant's division was responsible (the "foreign state"). These activities had been the subject of a criminal investigation by a UK law enforcement body (the "UKLEB") since 2013. The information in the Article was almost exclusively drawn from a confidential Letter of Request sent by the UKLEB to the foreign state.

5. The claimant claims that he had a reasonable expectation of privacy in information published in the Article and in particular the details of the UKLEB investigation into the claimant, its assessment of the evidence, the fact that it believed that the claimant had committed specified criminal offences and its explanation of how the evidence it sought would assist its investigation into that suspected offending.

6. The claimant claimed that Bloomberg misused his private information by publishing the Article and sought damages and injunctive relief. Following a four-day trial before Nicklin J, the claims were upheld and damages of £25,000 awarded, as set out in his open judgment of 17 April 2019 - [2019] EWHC 970 (QB); [2019] EMLR 20. Bloomberg's appeal was

dismissed by the Court of Appeal (Underhill LJ, Vice President of the Court of Appeal, Civil Division, and Bean and Simon LJJ) in its open judgment of 15 May 2020 - [2020] EWCA Civ 611; [2021] QB 28. Permission to appeal was granted by a panel of the Supreme Court on 17 December 2020.

In the United Kingdom courts, this means that before 17 December 2020, there was a public notice of the event; that the public including media could attend; there was access to the key filings; there was an explanation as to why this was a matter of public interest or novel law (it was neither); there was a reasoned permission judgment, that was delivered and publicly accessible; judiciary were identified (who did not go on to hear the appeal); the registrar's office did not block the public from access to the file generally, re public documents. Without this, there was a hearing without jurisdiction, ie there was some undeclared agenda in play concerning financial public reporting.

In other words, protection of reputation and turning to reputation management suppliers, including those in media or the courts can be first port of call, rather than investigating, escalating, repairing and curtailing where there is a systematic problem. "Doubling down" and forging ahead with use of reputation management devices and intermediaries, is the antithesis of the objectives of the Authorities under Banking Act 2009 and FSMA 2000 (Treasury; Bank of England; FSA).

A second example was heard in the Admiralty and Commercial Court on 22 September 2020.

[2020] EWHC 2710 (Comm) (CL-2020-000219) COMMERCIAL COURT (QBD) judgment delivered on 15 October 2020 RICHARD SALTER QC (Deputy) TKC LONDON LIMITED v ALLIANZ INSURANCE PLC

This was a test case for SMEs with all risks business insurance, as opposed to additional pandemic insurance where there was business interruption. The insurers had insisted on going to court even before paying out where there was pandemic explicit insurance. The test case involved a small restaurant. It was argued that it had to close because of government rules not because it could not safely open, and, even if it did, and the government did not stop it, the customers would not come.

This approach is very undermining of the insurance market: who would have thought that, with all risks insurance in regard business interruption, where there is a pandemic, the business is interrupted, the insurer is not there? Who of Treasury; Bank of England; FSA as was; was standing up for SMEs, the backbone of the economy and customer and supplier base of those regulated?

Third example of reputation management where something else is going on, is in the tax tribunals ending up in the court of appeal, with permission to appeal not granted until after the final judgment was delivered (or, more precisely, at the same time). The case involved the oil industry and licences granted by the Crown to UK operators, the benefit of which, through KPMG (receiver) and the Alberta courts, ended up with Royal Bank of Canada. There was an explanation of sorts that there was a point of principle on the applicable rate of tax under double tax agreements which affected many in the industry, therefore "it" needed to be heard.
https://www.judiciary.uk/live-hearings/royal-bank-of-canada-appellant-v-hm-revenue-customs-respondent/
Royal Bank of Canada (appellant) v HM Revenue & Customs (respondent)
Wednesday 17 – Thursday 18 May 2023

It is important that by considering cases as the three above, the House of Lords Committee addresses the question of why those notionally

regulated are choosing to be heard in courts without jurisdiction, and are content to live with the want of jurisdiction, because they have already bagged the benefit they were after. To the extent these are defending fatalities that have already come home to roost, but not been booked, one can only conclude that their operating model is not stable.

Questions

The Committee is seeking evidence on the following questions:

1. What opportunities or changes should be prioritised in order for the regulators to meet their secondary growth and competitiveness objectives effectively?

1.1. The relevant obligations and who / (which body) exactly in the executive is responsible to Parliament and the public for the recording, maintenance and enforcement of objectives, is enshrined in the statute which has been in place for at least a quarter of a century without repeal. The public includes public consultation and impact on the public purse. Public does not distinguish "consumer" from any other legal or natural person save for in explicit circumstances such as credit agreements.

1.2. The FSA (as it was) was recorded in law as the regulator of the financial services industry and had five objectives under the Financial Services and Markets Act 2000 which were listed as:

1. maintaining *market confidence*;
2. promoting *public understanding* of the financial system;
3. securing the appropriate degree of *protection* for consumers;
4. *fighting financial crime*; and
5. contributing to the *protection and enhancement of the stability of the UK financial system*.

1.3. The Banking Act 2009 as originally enacted, royal assent 12 February 2009, explained the obligations of the FSA, together with the Bank of England and Treasury as well as various others, including providing a code and compensation. Revisiting that Act and the accompanying Explanatory Notes is mandatory pre reading for this current Call for Evidence. A submission in WORD means this cannot be attached. Committee clerks should make this Explanatory Note available to the Committee.

An important extract is:

Objectives and code

4 Special resolution objectives

(1) This section sets out the special resolution objectives.

(2) The relevant authorities shall have regard to the special resolution objectives in
using, or considering the use of— (a) the stabilisation powers, (b) the bank insolvency procedure, or (c) the bank administration procedure.

(3) For the purpose of this section the relevant authorities are—

(a) the Treasury, (b) the FSA, and (c) the Bank of England.

(4) Objective 1 is *to protect and enhance the stability of the financial systems of the United Kingdom*.

(5) Objective 2 is *to protect and enhance public confidence in the stability of the banking systems of the United Kingdom*.

(6) Objective 3 is *to protect depositors*.

(7) Objective 4 is *to protect public funds*.

(8) Objective 5 is *to avoid interfering with property rights in contravention of a Convention right (within the meaning of the Human Rights Act 1998)*.

(9) In subsection (4), the reference to the stability of the financial systems of the United Kingdom includes, in particular, a reference to the continuity of banking services.

(10) The order in which the objectives are listed in this section is not significant; they are to be balanced as appropriate in each case.

5 Code of practice

(1) The Treasury shall issue a code of practice about the use of—

(a) the stabilisation powers,

(b) the bank insolvency procedure, and

(c) the bank administration procedure.

(2) The code may, in particular, provide guidance on—

Banking Act 2009 (c. 1)

Part 1 — Special Resolution Regime

4 (a) how the special resolution objectives are to be understood and achieved, (b) the choice between different options, (c) the information to be provided in the course of a consultation under this Part, (d) the giving of advice by one relevant authority to another about whether, when and how the stabilisation powers are to be used, (e) how to determine whether Condition 2 in section 7 is met, (f) how to determine whether the test for the use of stabilisation powers in section 8 is satisfied, (g) sections 63 and 66, and (h) compensation.

(3) Sections 12 and 13 require the inclusion in the code of certain matters about bridge banks and temporary public ownership.

(4) The relevant authorities shall have regard to the code.

(5) For the purpose of this section the relevant authorities are—

(a) the Treasury, (b) the FSA, and (c) the Bank of England.

1.4. This Call for Evidence says FSMA 2023 contains the following objective for the FCA and PRA:

“The competitiveness and growth objective is: facilitating, subject to aligning with relevant international standards— (a) the international competitiveness of the economy of the United Kingdom (including in particular the financial services sector), and (b) its growth in the medium to long term.”

It is wholly obscure how this statement fits in with the foregoing, which are about public protection; investor and market confidence; intervention to secure stability; law enforcement; consultation.

2. To what extent are the regulators focused on the objective to promote international competitiveness and growth? Are there areas where the ability of the regulators to fulfil their secondary objectives might be constrained by having to fulfil their primary objectives?
2.1. Not at all.

2.2. Secondary objectives are not compatible with primary obligations (see key points).

3. What are some of the barriers in the current regulatory framework (including the role and responsibilities of other regulators and bodies such as the Payment Systems Regulator, The Pensions Regulator and the Financial Ombudsman Service) that could hinder efforts to drive economic growth and international competitiveness in (a) the UK economy and (b) the financial services sector?

3.1. There is no discernible "regulatory framework". The FOS has arrears from at least 2008. It divulges confidential and personal information from terrified targets of the financial services industry, passes it secretly to the perpetrators, commissions contrary evidence, whether true or fictitious, or makes up its own, then closes the file and deletes it. Death tolls mount. It would be better and cheaper for this organisation, that builds false hope in the public, to be shut down without replacement.

4. Do the regulators have the right capability and capacity to fulfil their regulatory objectives on growth and competitiveness? To what extent might the culture of the FCA and PRA influence their ability to fulfil their growth and competitiveness objectives?

4.1. No. Since the FSA was shut, the culture as it was under Martin Wheatley, has been decimated. Staff attrition, including one year pay for those accepting voluntary exit, has purged the FCA of experience. The shared whistleblowing function with the PRA and BofE, is not staffed by experienced whistleblowers, includes those without at least fifteen to twenty years experience of law enforcement in the UK. Home working, flexi hours, and other benefits, means that there is no possibility of 24x7 response and paths including police protection and emergency court applications. There is no whistleblower protection. Staff say their job is to "summarise" what the whistleblower has reported and then to sign post elsewhere. There are no recording of evidence facilities or transcription facilities. There are no interview facilities. The recommendations of the Parliamentary Commission on Banking Standards 2012-3, and actions started at the FSA's offices in summer 2013, have been stymied since.

5. How effectively have the FCA and PRA consulted or engaged with industry in relation to the new secondary growth and competitiveness objective?

5.1. Not at all publicly. The Equalities Act 2010 requirement is for public calls for evidence, not separating some operators from others. There have been detailed calls on specific issues such as UK branch operations; pensions; etc. These have all suffered from building on some recent statements by some politicians, rather than tracing through the relevant legislation from source. Most got scrambled beyond repair around 2003-4. This became apparent once BREXIT took effect and the EU umbrella disappeared. There was not much one could hang one's hat on and a dearth of public library to find out.

6. In delivering their secondary objective on growth and competitiveness, what opportunities are there for the regulators to help to

promote and support innovation in the financial services sector? How effective has the FCA's regulatory sandbox been for supporting greater innovation in the financial services industry?

6.1. Financial services do not require innovation. They need to know what they are doing and find out who is benefitting at whose expense. Then they can prepare some accounts and look for an independent auditor. The effect of the 2008 permission to revalue closing stock led operators to "borrow" from their customers and others, without permission and no apparatus to "return" that which they borrowed. (Highland Financial, Commercial Court, Court of Appeal, 2011 onwards). The reparation has not been booked or worked its way through the system.

7. How should the regulators ensure that any measures introduced to meet the secondary growth and competitiveness objectives work for businesses of all sizes across the sector, including startups, scaleups, and incumbents?

7.1. There is no mechanism. These are commercial decisions.

8. Are there any additional metrics over and above those already agreed by the regulators that would better enable stakeholders to track progress and support scrutiny of their work against the secondary growth and competitiveness objective? How should a measure of growth be included in these metrics?

8.1. Growth is not defined.

9. Does the requirement within the secondary growth and competitiveness objectives to align with international standards create any constraints to fulfilling those objectives?

9.1. There are no international standards governing what the UK economic policy should be or how it might be achieved.

10. Are the existing accountability measures around the secondary growth and competitiveness objective adequate?

10.1. There is no machinery for accountability outside the Public Accounts Committee. The path for criminal convictions is not well trodden or defined. There is no witness or victim protection (EU directive October 2012, there should be).

11. Are there examples of regulatory policies in other jurisdictions that should be considered by UK regulators to help facilitate the new secondary objective? What might the FCA and PRA be able to learn and apply from comparable supervisors in other markets in terms of applying secondary objectives on growth and competitiveness?

11.1. No.

11.2. Post BREXIT, relationships are strained. Investing in ONS, which is reported as losing experienced staff, woyld be a splendid and productive thing to do. Then at least HoL would have some figures to work with and serious experienced professionals to help to inform the Committee.

29 November 2024