



King's Research Portal

Document Version
Peer reviewed version

[Link to publication record in King's Research Portal](#)

Citation for published version (APA):

Keller, A. (2022). The Public Role of Banks: A New Narrative Born? *Journal of International Banking Law Review*.

Citing this paper

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

General rights

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

The Public Role of Banks – A New Narrative Born?

"Finance is a means to an end, not an end in itself... It is supposed to serve the interests of the rest of society, not the other way around." (Joseph E. Stiglitz)¹

There is a prevailing belief that finance is all about individualistic self-interest and Darwinistic pursuit of money, leaning heavily on the ‘Wolf of Wall Street’ narrative of financial markets.² It comes as no surprise that following the 2007-2009 global financial crisis, the UK’s Parliamentary Commission on Banking Standards (PCBS) observed that there is ‘a profound loss of trust born of profound lapses in banking standards.’³ But this underlying understanding of financial markets may be changing. In recent years, there is a growing recognition that ‘firms are part of...society, as such they have public interest duties’⁴ and must retain their social license to be allowed to operate and grow.⁵ The ‘social license’ narrative is reflected in the fast-pacing global and domestic regulatory initiatives of sustainable finance⁶ and culture in finance.⁷ It is also evident in the critical role that banks have played during the Covid-19 crisis as facilitators of credit and other public guarantee loan programs to the economy.⁸ Banks were urged by politicians to ‘rise to the challenge to

¹ JE Stiglitz, ‘Taming Finance in an Age of Austerity’ *Common Dream* (12 July 2010).

² D Rouch, *The Social Licence for Financial Markets* (Palgrave, 2019), 9; M Friedman, ‘The Social Responsibility of Business is to Increase its Profits’ in *WC Zimmerli, M Holzinger and K Richter* (eds) *Corporate Ethics and Corporate Governance* (Springer, 2007), 173-178.

³ PCBS, *Changing Banking for Good*, Fifth Report (June 2013), Summary.

⁴ A Bailey, ‘FCA Transforming Culture in Financial Services’ (19 March 2018) available at <https://www.fca.org.uk/news/speeches/transforming-culture-financial-services>

⁵ M Carney, ‘Building Real Markets for the Good of the People’ (10 June 2015) available at <https://www.bankofengland.co.uk/speech/2015/building-real-markets-for-the-good-of-the-people>

⁶ For instance, A Proposal of the European Commission for a Corporate Sustainability Reporting Directive COM (2021) 189 final; UK Finance is actively involved in promoting sustainable finance. See Grantham Research Institute and the University of Leeds ‘Financing Climate Action with a Positive Social Impact: How Banking Can Support a Just Transition in the UK’ (July 2020) available at <https://www.lse.ac.uk/granthaminstitute/publication/>.

⁷ A Keller and A Kokkinis, ‘The Senior Managers and Certification Regime in Financial Firms: An Organisational Culture Analysis’ (copies available with the authors); Rouch (2019) (n 2), 20-22; A Darling (27 March 2009, FSA): “...just as society needs the banks, banks need society too”. The regulatory focus on sustainability and culture is embedded in the Corporate Social Responsibility (CSR) concept. See H Liang and L Renneboog, ‘Corporate Social Responsibility and Sustainable Finance: A Review of the Literature’ (2020) European Corporate Governance Institute Finance WP 701; J Nelson, ‘The Public Role of Private Enterprise Risks, Opportunities and New Models of Engagement’ (2004) Corporate Social Responsibility WP 1. On CSR, see AB Carroll, ‘Carroll’s Pyramid of CSR: Taking Another Look’ (2016) 1(1) *International Journal of Corporate Social Responsibility* 1.

⁸ A letter from the Chancellor, the Gov by the Governor of the Bank of England, and the FCA’s CEO to the CEOs of the UK Banks on COVID-19 and Bank Lending, 25 March 2020 available at <https://www.bankofengland.co.uk/-/media/boe/files/letter/2020/covid-19-and-bank-lending.pdf>. See also J Dugan (Citigroup Chair), ‘A Chance for Banks to Change the Narrative’ (2020) available at <https://bankingwithinterest.libsyn.com/a-chance-for-banks-to-change-the-narrative-citigroup-chair-john-dugan>

support the economy and protect jobs’ as equal and true allies.⁹ In public discourse, banks are viewed as ‘being part of the solution rather than the problem’.¹⁰ Of course, the narrative supporting the public role of banks is not disparate. It is part of a broader movement over the past two decades of extending the regulatory function of the state into the private sector and decentralising policing from state-controlled agents to community- and market-based third parties.¹¹ Moreover, as we shall see in Part III, banks have embraced their broader role in society, inter alia, by adopting voluntary industry initiatives aimed at strengthening purposeful culture¹² and promoting sustainability in banking.¹³ The flourishing of these narratives is capable of not only shifting the public opinion about banks but also shaping the law that governs them.¹⁴

This Article takes these observations as a starting point and examines to what extent the emerging view of banks as holding a social license has resulted in legislators and the courts increasingly evoking narratives that embody the public role of banks, termed here, the gatekeeper narrative. It does so by analysing three case studies: the role of banks in money laundering detection and prevention as imposed in legislation, the development of the private law Quincecare duty in English Courts and the broader interpretation of banks’ duties in the Financial Services Ombudsman’s decisions, and finally, the self-regulatory initiatives of the banking sector to promote, for instance, Environmental, Social and Governance objectives. The Article suggests that the gatekeeper narrative is used by legislators, regulators and the courts to define, expand and where necessary, confine banks’ duties.

⁹ Letter to Banks (25 March 2020) (n 8).

See also Grantham Research Institute Report (n 6), 5 stating that the purpose of banks in the public discourse is to serve the real economy

¹⁰ J Giese and A Haldane, ‘COVID-19 and the Financial System: a Tale of Two Crises’ (2020) 36(1) *Oxford Review of Economic Policy* s200.

¹¹ ME Buerger and LG Mazerolle, ‘Third-Party Policing: A Theoretical Analysis of an Emerging Trend’ (1998) 15(2) *Justice Quarterly* 301; J Black, ‘Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation’ (2003) *Public Law* 63.

See also SR Anleu, G Mazerolle, L Presser, ‘Third-Party Policing and Insurance: The Case of Market-Based Crime Prevention’ (2000) 22(1) *Law and Policy University of Denver* 67.

¹² For instance, the Financial Services Culture Board (formally the Banking Standards Board) was established in 2015 and relaunched in 2021 see <https://financialservicescultureboard.org.uk/>

¹³ According to Mobyquity, ‘A Benchmark for Sustainable Banking’ (May 2021) available at <https://www.mobiquity.com/insights/benchmark-for-sustainable-banking-research-report>, in the UK, 78% of surveyed banks recognise sustainability as an important part of the bank’s business strategy. Banks have also embraced this narrative in public discourse, with the Deutsche Bank’s CEO recently calling other banks to “Go Green or Lose License to Operate” (*FT*, 20 May 2021)

¹⁴ MJ Roe and R Shipra, ‘The Power of Narrative in Corporate Lawmaking’ (2020) ECGI Working Paper No 554, 32. As such, the authors observe that “changes in narratives change the law and then the real world”. See also J Bruner, ‘The Narrative Construction of Reality’ (1991) 18(2) *Critical Inquiry* 1.

The analysis is conducted through the lens of the gatekeeper doctrine and third-party policing scholarship in the context of two distinct tensions in the banking sphere. The first is the decrease in public trust in banks against the appreciation of the benefits of the bank-customer long-term relationship and its usefulness during a crisis¹⁵ and the second is the conflict between market pressures and the obligations of banks to their customers (in particular, obeying the customer's mandate and the duty of confidentiality) versus legal demands to act as guardians in the public interest.

The remainder of this Article proceeds as follows. Part I outlines the three key narratives that have been developed in financial law: the arm's-length, fiduciary and consumerist narratives and suggests that there may be a new narrative emerging in financial law, one that can be termed as 'the gatekeeper narrative'. Part II analyses the concept of a gatekeeper and critically assesses the rationale behind assigning a gatekeeper role to banks. It then presents the shortcomings of enlisting banks to promote public interest objectives. The prolific literature on the design of gatekeeper liability is drawn upon to understand these shortcomings and suggest ways to address them. Part III offers evidence to the emergence of the gatekeeper narrative in financial law by exploring three different sources where the narrative is articulated – judgment-led, legislative and industry-driven. Part IV concludes.

PART I: NARRATIVES IN FINANCIAL LAW

Uncovering the narratives in law is vital “to understanding how law operates, under what premises, and with what contingencies.”¹⁶ Narratives “...organize certain kinds of problems into a form that renders culturally meaningful both the problems and their possible resolutions.”¹⁷ For instance, the rhetoric of judicial opinions can reveal the reasons behind the law based on policy and social consequences¹⁸ and according to a more extreme view, justify

¹⁵ See, for instance, YouGov-Cambridge Report, *Public Trust in Banking* available at https://cdn.yougov.com/cumulus_uploads/document/y1f7gpof19/Public_Trust_in_Banking_Final.pdf But see PWC Survey, Pulse Small Business Survey, April 2020 available at <https://www.pwc.com/us/en/industries/banking-capital-markets/library/small-business-banking-survey.html> with 55.2% of surveyed small businesses' trust remaining largely unchanged during the Covid-19 crisis and in 25.4% of these businesses "trust has gone up".

¹⁶ G Olson, 'Narration and Narrative in Legal Discourse' (2014) *The Living Handbook of Narratology* available at <http://www.lhn.uni-hamburg.de/node/113.html> referring to Peter Brooks, 'Narrative in and of the Law' in J Phelan and PJ Rabinowitz, *A Companion to Narrative Theory* (Oxford Blackwell 2005), 415-426. See Brooks, 417: "Narratives [in law] do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results."

¹⁷ JB Baron and J Epstein, 'Is Law Narrative?' (1997) 45 *Buffalo Law Review* 141, 147.

¹⁸ P Gewirtz, 'Narrative and Rhetoric in the Law' in *Peter Brooks Paul Gewirtz Law's Stories: Narrative and Rhetoric in the Law*, 3 and 11.

decisions already made.¹⁹ Moreover, the narratives of policymakers and regulatory authorities can expose the manner in which the law responds to changes and adapts. Narratives, therefore, form the reality (as reflected in law) but also have the potential to alter that reality.²⁰ Distinctively, narratives are a strong driving force in financial law. This is particularly the case in common law systems, which allow for incremental development of the law and more specifically, in reflexive collaborative governance which embraces forms of self-regulation. An analysis of narratives will, accordingly, expose the evolvability of financial law and its striking ability to adapt to new challenges.²¹

In financial law, scholars recognised three strains of narrative that have developed independently but co-exist: the arm's-length, fiduciary and consumerist.²² While the arm's length narrative is not unique to the bank-customer relationship, it is considered to be the dominant narrative in financial services contract law.²³ Parties are perceived to be strangers who act in their own interest and owe no duties to each other except in the terms of their contract.²⁴ This perception is in line with the view that firms must overall "refrain from violating laws, but they usually do not need to take any particular action to benefit the public."²⁵

The arm's length narrative is threaded throughout judiciary opinions in banking case law. After all, the bank-customer relationship is a contractual one, fundamentally between debtor/borrower and creditor.²⁶ Yet, this is not to say that there are no exceptions. For instance, in common law, the doctrine of undue influence was developed in equity to denote a 'not at arm's length' transaction.²⁷

The fiduciary narrative is found at the other end of the spectrum and can only be described, at best, as a rare occurrence in the banking context. Banks 'are not charitable

¹⁹ W Fisher, *Human Communication as Narration Toward a Philosophy of Reason, Value and Action* (University of South Carolina Press 1987), 187.

²⁰ DB Conti, 'Narrative Theory and the Law: A Rhetorician Invitation to the Legal Academy' (2001) 39(2), *Duq. Law Review* 457, 465; Bruner (n 14),⁵ observing that "...It was perhaps a decade ago that psychologists became alive to the possibility of narrative as a form not only of representing but of constituting reality...".

²¹ JB Ruhl, B Cosens, N Sojininen, *Resilience of Legal Systems in Multisystemic Resilience: Adaptation and Transformation in Contexts of Change* (OUP, 2021).

²² The term 'narrative' is used to mean "the deep structures of assumption which inform legal rules, but which are not always fully articulated in them, and which are most fully articulated in the case law." J Benjamin, 'The Narratives of Financial Law' (2010) 30(4) *Oxford Journal of Legal Studies* 787-788.

²³ Cranston, *Principles of Banking Law* (OUP, 2017), 202 and 276.

²⁴ Benjamin (n 22), 792.

²⁵ R Van Loo, 'The New Gatekeepers: Private Firms as Public Enforcers' (2002) 106 *Virginia Law Review* 467.

²⁶ *Foley v Hill* (1848) 2 HLC 28 (HL).

²⁷ WC Newman, 'Legal Use of the "Arm's Length" Concept' (1955) 11(1) *The University of Toronto Law Journal* 139. This is not the only exception see, for instance, *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630, [2005] 2 *Lloyd's Rep* 588.

institutions'²⁸ and the courts are reluctant (and even hostile),²⁹ as a matter of policy, to impose fiduciary duties on banks.³⁰ The courts have consistently reiterated that banks' deposit taking and lending activities are not, on the face of it, fiduciary in nature.³¹ Even when dealing with a vulnerable customer, the courts stressed that 'in the normal case...there would generally be no question of any fiduciary duty'.³² The fiduciary narrative in the banking sphere is, therefore, rare and recognised only where there is a special relationship or in exceptional circumstances. Even in those rare cases, banks may avoid liability by making full disclosure to the customer that there is an actual or potential conflict of interest and getting his/her fully informed consent for the bank to continue to act in the circumstances³³ or alternatively and subject to statutory limitations, include an excluding term in the contract.

The third common narrative, the consumerist narrative, reflects a more paternalistic approach of law and is increasingly becoming more prevalent in financial legislation.³⁴ In recent years, the consumerist narrative is high on the Financial Conduct Authority (FCA)'s agenda. The FCA consistently emphasises the need for banks and other supervised financial institutions to adjust their practices and conduct to the needs of vulnerable customers.³⁵ This narrative is also illuminated in the FCA recent Consultation Paper on introducing a new consumer duty that would set clearer and higher standards for the culture of firms and their conduct beyond the FCA current set of Principles and Rules.³⁶ The consumerist narrative acknowledges the fact that the parties in the bank-customer relationship are unequal and that weaker parties, i.e. customers in general and vulnerable customers, in particular, are fit for protection from unfair treatment of banks.³⁷ As such, banks are required in the High-level

²⁸ *National Westminster plc v Morgan* [1983] 3 ALL ER 85, 91 (CA)

²⁹ Ellinger's *Modern Banking Law* (OUP 2011), 129.

³⁰ *Guardian Ocean Cargoes Ltd v Banco do Brasil SA* [1991] 2 Lloyds Rep 68.

³¹ For instance, *Governor and Company of the Bank of Scotland v A Ltd* [2001] 1WLR 751.

³² *Cornish v Midland Bank plc* [1985] 3 All ER 513, 522; For instance, in *Wright v HSBC plc* [2006] EWHC 930 (QB).

³³ *Australian Securities and Investment s Commission v Citigroup Global Markets Australia Pty Ltd* (No 4) 293-296.

³⁴ Benjamin (n 22), 799.

³⁵ FCA Business Priorities 2020/21 include protecting the most vulnerable; FCA, *Guidance for Firms on the Fair Treatment of Vulnerable Customers* (March 2021) available at <https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers>.

³⁶ FCA, *A New Consumer Duty* Consultation Paper (May 2021) CP 21/13 available at <https://www.fca.org.uk/publication/consultation/cp21-13.pdf>

³⁷ The literature on this topic is vast. See, for instance, JY Campbell and others, 'Consumer Financial Protection' (2011) 25(1) *Journal of Economic Perspectives* 91; JY Campbell, 'Restoring Rational Choice: The Challenge of Consumer Financial Regulation' (2016) 106(5) *American Economic Review: Papers and Proceedings* 1; O Ben-Shahar, 'The Myth of 'Opportunity to Read' in Contract Law' (2009) 5 *European Review of Contract Law* 1, 2.

On vulnerability see D Bugeja, *Reforming Corporate Retail Investor Protection* (Hart 2019), 13.

Principles to pay due regard to the interests of their customers and treat them fairly³⁸ and in the future, may even need to be ‘putting themselves in their customers’ shoes’ and meet a reasonableness standard in the proposed Consumer Duty.³⁹

Financial law, however, is far from being static, and its reduced rigidity is considered a sign of strength.⁴⁰ The development of a new narrative can address the limits of the dominant arm’s-length narrative that perhaps did not stand the test of time, having to face challenges of customers’ vulnerability in increasingly complex financial markets and sophisticated money laundering activity that crosses borders. In recent years, there are, therefore, early signs of a fourth narrative developing. It is referred to here as ‘the gatekeeper narrative’ to denote the public role of banks and the duties and responsibilities that come along with it. This Article, accordingly, demonstrates how legislators, regulators, the courts and even banks themselves have come to embrace a narrative that imposes a positive responsibility on banks as gatekeepers and allows them to maintain their social licence and promote their public interest duties.

PART II: BETWEEN THE DEVIL AND THE DEEP BLUE SEA

A. WHO GATEKEEPERS ARE

The traditional perception of gatekeepers follows a narrow interpretation associated with John Coffee of "a reputational intermediary who provides verification or certification services to investors."⁴¹ In other words, gatekeepers are repeat players who have, over time, developed "reputational capital" by verifying a corporation's statement.⁴² This narrow definition of gatekeeper largely refers to independent professionals such as accountants, auditors, investment bankers and lawyers. Banks are, therefore, outside the ‘traditional’ gatekeepers’

See also, PR Lane, ‘The Role of Financial Regulation in Protecting Consumers’ (University College Cork, 23 February 2017) available at <https://www.centralbank.ie/news/article/financial-regulation-protecting-consumers-governor-lane>

³⁸ FCA Handbook, Principle 6. See M Wheatley, *The Fairness Challenge* (October 2010, Mansion House, London) available at <https://www.fca.org.uk/news/speeches/fairness-challenge>

³⁹ FCA *Consumer Duty Consultation Paper* (n 36), para 1.3. ‘...for firms it means encouraging a more consumer-centric approach to business. Placing far more emphasis on the culture of the firm at every level and at every stage: from chief exec to frontline staff, from product design to sale. Where Chief Executives and senior management are accountable in the way that the Banking Commission envisages.’

It is to be noted that consumer legislation can also fall within the gatekeeper narrative. Scott, for instance, suggests that s 75 of the Consumer Credit Act provides an incentive to issuers of credit cards to vet retailers who they permit to accept payments via their credit cards. See C Scott, ‘Gatekeepers and Non-State Intermediation in Regulatory Governance’ (ECPR Third Conference, Budapest, September 2005), 10.

⁴⁰ Benjamin (n 22), 791.

⁴¹ JC Coffee, ‘Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms’ (2004) 84 *Boston University Law Review* 301, 309.

⁴² JC Coffee, *Gatekeepers: The Professions and Corporate Governance* (OUP 2006), 9.

circle. Yet, the role that banks play fits comfortably with a broader understanding of the concept of a gatekeeper and its underlying elements.⁴³ In a seminal paper, Kraakman defines gatekeepers as ‘private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers’.⁴⁴ As opposed to Coffee’s definition, Kraakman’s broader definition is agnostic as to the gatekeeper’s incentive for preventing the relevant misconduct.⁴⁵ This is not to say that banks do not have an incentive to intervene based on their reputation but their incentive is also derived from the existence of explicit regulatory banking licence and legal liability and more broadly, from a social licence.⁴⁶

Gatekeepers can monitor and control or influence the conduct of other actors and thereby deter wrongdoing by them.⁴⁷ To provide incentives for gatekeepers to exercise their ability to monitor and control, the legal regime imposes sanctions on gatekeepers who fail to withhold support or report about the wrongdoing (gatekeeper liability). Kraakman summarises the conditions for successful gatekeeping that include “(1) serious misconduct that practicable penalties cannot deter; (2) missing or inadequate private gatekeeping incentives; (3) gatekeepers who can and will prevent misconduct reliably, regardless of the preferences and market alternatives of wrongdoers; and (4) gatekeepers whom legal rules can induce to detect misconduct at a reasonable cost”.⁴⁸ The design of these legal duties is a complex task and its success hinges on achieving the right balance between encouraging the ‘detection and interdiction of offenses without overburdening the private relationships that serve as their vehicles.’⁴⁹

As will be demonstrated in Part III, banks assume strong gatekeeping responsibilities and regulators leverage the potential liability of banks to transform banks into gatekeepers. The narrative that supports those responsibilities is injected into court decisions, legislation and voluntary initiatives assumed by banks. The structure of banks’ gatekeeping duties, however,

⁴³ RH Kraakman, ‘Corporate Liability Strategies and the Costs of Legal Controls’ (1984) 93 Yale Law Journal 857, 895-896; RH Kraakman, ‘Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy’ (1986) 2 Journal Law, Economics and Organisation 53, 53.

⁴⁴ See Coffee (n 41), 308-309 who criticises the broad understanding of a gatekeeper that encompasses ‘any person or entity who provides a necessary service or certification without which the corporation cannot accomplish a transaction’ though suggesting that it ‘seems overly broad because it ignores both the deterrent capacity of the gatekeeper and whether it possesses reputational capital.’

⁴⁵ E De Fontenay, ‘Private Equity Firms as Gatekeepers’ (2013/14) 33 Review of Banking and Financial Law 115, 136.

⁴⁶ F Partnoy, ‘Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime’ (2001) 79 Washington University Law Quarterly 491, 505.

⁴⁷ A Tuch, ‘Multiple Gatekeepers’ (2010) Harvard Discussion Paper No 33 101, 107.

⁴⁸ Kraakman (1986) (n 43), 61.

⁴⁹ Kraakman (1984) (n 43), 893.

often risks asking too much of banks and can be compromised by other conflicting duties that banks are expected to comply with.

B. WHY WE NEED BANKS TO PERFORM A GATEKEEPER ROLE: A MARKET-FIXING APPROACH V. A SOCIAL LICENCE APPROACH

The key route to articulating the role of banks as gatekeepers is understanding why banks are needed as gatekeepers in the first place and whether their operation as gatekeepers is a warranted policy and regulatory objective. This can be framed within two distinct theories on regulatory intervention. The first is the old ‘market failures’ theory. Regulation (including the recruitment of gatekeepers) is needed to correct inefficient allocation of resources by markets, i.e., market failures, such as information asymmetries.⁵⁰ This is how the traditional argument would proceed: Financial markets exhibit inefficiencies and are nearly always imperfect.⁵¹ Regulation should, therefore, step in and fix these failures. Furthermore, given their interconnected, complex and adaptive nature, financial markets are particularly difficult to police.⁵² The scale and complexity of transactions and the parties involved as well as the increasing sophistication of fraudsters and money launderers present a particular challenge to regulators. In such an environment, banks are well-positioned to detect and disrupt wrongdoing that is facilitated through their customers’ accounts and mitigate information asymmetry.⁵³ They have superior access to information since they directly transact with their customers (i.e. the potential wrongdoers)⁵⁴ and are often seen as providing a private monitoring service on behalf of financial markets.⁵⁵ But a theoretical framework of ‘market fixing’ is not sufficient to account for a suggested change in narratives and the language that characterise it of correcting failures may become self-fulfilling.⁵⁶

⁵⁰ JW Stiglitz and A Weiss, ‘Credit Rationing in Markets with Imperfect Information’ (1981) 71(3) *American Economic Review*.

⁵¹ JE Stiglitz, ‘The Role of the State in Financial Markets’ *Proceedings of the World Bank Annual Conference on Development Economics* 1993.

⁵² Indeed, there is a growing recognition that many of the key challenges that regulators face in markets are wicked problems: FCA, ‘Economics for Effective Regulation’ (March 2016) *Occasional Paper* 13, 10.

⁵³ F Allen and E Carletti, ‘The Roles of Banks in Financial Systems’ in AN Berger, P Molyneux and J OS Wilson (eds) *The Oxford Handbook of Banking* (OUP, 1 ed, 2012).

See also R Van Loo, ‘The New Gatekeepers’ (n 25), 40-41 refers to private firms as enforcer-firms and suggest that banks can also lower the cost of regulation given their expertise.

⁵⁴ Kraakman (1984) (n 43), 62 explains that gatekeeper strategy ordinarily enlists third parties who transact with wrongdoer since ‘gatekeepers are better informed than regulators regarding the goals, intentions, and underlying financial realities of client firms.’

⁵⁵ DW Diamond, ‘Financial Intermediation and Delegated Monitoring’ (1984) *Review of Economic Studies* 393.

⁵⁶ Rouch (2019) (n 2), 20; F Ferraro, J Pfeffer and RI Sutton, ‘Economics Language and Assumptions: How Theories can Become Self-Fulfilling’ (2005) 30(1) *The Academy of Management Review* 8.

Recent thinking in economic theory, therefore, casts doubts on the reactive market-fixing role of governments and regulation and advocates a radical change; It views public goods, such as financial stability and consumer protection, as common objectives.⁵⁷ The regulatory process is not aimed at fixing failures but is rather a process where different interest groups engage in the collective creation of value.⁵⁸ According to this perspective, developing partnerships is key to the creation of value in support of a common good.⁵⁹

The emerging ‘common objective’ approach to regulatory intervention fits in well with the gatekeeper narrative which is embedded in the theory of social licence.⁶⁰ A social licence goes beyond a mere statutory banking licence as a gift from the state. Mark Carney, the former Governor of the Bank of England, described the concept as follows: “*Markets are not ends in themselves, but powerful means for prosperity and security for all. As such they need to retain the consent of society – a social licence – to be allowed to operate, innovate and grow.*” Social licence, therefore, encompasses the idea that the operation of banks hinges on the consent of society and should be aligned with the goals of the wider community.⁶¹ It views banks (and more generally, businesses) and the state as partners in a social contract with a shared aim of creating social value alongside profit generation.⁶² Accordingly, rather than viewing banks and the markets, on one side and regulators and public goods, on the other, as conflicting paradigms, the gatekeeper narrative enables synthesising these actors towards a common goal/s. This new understanding of the role of banks discards them as gatekeepers being driven solely by reputational incentives and/or costs of potential legal liability. It supports a much stronger force of culture that can drive and shape banks’ behaviour.⁶³ It may be that the gatekeeper narrative will spur a cultural change in banks or that a cultural change is making way to this new narrative or that both trends are happening simultaneously. Without an answer to this egg and chicken question, the extent of the social licence and its impact on the legal obligations of banks is an area worth exploring. Do banks have a passive role to not make things worse and internalise their negative externalities according to the

⁵⁷ M Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (Penguin 2021), 170.

⁵⁸ *ibid*, 171.

⁵⁹ *ibid*, 193.

⁶⁰ Rouch (2019) (n 2), 113; ‘Exit Right: The Contract Between Society and Banks will get Stricter’ Special Report, *The Economist* (16 May 2009).

⁶¹ On the origin of the social licence in the mining industry see Rouch (2019) (n 2), 129; Carney (2015) (n 5).

⁶² E Borg and C Unruh, ‘Reshaping Relations Between the State and the Private Sector post-COVID-19? Exploring the Social Licence Framework’ (2021) 9 *Journal of the British Academy* 87: ‘given the benefits they enjoy, banks (and other business organisations) could not reasonably reject a principle that requires them to contribute to social goods’.

⁶³ J Gilboy, ‘Compelled Third-Party Participation in the Regulatory Process: Legal Duties, Culture, and Noncompliance’ (1998) 20(2) *Law and Policy* 135.

‘market-fixing’ approach or do banks have an active role that requires them to make things better?⁶⁴

C. CHALLENGES OF BANKS AS GATEKEEPERS

Whatever the extent of a social licence and the obligations which are attached to it, it undoubtedly comes with numerous challenges. Much can be learnt from the well-developed gatekeeper literature on the challenges of utilising gatekeepers to promote a regulatory objective and the potential solutions to address them. First and similar to other gatekeepers, banks are often met with opposing demands and may find themselves between the devil and the deep blue sea. On the one hand, they face increasing market pressures to provide a swift response to their customers’ instructions and complying with the contractual duty of confidentiality and data protection legislation. At the same time, banks, increasingly, face legal demands to act as guardians in the public interest and detect and prevent fraud and money laundering. This invidious position was long acknowledged by the courts, observing that banks are “in a most unenviable position. They are at risk of criminal prosecution if they entertain suspicions but do not report them or, if they report them, and then nevertheless carry out their customer's instructions without authorisation. If they do not act as instructed, their customers are likely to become incensed and some of those so incensed may begin litigation.”⁶⁵

As we shall see in Part III, the regulatory framework shields banks, to some extent, from these conflicting obligations. There is, however, a concern that a regulatory regime that imposes liability on banks when failing to monitor wrongdoing will become mere ‘window-dressing. In that case, banks will serve only a “cosmetic” gatekeeping function, showing regulators that they are “doing something...without actually exerting considerable influence.”⁶⁶ The potential focus on appearances rather than substance is particularly acute in the suspicious activity reports that banks are required to produce in order to tackle money laundering and at times, avoid legal liability and corresponding costs.

Second and related, banks can also be said to follow conflicting narratives. While banks often communicate to their customers messages of trust, loyalty, long-term relationship

⁶⁴ E Borg, ‘The Thesis of “Doux Commerce” and the Social Licence to Operate Framework’ (2021) 30(3) Business Ethics, the Environment and Responsibility 412.

⁶⁵ Longmore LJ in *Shah and another v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 31, para 32.

⁶⁶ R Van Loo, ‘The New Gatekeepers’ (n 25), 18; KD Krawiec, ‘Cosmetic Compliance and the Failure of Negotiated Governance’ (2003) 81 Washington University Law Quarterly 487.

and confidentiality,⁶⁷ in their rhetoric to the public and regulators, they also utilise the gatekeeper narrative and endorse their important contributing role to society.⁶⁸ Similar to other gatekeepers, these narratives may potentially conflict, creating a blurred inconsistent story of the role of banks and impeding the effectiveness of their gatekeeping role.⁶⁹

Third, and, once again, mirroring the challenges of other more traditional gatekeepers, banks are expected to guard customers who are “paying their bills”.⁷⁰ This, in turn, may make it easier to capture banks that will be “...biased away from the public interest simply because close affinity with the client renders the desired independence psychologically impossible.”⁷¹ The potential capture of banks may be exacerbated by increased competition in financial markets and the entrance of new players.⁷² In that environment, banks may find themselves even more pressurised to obey their customers’ mandate and turn a blind eye. At the same time, in a more competitive environment, reputation may become a stronger incentive to gatekeeper monitoring. A bank then may not be so inclined to risk its “firm-specific reputational capital” by facilitating customers’ offences.⁷³ Still, while there is no doubt that fear of devalued reputation alongside the fear of litigation provide an incentive to banks to act as gatekeepers,⁷⁴ recent high-profile money laundering cases suggest otherwise.⁷⁵ These cases show that it is rather easy to entice banks to condone wrongdoing, particularly where the profits exceed any costs associated with their reputational capital or potential sanctions.⁷⁶

Finally, relationship banking⁷⁷ that entails repeated interactions with customers is increasingly replaced by transaction-oriented banking.⁷⁸ This has the potential to negatively

⁶⁷ On trust and loyalty see A Hoffmann and C Birnbrich, ‘The Impact of Fraud Prevention on Bank-customer Relationships an Empirical Investigation in Retail Banking’ (2012) 30(5) *International Journal of Bank Marketing* 390, 394.

⁶⁸ See Part C.

⁶⁹ Coffee (2004) (n 41), 326.

⁷⁰ On gatekeepers’ profit motives see Kraakman (1986) (n 43), 892.

⁷¹ JS Demski, ‘Corporate Conflicts of Interest’ (2003) 17(2) *Journal Economic Perspectives* 51, 57.

⁷² L Wewage, MC Thomsett, *The Digital Banking Revolution How Fintech Companies Are Transforming the Retail Banking Industry Through Disruptive Financial Innovation* (3rd edition, De Gruyter 2020), 33.

⁷³ Kraakman (1984) (n 43), 893.

⁷⁴ JC Coffee, *Gatekeepers: The Role of Professions in Corporate Governance* (OUP 2006), 4-5.

⁷⁵ FCA Annual Public Meeting 2020 available at <https://www.fca.org.uk/publication/transcripts/annual-public-meeting-2020.pdf>

See also M Goldby, ‘Breaches of AML Reporting Requirements by UK Bankers: Are Effective Enforcement Choices Being Made by Financial Regulators?’ in C Russo, R Lastra and W Blair, *Research Handbook on Law and Ethics in Banking and Finance* (Edward Elgar 2019), 317-337.

⁷⁶ Kraakman (1984) (n 43), 891.

⁷⁷ Relationship banking involves the provision of financial services by an intermediary that “i. invests in obtaining customer-specific information, often proprietary in nature; and ii. evaluates the profitability of these investments through multiple interactions with the same customer over time and/or across products.” A Boot, ‘Relationship Banking: What Do We Know?’ (2000) 9(1) *Journal of Financial Intermediation* 7.

⁷⁸ On the interaction between relationship banking and competition see A Boot and A Thakor, ‘Can Relationship Banking Survive Competition’ (2000) 55(2) *Journal of Finance* 679.

affect both the *incentive* and *ability* of banks to monitor their customers.⁷⁹ With regards to incentives – in relationship banking, banks have a strong incentive to invest in information production about their borrowers, the cost of gathering the information is reduced and accordingly, their ability to overcome problems of asymmetric information is enhanced.⁸⁰ With regards to ability – banks’ ability to monitor and assess the creditworthiness of their customers increasingly depends on receiving information from other gatekeepers. In a regulatory environment that shifts from data ownership to data sharing, open banking and soon enough, open data,⁸¹ banks may ‘lose’ their competitive advantage in data collection. Overall, if both the incentive and ability of banks to monitor is reduced and depends on third parties, the ability of banks to provide effective gatekeeping may be weakened. This process may also result in an expectation gap between what the regulators and the public expect of banks and the outcomes that banks can deliver.

PART III: EVIDENCE OF GATEKEEPER NARRATIVE AND ITS CHALLENGES

A. ANTI-MONEY LAUNDERING REGULATORY REGIME

The ‘gatekeeper narrative’ of acting in the public interest is threaded through the regulatory regime of anti-money laundering (AML) in the UK.⁸² The aim of AML regulation is “to encourage participants in the system to behave as custodians and guardians of the public interest in preventing money laundering.”⁸³

⁷⁹ Fontenay (n 45), 120 citing S Page and P Swaffield, An Introduction to the Loan Asset Class in *Handbook of Loan Syndication and Trading* 22–23 (Allison Taylor and Alicia Sansone eds., 2007).

⁸⁰ Similar to other gatekeepers, the amount of repeat-play affects decisions whether to engage in reputation-depleting activities or not. Partnoy (2001) (n 46), 500.

⁸¹ Bank of England, ‘Open Data to SME Finance’ (March 2020). Though whether banks maintain their competitive advantage in data analysis remains to be seen.

⁸² A Tuch, ‘The Limits of Gatekeeper Liability’ (2017) 73(2) *Washington and Lee University Law Review* 719; S Gadinis and C Mangels, ‘Collaborative Gatekeepers’ (2016) 73 *Washington and Lee University Law Review* 797.

It is also evident in AML case law. For instance, in *N v RBS plc* [2019] EWHC 1770 (Comm), para 105 “The wider, public, interests of the prevention of crime and the protection of the victims of crime are a further crucial part of the picture.” supported the bank’s decision to terminate relationship with its customer.

⁸³ M Steward, ‘The Importance of Purposeful Anti-money Laundering Controls’ (24 March 2021, AML and ABC Forum 2021) available at <https://www.fca.org.uk/news/speeches/importance-purposeful-anti-money-laundering-controls>

The World Bank referred to private sector intermediaries, including banks, as gatekeepers, reiterating that “While sometimes presented as “enablers” or “facilitators” of illicit activity... the term “gatekeepers” more accurately captures the dual potential to promote or impede illicit transactions. “ World Bank, Stolen Asset Recovery Initiative, ‘The Role and Responsibilities of Gatekeepers in the Fight against Illicit Financial Flows: A Unifying Framework’ (June 2021).

Scholars explored the role of banks in fighting money laundering in light of theories of private policing. For instance, M Egan, ‘The Role of the Regulated Sector in the UK Anti-Money Laundering Framework: Pushing the Boundaries of the Private Police’ (2010) 6 *Journal of Contemporary European Research* 272. More

The gatekeeper literature provides constructive insights regarding the role of banks in fighting money laundering. The various ‘gatekeeper strategies’ are consolidated in the Proceeds of Crime Act 2002 (POCA)⁸⁴ and the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (AML Regulations).⁸⁵ Drawing on the gatekeeper literature’s terminology, banks are mandated multiple roles: they are “bouncers” performing customer due diligence and “know your customer” upon individuals or firms opening an account⁸⁶ and they are also chaperons – with a duty to monitoring their customers’ transactions on an ongoing basis.⁸⁷ A bank is mandated to cease transactions going through its customer’s account and terminate any business relationship with the customer where it is unable to apply customer due diligence measures.⁸⁸ But the duties of banks go beyond a passive gatekeeper. To complement the rather weak reputational risk that may come along with indirectly abating money launderers, the AML regulatory regime threatens banks with sanctions and liability. A bank could be liable for a primary offence if, for instance, it enters into or becomes concerned in an arrangement which he knows or suspects facilitates ‘the acquisition, retention, use or control of criminal property by or on behalf of another person.’⁸⁹ In addition, POCA includes a ‘whistleblower strategy’ that compels a bank that knows or suspects or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering to disclose its suspicion to the authorities.⁹⁰ To avoid liability of a principal money laundering offence, banks can make an authorised disclosure by submitting a Suspicious Activity Report (SAR) and seek appropriate consent from the authorities to do a prohibited act, i.e. to comply with their customer’s instructions.⁹¹ Banks benefit from immunity from civil liability where, by serving as gatekeepers, they risk breaching the contractual obligation to obey their customer’s mandate.⁹²

generally, see P O’Malley and D Palmer, ‘Post Keynesian Policing’ (1996) 25 *Economy and Society* 137. However, the gatekeeper literature is particularly helpful in analysing liability rules.

⁸⁴ The Proceeds of Crime Act 2002 (c.29).

⁸⁵ SI 2019/1511.

⁸⁶ AML Regulations, Regs 27-30; See also Regulations 33-35 for the requirement to apply, in certain circumstances, enhanced due diligence measures and enhanced ongoing monitoring, in addition to the customer due diligence measures required under regulation 28.

⁸⁷ AML Regulations, reg 28(11)

⁸⁸ According to reg 31 where, in relation to any customer, the bank is unable to apply customer due diligence measures it must not carry out any transaction through a bank account with the customer or on his behalf.

⁸⁹ This is a principal offence. POCA, s 328 but liability can arise under ss 327 and 329 POCA.

⁹⁰ See POCA, s 330 for the full list of conditions.

⁹¹ POCA, ss 335 and 338.

⁹² According to section 338(4a) POCA where an authorised disclosure is made in good faith, no civil liability arises in respect of the disclosure on the part of the person by or on whose behalf it is made.

Unlike other gatekeepers, banks have not fought zealously the burden of their gatekeeper role.⁹³ On the contrary, they have embraced, at least in public discourse, the responsibilities of a gatekeeper, investing immeasurably in developing AML control and management systems, engaging in self-regulatory initiatives and establishing networks of coordination.⁹⁴ Yet, despite embracing the AML regime, it is doubtful whether the current legal mechanisms are effective. The reporting duty, in particular, serves to illustrate the limitation of banks as gatekeepers and the limitation of legal liability threat as a successful incentive mechanism. Evidence suggests that banks take one of two extreme strategies: they often turn a blind eye, or they take a defensive approach to avoid reaching the liability threshold.⁹⁵ Both over-monitoring and under-monitoring are sub-optimal and costly. Under-monitoring leaves money laundering undetected while over-monitoring may result in de-risking or defensive reporting as banks and individuals wish to reduce their own legal risk.⁹⁶

This is far from being a theoretical concern. In 2015, the FCA observed that in light of the legal and regulatory obligations in the UK and abroad, some banks were no longer offering financing services to entire categories of customers associated with higher money laundering risk and/or withdrew from providing correspondent banking services.⁹⁷ In contrast to appropriate risk management, a practice of de-risking impedes legitimate access to financial services and financial inclusion.⁹⁸ Defensive reporting, on the other hand, can create a risk-averse environment and result in a “needle-in-the-haystack” problem for the authorities, as banks produce reports with no or low intelligence on money laundering.⁹⁹

What is then the most suitable route for reform? There is prolific literature on which liability rules would trigger the optimal incentives for gatekeepers to monitor and control in

⁹³ Coffee (n 42), 220.

⁹⁴ For instance, the leading UK Trade Associations in the financial services industry have formed the Joint Money Laundering Steering Group (JMLSG) that produces guidance to assist the financial industry sectors to comply with AML obligations.

Banks can be said to be both market gatekeeper that face market incentives to act and public gatekeeper that are subject to legal duties. Gilboy (1998) (n 62) suggests an alternative approach of driving gatekeeper through culture and professional norms.

⁹⁵ On gatekeepers see Coffee (n 42), 371 commenting that in that case, they become useless.

⁹⁶ These behaviours are not unique to banks, generally on gatekeepers' reponses to liability see Coffee (n 42), 166-168; LA Cunningham, 'Beyond Liability Rewarding Effective Gatekeepers' (2007) George Washington Law Faculty Publications available at https://scholarship.law.gwu.edu/faculty_publications/, 16.

⁹⁷ Such as money transmitters and FinTech companies. FCA Website Statement on De-Listing (27 April 2015).

⁹⁸ T Durner and L Shetret, 'Understanding De-Risking and Its Effects on Financial Inclusion' (November 2015) Research Report Global Center on Cooperative Security.

⁹⁹ Law Commission, *Anti-money Laundering: the SARs Regime Law Com No 384 HC 2098*, para 1.54; M Fleming, 'UK Law Enforcement Agency Use and Management of Suspicious Activity Reports: Towards Determining the Value of the Regime' (London 2005), 25. This concern is not unique to the AML context. The 'gatekeeper liability' literature identified the potential of liability risk to 'overshoot the mark' and create excessive risk-aversion. Cunningham (n 96), 15.

the public interest.¹⁰⁰ Kraakman provided high-level guidance suggesting that “The success of gatekeeper liability hinges on the development of legal duties that encourage the detection and interdiction of offenses without overburdening the private relationships that serve as their vehicles.”¹⁰¹ In the banking sphere, the burden on the sector is undisputed. However, a reform of the standard of suspicion that guides reporting in the liability rules and better management of the information required in the SARs could tip the balance in the right direction.¹⁰² Furthermore, to overcome the fragmented knowledge of banks on money launderers, particularly where it is conducted across several jurisdictions,¹⁰³ more emphasis should be given to enhancing coordination across multiple banks.¹⁰⁴

The inefficiency of banks’ gatekeeping role can also be addressed by affecting the incentives that guide their decisions. While AML forms the lion’s share of UK banks’ conduct costs¹⁰⁵ and the fines for non-compliance can be substantive¹⁰⁶ the fear of litigation, to date, has not been strong. Banks often see regulatory fines not as penalties but as “the cost of doing business” or “small beer”.¹⁰⁷ This has significant explanatory power for the high-profile cases which reveal a cost-benefit approach of banks to potential legal sanctions and costs.¹⁰⁸

This bleak picture, however, may soon be changing with the threat of regulatory enforcement intensifying.¹⁰⁹ In March 2021, the FCA brought the first prosecution against a bank under the AML regulatory regime.¹¹⁰ This prosecution signals a shift in the FCA enforcement approach which now pursues a dual track, i.e. simultaneous civil and criminal

¹⁰⁰ On designing liability rules see Tuch (n 82), 103. Coffee (2004) (n 41); F Partnoy, ‘Strict Liability for Gatekeepers: A Reply to Professor Coffee’ (2004) 84 Boston University Law Review 365; JC Coffee, ‘Partnoy’s Complaint: A Response’ (2004) 84 Boston University Law Review 377. See also A Hamdani, ‘Gatekeeper Liability’ (2003) 77 South California Law Review 53.

¹⁰¹ Kraakman (n 43), 893.

¹⁰² The Law Commission (n 99), para 2.28.

¹⁰³ ‘The War Against Money-laundering is Being Lost’, *The Economist* (17 April 2021).

¹⁰⁴ Tuch (2010) (n 47), 1585 suggested that “some wrongs may be optimally deterred by multiple gatekeepers taking precautions...”

¹⁰⁵ The Centre for Banking Research, Conduct Costs Project available at <https://www.cass.city.ac.uk/faculties-and-research/centres/cbr/research/conduct-costs-project>

¹⁰⁶ FCA's largest AML penalty to date was issued to in 2017 to Deutsche Bank £163,076,224.

¹⁰⁷ Responses to Richard Murphy Blog, ‘Money Laundering is Rampant and the Government is Refusing to Put in Place the Measures to Tackle It, 21 September 2020.

¹⁰⁸ In 2020, leaked documents from the US Financial Crimes Investigation Network (FinCEN) revealed the role banks play in facilitating money laundering. See C Matthew, ‘What the FinCEN Leaks Reveal about the Ongoing War on Dirty Money’ (*Brookings*, September 2020).

¹⁰⁹ On the negative effect of reducing the risk of liability see Coffee (n 41), 321.

¹¹⁰ Based on reg 45, AML Regulations 2007. M Steward, ‘Partly Contested Cases, The Pipeline and AML Investigations (Global Investigations Review Live event, London, 4 April 2019); N Megaw and C Binham, ‘FCA Brings Money Laundering Charges Against NatWest’ *FT* (16 March 2021).

enforcement routes.¹¹¹ The gatekeeper narrative is evident in the FCA supporting rationale for the change, stating that – ‘*MLR failures let down the whole community and, in this sense, they may constitute:...a breach and violation of public rights and duties which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanours.*’¹¹² Despite these changes, individuals may still be largely sheltered from gatekeepers liability as the enforcement under the Senior Managers and Certification Regime (SMCR), to date, has been minimal.¹¹³

Even if the FCA strengthens the fear of litigation, it may not be sufficient by itself to enhance the incentive of banks to monitor¹¹⁴ and may further encourage banks to adopt defensive techniques that would protect them from liability. Drawing on scholarship on gatekeeper liability, there is, arguably, a need to complement deterrence with carrots. A legal framework that rewards banks might overcome some of the current limitations and create an optimal gatekeeper behaviour.¹¹⁵ In addition, regulators can advance ‘ethicability’¹¹⁶ in banking i.e., culture “where the ‘ethic of care’ – doing what is right takes precedent over the ‘ethic of obedient’ – doing what is allowed.”¹¹⁷ This fits in well with the ‘purposeful culture’ advocated by the FCA in recent years and in particular, a culture of compliance with the AML framework.¹¹⁸

Another way of enhancing the gatekeeper role is by promoting public-private partnerships. Indeed, banks already play a key role in developing and implementing AML standards and economic crime policy.¹¹⁹ Representatives of major banks, such as HSBC and

¹¹¹ Steward (n 110).

¹¹² *ibid*, referring to Commentaries on the Laws of England (1765-69), William Blackstone.

¹¹³ SMCR places a responsibility on **all** senior management to counter the risk of financial crime, with particular responsibility lying with senior managers holding responsibility for financial crime, including SMF17 / MLRO and Prescribed Responsibility D. A recent ‘Dear CEO Letter’ titled ‘Action Needed in Response to Common Control Failings Identified in AML frameworks’ (21 May 2021) highlights the key areas where firms have fallen short of the requirements set out in SYSC 6.3 and the MLR 2017. For instance, with regard to SARs: “We often find instances where the process by which firms’ employees can raise internal SARs to the nominated officer is either unclear, not well documented or not fully understood by staff.”

Based on Freedom of Information request, as of October 2020, the FCA opened 34 investigations, 11 were closed without action and in one case the FCA successfully enforced a fine-<https://www.bovill.com/only-34-investigations-and-one-enforcement-action-after-four-and-a-half-years-of-smcr/>

¹¹⁴ Coffee (n 42), 370.

¹¹⁵ Cunningham (2007) (n 96).

¹¹⁶ Wheatley (n 38) drawing on R Steare *Ethicability How to Decide What’s Right and Find the Courage to Do It* (Roger Steare Consulting Ltd 2019).

¹¹⁷ *ibid*

¹¹⁸ FCA Decision Notice to Mohammed Ataur Rahman Prodhan (May 2018) Ref MAP01293; Keller and Kokkinis (n 7).

¹¹⁹ The Joint Money Laundering Intelligence Taskforce (JMLIT), for instance, is a partnership between law enforcement and the financial sector with the aim of exchanging and analysing information relating to money laundering and wider economic threats.

Barclays, are members of the Economic Crime Strategic Board (ECSB)¹²⁰ and of the National Economic Crime Centre (NECC).¹²¹ Despite the benefits of private-public partnerships in creating collaborative governance, they also present risks and may be susceptible to policy capture that could compromise both their effectiveness and legitimacy.¹²²

Two conclusions stand out from the foregoing discussion. First, that the gatekeeper narrative is threaded as a rationale to the AML regime and that the theory of gatekeeper liability can explain comfortably the challenges in its implementation. Second, in its current form, the AML regime does not achieve an appropriate balance neither between gatekeeper monitoring and asking too much of banks nor between sufficient legal threat and negative side-effects of an excessive threat of liability. The results on the ground suggest an "expectations gap" between what regulators and the public want banks to do as gatekeepers and the actual capacity and incentives of banks.¹²³ Accordingly, it is debatable whether the value of gatekeeper monitoring is declining since banks fail, at least in part, to assist authorities to uncover money laundering while the costs are increasing.¹²⁴ This is coupled with some troublesome evidence of the unwarranted culture of banks that view their gatekeeper role as a simple cost-benefit exercise with the ultimate aim of maximising profits.¹²⁵ It is argued that in such an environment, reputation as an incentive for gatekeeper monitoring is no longer sufficient¹²⁶ and should be complemented by other strategies such as 'ethicability' and offering positive incentives for compliance.

¹²⁰ The ECSB was established in 2019, meets twice a year and publishes the Economic Crime plan. It is jointly chaired by the Chancellor and the Home Secretary and includes independent representatives with senior private sector members, inter alia, from financial sectors. The Civil Society Organisations Steering Group was established in 2020 to provide a mechanism for civil society organisations to comment on the work of the ECSB. See Question for Home Office UIN 517 39 answered on 30 September 2020.

¹²¹ The NECC was launched in 2018 bringing together regulatory authorities, enforcement and justice agencies, government departments and the private sector.

¹²² C Binham, 'Overhaul of Financial Crime Rules Too Weak, Warn Critics', *FT* (12 July 2019) reporting on the criticism of capture at the ECSB These concerns will be further explored in Part III.C.

¹²³ Coffee (2004) (n 42), 345.

¹²⁴ Partnoy (2001) (n 46), 493.

¹²⁵ In this cost-benefit approach, the third-party enforcer is expected to disobey the law unless individuals conclude that anticipated penalties and sanctions will exceed the benefits from evading the law. But see R Kagan and J Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' (1984) Organisation und Recht 352 who suggest that while some corporations may act as amoral calculator, most would not act based on pre-economic calculations; Gilboy (n 62), 145.

¹²⁶ Partnoy (n 46), 534. Particularly when they are weighted against the benefits that come with colluding in fraudulent conduct. JC Coffee, 'The Acquiescent Gatekeeper: Reputational Intermediaries, Auditor Independence and the Governance of Accounting' (2001) available at SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=270944, 3.

B. QUINCECARE DUTY

The gatekeeper narrative is also illustrated in the development of the Quincecare duty of care in English Courts. The Quincecare duty is derived from the unreported judgement of Steyn J *Barclays Bank plc v Quincecare Ltd*¹²⁷ and is "a specific manifestation of the duty of care owed by a banker to its customer in relation to instructions."¹²⁸ The Quincecare duty arises once a bank has been 'put on inquiry' in the sense that he has reasonable grounds (though not necessarily proof) for believing the order is an attempt to misappropriate the customer's funds. The duty requires the bank to refrain from executing its customer's order and the external standard of the likely perception of the ordinary prudent banker is the governing one.

To define the boundaries of the Quincecare duty, Mr Justice Steyn outlined the invidious position of banks and the balancing act involved: '*The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers.*'¹²⁹

The Court of Appeal in *Lipkin Gorman (a firm) v Karpnale Limited* derived assistance from the *Quincecare* case. In *Lipkin*, Mr Cass, a partner in the appellant firm of solicitors, withdrew a large amount of money from the solicitors' bank account for which he was a signatory and lost it when gambling at a casino. Lord Justice Parker held in the Court of Appeal that - "*If a reasonable banker would have had reasonable grounds for believing that Cass was operating the client account in fraud, then, in continuing to pay the cash cheques without inquiry the bank would, in my view, be negligent and thus liable for breach of contract*"¹³⁰ But Lord Justice Parker also acknowledged the limitation of that duty: "*... The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility albeit not amounting to a probability that its customer might be being defrauded...If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry. He could not simply sit back and ignore the situation* (my emphasis)."¹³¹

¹²⁷ *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363.

¹²⁸ *Federal Republic of Nigeria v JP Morgan Chase Bank, NA* [2019] EWHC 347 (Comm), para 40. The duty is imposed as an implied term or is imposed by the tort of negligence.

¹²⁹ Mr Justice Steyn in *Quincecare* at 376-377.

¹³⁰ *Lipkin Gorman (a firm) v Karpnale Ltd* [1989] 1 WLR 1340 at 1377-1378.

¹³¹ *ibid*

Lord Justice May in *Lipkin* stressed that the bank's obligation to honour cheques is largely automatic and mechanical and therefore, the circumstances in which a bank could be held to be under a duty to exercise any degree of care in deciding whether to honour a customer's cheque would be exceptional. Yet, Lord Justice May hesitated to lay down any detailed rules and emphasised that '*Having in mind the vast numbers of cheques which are presented for payment every day in this country...it is in my opinion only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque at once and refer it to his or her superior, and when any reasonable superior would hesitate to authorise payment without enquiry, that a cheque should not be paid immediately upon presentation and such enquiry made... it would I think be only in rare circumstances...*'¹³²

The narratives articulated in both *Quincecare* and *Lipkin* reflect the limited, exceptional duty of care of banks in complying with the day-to-day instructions of their customers. The efficiency of the banking business serves as a determinative factor and banks are expected to 'not sit back and ignore the situation' when paying out cheques.

It took 30 years for a bank to be held liable, for the first time, for breach of the *Quincecare* duty in the case of *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*.¹³³ *Singularis* was wholly owned by a Mr Al Sanea, who was also its authorised signatory, director, chairman, president and treasurer. On the instructions of Mr Al Sanea, Daiwa paid out funds from the company's account to entities that were ultimately controlled by Mr Al Sanea. *Singularis*'s liquidators sought to recover the funds, inter alia, based on a claim of breach of the *Quincecare* duty. Mrs Justice Rose in the Chancery Court held that Daiwa had breached its duty of care to *Singularis* in making the payment without any proper inquiry as any reasonable banker would have realised that there were "*many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud on the company*".¹³⁴ The gatekeeper narrative led the court to conclude that "*Daiwa owed Singularis a duty to guard* (my emphasis) *against being misled into paying away Singularis' money*" by fraudulent instructions.¹³⁵

¹³² *ibid* at 1356-1357.

¹³³ [2019] UKSC 50. The finding that Daiwa had breached the *Quincecare* duty was not challenged, and the appeal focused on the availability of defences arising from the fact that the fraudster was the sole shareholder and a director of the claimant company.

¹³⁴ Mrs Justice Rose [2017] EWHC 257 (Ch), para 192.

¹³⁵ Mrs Justice Rose [2017] EWHC 257 (Ch) para 228. Most interestingly, Mrs J Rose applied the same reasoning and terminology of Evans-Lombe J in *Barings plc (in liquidation) and another v Coopers & Lybrand (a firm) and others (No. 2)* [2003] EWHC 1319 (Ch). In that case, Barings was suing its auditors for failing to spot the fraudulent conduct of their trader, Mr Leeson. The court held that auditors had a contractual duty to Barings to investigate the truth of the representation made to them by Leeson.

The Court of Appeal in *Singularis* followed the line in *Quincecare* and *Lipkin* and emphasised that “*it will be a rare situation for a bank to be put on inquiry; there is a high threshold*”¹³⁶ The uniqueness of *Singularis* is, however, in the strong public policy narrative that drove the decision. Lady Hale, giving the Supreme Court decision, cited with approval the Court of Appeal’s reasoning noting that denial of the claim against the bank ‘...*would have a material impact on the growing reliance on banks... to play an important part in reducing and uncovering financial crime and money laundering...* (my emphasis)”¹³⁷

It is clear from the trilogy of cases *Quincecare*, *Lipkin* and *Singularis* that a bank cannot be a bystander and must refrain from making a payment (despite an instruction on behalf of its customer to do so) where it has reasonable grounds for believing that the payment is part of a scheme to defraud the customer. But is the bank expected to be a detective? Would a banker with reasonable grounds be also under a duty to make reasonable enquiries to ascertain whether or not there is substance to those reasonable grounds? In other words, is there a positive duty to make reasonable enquiries or does the *Quincecare* duty encompass only a negative duty not to pay while the bank has the relevant reasonable grounds?

Mr Justice Burrows in *The Federal Republic of Nigeria v JP Morgan* was strongly inclined to the view that there was an additional duty on the bank to make reasonable enquiries to ascertain whether or not there is substance to those reasonable grounds.¹³⁸ In analysing the suitability of such duty, he noted that: “*In the fight to combat fraud, banks with the relevant reasonable grounds for belief should not sit back and do nothing. Moreover, the duty of enquiry on banks would not be unduly onerous* (my emphasis) *because it would always be limited by what an ordinary prudent banker would regard as reasonable enquiries in a situation where there are reasonable grounds for believing that the customer is being defrauded.*”¹³⁹

Mr Justice Burrows then proceeded to explain that even if a bank with the relevant reasonable grounds for belief has a duty of care to make reasonable enquiries it would be “*potentially misleading*” to describe the *Quincecare* duty as a duty of care to make enquiries or to investigate and that the core of the *Quincecare* duty is a negative duty not to pay while

¹³⁶ Lord Justice Geoffrey Vos, [2018] EWCA Civ 84, para 98.

¹³⁷ Lady Justice Rose [2017] EWHC 257 (Ch) para 219 cited in Supreme Court decision in para 17.

¹³⁸ *The Federal Republic of Nigeria v JP Morgan* (n 29). Handed down a few days prior to the decision in *Singularis*.

¹³⁹ *ibid*, para 30.

the bank has the relevant reasonable grounds. He summarised that a positive enquiry or investigation would be additional to that.¹⁴⁰

In the Court of Appeal, Lady Justice Rose somewhat criticises Mr Justice Burrows's judgment by saying that *"I do not see that it is useful to describe some parts of the Quincecare duty as being core and some parts of it as being separate or subsidiary or additional. Nor do I think it is helpful for this court to give an indication as to what factors are likely to be relevant to the trial judge's overall assessment of what the Bank should have done. That will become clear once the findings of fact in the case are made."*¹⁴¹ However, Rose LJ goes on to say that in most cases, the duty will require **"something more from the bank than simply deciding not to comply with a payment instruction"** (my emphasis). *The bank will usually be anxious to resolve its concerns, not least so as to minimise the risk of incurring liability to its client for any loss arising from the non-payment.*¹⁴²

It, therefore, remains unclear what a bank is required to do to comply with the Quincecare duty beyond 'not sitting back and ignoring' and doing 'something more'. Banks are left with no factors to guide their decisions or determine the extent of their investigatory role or whether, for instance, it also extends to an obligation to contact regulatory authorities. It is clear from this chain of cases that the role of a bank is not simply one of a passive bystander but that there is a positive more onerous duty on banks to uncover financial fraud. Yet, a bank and its customer can agree to exclude the duty, subject to statutory restrictions and as long as clear terms are used.¹⁴³

The narrative articulated in a recent decision of the High Court on Quincecare duty, *Philipp v Barclays Bank UK Plc*,¹⁴⁴ is instrumental to our analysis. The case involved the practice of Authorised Push Payments (APPs) that were made by Mrs Philips who was led to believe that she is assisting an investigation by the FCA and National Crime Agency and authorised the payment to fraudsters. Mrs Philipp claimed that the bank breached Quincecare duty as it failed to ask her safeguarding questions with a view to unearthing a potentially fraudulent transaction, particularly in light of the high sum that was involved in the order.¹⁴⁵ The High Court rejected the claim, concluding that it would be commercially

¹⁴⁰ *ibid*, para 31. *"In any event, a bank, which is acting honestly and without reasonable grounds for believing that its customer is being defrauded, has no duty of care to enquire/investigate. In other words, there is no duty of care to enquire/investigate prior to the point in time when the bank has reasonable grounds for believing that its customer is being defrauded."*

¹⁴¹ *JP Morgan v The Federal Republic of Nigeria* [2019] EWCA Civ 1641, para 22.

¹⁴² *ibid*, para 21.

¹⁴³ In the circumstances of the case, the wording of the exclusion was not sufficiently clear.

¹⁴⁴ [2021] EWHC 10 (Comm)

¹⁴⁵ *ibid*, para 109.

unrealistic and unduly onerous to expect bank staff to be under a duty to ask such questions whenever any payment instruction is authorised by the customer attending the bank in person, regardless of the sum involved.¹⁴⁶ The High Court referred to the gatekeeper narrative but, interestingly, this time, it used the narrative to define the limits and contain the scope of the Quincecare duty¹⁴⁷ - “*It is because the **Bank cannot be expected to carry out such urgent detective work, or treated as a gatekeeper or guardian** (my emphasis) in relation to the commercial wisdom of the customer’s decision and the payment instructions which result...*”¹⁴⁸ Therefore, a duty imposed on the bank to have procedures aimed at potentially protecting Mrs Philipp from her own decisions would be an unduly burdensome interpretation of the Quincecare duty. The High Court, accordingly, clarified that the Quincecare duty is confined to cases where the suspicion raised is one of attempted misappropriation of the customer’s funds by an agent of the customer.¹⁴⁹ Where the customer is an individual, their authority to instruct the bank is apparent and must be taken by the bank to be real and genuine (even if it was induced deceitfully by a third party).¹⁵⁰

On the facts of *Philipp*, the public interest of preventing fraud and the corresponding Quincecare duty imposed on banks were standing against the customer's freedom to spend his monies.¹⁵¹ But it remains the case that the gatekeeper narrative is used in the rhetoric of the court to define the scope of the Quincecare duty and its borders. The High Court explained that where the duty is said to involve second-guessing the customer’s genuine instructions, the raising of the suggested safeguarding questions would have to be supported by some form of clearly recognised banking code defining the circumstances in which the need for such questions would be triggered.¹⁵² As we shall see in Section C, the banking industry has indeed developed a voluntary system for the reimbursement of victims of APP fraud.

It is instructive to compare the decision in *Philipp* with the decisions of the Financial Services Ombudsman (FSO). The FSO has recently upheld several complaints concerning APP scams, at times going beyond the interpretation of the Quincecare duty in order to reflect what is “fair and reasonable”.¹⁵³ For instance, in a recent decision, the FSO summarises the Quincecare duty but decides that, in addition, and as a matter of good industry practice, firms

¹⁴⁶ *ibid*, paras 168 and 171.

¹⁴⁷ In another case, *Stanford International Bank Ltd v HSBC Bank plc* [2021] EWCA Civ 535 the Court confined the Quincecare duty and clarified that it is owed to the customer and not to its creditors.

¹⁴⁸ *Philipp v Barclays Bank* (n 142), para 172.

¹⁴⁹ *ibid*, para 156

¹⁵⁰ *ibid*, para 164.

¹⁵¹ *ibid*, para 175.

¹⁵² *ibid*, para 159.

¹⁵³ FCA Handbook, DISP 3.8.

should also take proactive steps to identify and assist vulnerable consumers and consumers in vulnerable circumstances and identify and help prevent transactions, particularly unusual or out of character transactions, that could involve fraud or be the result of a scam.¹⁵⁴ The interpretation of the FSO of the gatekeeper role of banks is broader than the interpretation of the courts and as we shall see in section C below, it may be that with the gradual embracement of a relevant voluntary code, the courts will follow suit.

C. VOLUNTARY INITIATIVES OF BANKS SELF-REINFORCING THE GATEKEEPER NARRATIVE

In recent years, the banking sector reinforces the gatekeeper narrative via the rhetoric of “playing an important role in society” and promoting sustainability in finance. Banks in the UK and worldwide often use in their mission statements and reports a terminology that promotes their societal narrative such as ethic, society, community and Environmental, Social and Governance (ESG). For instance, Deutsche Bank declares that “*We believe that our responsibility extends beyond our core business. Therefore, we invest in the societies in which we operate – and thus in our own future.*” and Citibank “*We strive to earn and maintain the public's trust by constantly adhering to the highest ethical standards.*”¹⁵⁵ But does the gatekeeper narrative go beyond mere rhetoric in public and corporate discourse?

Banks increasingly face pressures from stakeholders to provide Non-Financial Reporting and demonstrate a purpose wider than profit-making.¹⁵⁶ These pressures also led to the development of regulatory reporting requirements¹⁵⁷ that reshape the relationship between

¹⁵⁴ *W v Santander plc*, DRN-2588968 (April 2021). The Ombudsman observes that the courts have interpreted narrowly the Quincecare duty of care. A similar line of argument on the duty of a bank to detect unusual transaction see *Mrs T v Clydesdale Bank plc*, Ref: DRN3331283 (February 2020). Similarly, in *B v Lloyds plc* DRN-2456585 (May 2021) the Ombudsman decided that the bank “...could and should have done more, particularly given the requirements of the Banking Protocol which encourages staff to ask probing questions and to get into the detail in order to test the purpose of the payment.” See also *Ms S v HSBC* Ref: DRN6189254 (March 2021) the Ombudsman also explained why it departs from *Philipp* case to reflect good industry practice, expecting the bank to enquire where a vulnerable customer was involved; *Mr W v Santander* DRN-2588968 (April 2021) observed that – “I’m mindful that the bank is the expert here and, had it known the full circumstances, I’d expect it to quickly identify Mrs W was the victim of a scam, the same can’t be said for her. She was a vulnerable person with little or no knowledge of financial crime.” but see *W Ltd v Barclays Bank* (January 2020) Ref: DRN2164352 where the payment was in line with normal spending and general activity on the account.

¹⁵⁵ Deutsche Bank Mission Statement <https://www.db.com/ct/en/strategy/mission-statement.htm> and Citi Mission available at <https://www.citigroup.com/citi/about/mission-and-value-proposition.html>, respectively.

¹⁵⁶ Stakeholders Perception of Non-Financial Reporting (October 2019) BEIS Research Paper No 27.

¹⁵⁷ Directive 2014/95/ of 22 October 2014 amending Directive 2013/34/EU as regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups L 300/1.

banks, society and the state and define what their common social purpose mean in practical terms. For instance, the Non-Financial Reporting Directive (NFRD) requires all large (those with greater than 500 employees) public interest entities, including banks, to disclose information on environmental, social and community matters.¹⁵⁸

In addition to complying with legislative measures, banks often engage in voluntary reporting initiatives¹⁵⁹ and take an active role in the development of ESG standards. In partnership with the United Nations Environment Programme (UNEP), the Principles for Responsible Banking were launched in 2019 and currently have 230 signatories representing more than a third of the global banking industry.¹⁶⁰ The Principles are designed to align banks' strategy and practice with the vision set out in the Sustainable Development Goals and the Paris Climate Agreement.¹⁶¹

Banks also fill in regulatory gaps via voluntary self-regulatory initiatives.¹⁶² For instance, the Reimbursement Model Code for APP scams (RMC) sets standards for prevention, detection, dispute resolution and reimbursement of victims of APP scams.¹⁶³

In the UK, NFR obligations are governed by the Companies Act 2006 (CA 2006) and the NFRD. See also Taxonomy on Sustainable Finance Regulation (EU) 2020/852; Regulation (EU) 2019/2088 on Sustainability-related Disclosures in the Financial Services Sector; The Proposal for a Corporate Sustainability Reporting Directive (proposal by the European Parliament 21 April 2021; Global Reporting Initiative (GRI) that developed and oversees the Sustainability Reporting standards available at <https://www.globalreporting.org/>.

¹⁵⁸ NFRD Article 19a. Public interest entities (PIEs) are businesses of significant public relevance because of the nature of their business, size or number of employees.

See also EBA Report on Management and Supervision of ESG Risks for Credit Institutions and Investment Firms (June 2021) available at <https://www.eba.europa.eu/eba-publishes-its-report-management-and-supervision-esg-risks-credit-institutions-and-investment>; Department for Business, Energy and Industrial Strategy (DBEIS), Mandatory Climate-related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and LLPs, closed May 2021 available at <https://www.gov.uk/government/consultations/mandatory-climate-related-financial-disclosures-by-publicly-quoted-companies-large-private-companies-and-llps>

¹⁵⁹Department of Business, Energy and Industrial Strategi (BEIS), 'Frameworks for Standards for Non-Financial Reporting Final Report' (April 2020) BEIS Research Paper 52; M Maguire, 'From Private Regulation to Public Policy: The Case of Corporate Non-Financial Reporting' (2013) 43 *Perspectives on Europe* 67.

¹⁶⁰ The United Nations Environment Programme Finance Initiative is a partnership between UNEP and the global financial sector.

¹⁶¹ available on UNEPI website <https://www.unepfi.org/banking/bankingprinciples/>

¹⁶² On self-regulation see J Black, 'Constitutionalising Self-Regulation' (1996) 59(1) *The Modern Law Review* 24. Some scholars view self-regulation as a superior form of statutory regulation see A Ogus, 'Re-thinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97 while other scholars suggest that self-regulation cannot replace traditional deterrence-based enforcement. J Short and MW Toffel, 'Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment' (2010) *Georgetown Public Law and Legal Theory Research Paper* No 11-14.

¹⁶³ It is to be recalled that the Court in *Philipp* case held that the Quincecare duty does not extend to APPs and noted the RMC Code. The development of the Code was supported by the regulatory authorities. The Authorised Push Payments Scams Steering Group was established by the Payment Services Regulator (PSR) and was led by an independent chair appointed by the PSR. Its members were appointed by the Chair with an equal number of representatives of payment service providers and consumers with observers from regulators, government and law enforcement attending the meetings and UK Finance was the Secretariat. In July 2019, the Lending Standards Board became the independent governing body of the CRM Code. The Code was last

Clearly, banks stand to gain from participating in the development of these standards. They can affect and mould self-regulatory standards to their needs and stave off the possibility of more intrusive regulation. A voluntary code also offers banks some sort of redemption or at least, an opportunity to restore the degradation of their public image which followed the 2007-2009 financial crisis. More generally, voluntary codes can be adopted and adapted swiftly and be more responsive to consumer and industry needs.¹⁶⁴ Nevertheless, narratives and intentions may not coincide with compliance. It may also not come with a substantive change in banks' culture as a core force in driving their behaviour as gatekeepers. The Lending Standards Board, the official governing body of the RMC, has recently identified a myriad of procedural and substantive failings in the implementation of the Code.¹⁶⁵ These failings call into question the effectiveness of the RMC and elucidate the flaws of relying on a voluntary code to protect customers.

Finally, in the banking sphere, the traditional command-and-control is complemented by a public-private collaborative form of regulation that is befitting the gatekeeper role of banks and its supporting theoretical foundation. This regulatory form posits dynamic cooperation and dialogue between regulatory authorities and the private sector via sharing information and developing standards to achieve common regulatory goals.¹⁶⁶ Banks' cooperation with regulatory authorities is particularly evident in the fight against money laundering, where they not only implement AML rules but also affect governance.¹⁶⁷ The Joint Money Laundering Intelligence Taskforce (JMLIT) is thought to be a success story of what public-private partnerships can achieve¹⁶⁸ and is considered an example of best

updated in January 2021: <https://www.lendingstandardsboard.org.uk/wp-content/uploads/2021/01/LSB-review-of-the-CRM-Code-FINAL-January-2021-.pdf>

¹⁶⁴ Treasury Select Committee, 'Economic Crime: Consumer View', Chapter 4 (Consumers Rights and Responsibilities) (November 2019), paras 108-114.

On self-regulation and the advantages of private systems of social control over public systems see F Furger, 'Accountability and Systems of Self-Governance: The Case of the Maritime Industry' (1997) 14(4) *Law and Policy* 445, 467.

¹⁶⁵ Lending Standards Board, Follow-up Review of Contingent Reimbursement Model Code for Authorised Push Payment Scams Approach to Reimbursement of Customers – Provision R2(1)(c) (June 2021).

¹⁶⁶ For instance, J Freeman, 'Collaborative Governance in the Administrative State' (1997) 45(1) *UCLA Law Review* 1; R Weber, 'New Governance, Financial Regulation, and Challenges to Legitimacy: The Example of the Internal Models Approach to Capital Adequacy' (2010) 63 *Administrative Law Review* 783.

¹⁶⁷ E Tsingou, 'New Governors on the Block: The Rise of Anti-Money Laundering Professionals' (2018) 69 *Crime, Law and Social Change* 191.

¹⁶⁸ On the impact of JMLIT see HM Treasury and Home Office, Economic Crime Plan, 2019-2022; The Royal United Services Institute Future of Financial Intelligence Sharing, 'Five Years of Growth in Public-private Financial Information Sharing Partnerships to Tackle Crime' (August 2020) available at https://www.future-fis.com/uploads/3/7/9/4/3794525/five_years_of_growth_of_public-private_partnerships_to_fight_financial_crime_-_18_aug_2020.pdf

practice.¹⁶⁹ It was founded in 2015 and brings together banks, the National Crime Agency and the FCA to collectively prevent, detect and disrupt money laundering, terrorist financing and associated threats. While such collaboration is warranted, it should include not only sharing of information between banks and regulators but also within the banking industry,¹⁷⁰ across borders and across all sectors and industries that play a gatekeeper role in fighting money laundering. The advent of privacy-enhancing technologies can alleviate the conflicted position that these collaborations may produce and enable banks to collaborate without risking statutory data privacy infringement and the long-standing duty of confidentiality to their customers.¹⁷¹

CONCLUSIONS

While the arm's length narrative may still be dominant in financial law, the gatekeeper narrative is another emerging narrative that runs alongside the consumerist narrative and can no longer be overlooked. The "social licence" theorem fits in well with the gatekeeper narrative and the gradual regulatory focus on purposeful culture and sustainable finance. Such conception moves away from regulation as a 'fixer' of failures in markets. Instead, it embraces increased participation of the private sector in governance and dynamic collaboration of the private-public sector to achieve common social goals. This article demonstrated how the gatekeeper narrative promulgates the role of banks in detecting and preventing money laundering; is evident in the development of the Quincecare duty in English Courts and in the broader interpretation of banks' duties in the FOS's decisions and reflected in the self-regulatory initiatives of banks in promoting common societal objectives.

The gatekeeper narrative offers the promise of overcoming an informational disadvantage of regulators in complex and global financial markets. Still, banks are not immune to the challenges that exist when enlisting non-state parties to police and advance regulatory goals. A combination of a threat of legal liability and damage to their reputational capital is necessary but not sufficient in driving banks to conduct their monitoring role effectively. Banks are therefore forced to pursue extreme strategies that are primarily aimed at avoiding liability. By changing the standard of liability and offering positive incentives to

¹⁶⁹ FATF, 'Mutual Evaluation Report Anti-Money Laundering and Counter-terrorist Financing Measures United Kingdom, December 2018, 39.

¹⁷⁰ For instance, D Robinson, 'Belgian Banks Plot Platform to Share Anti-money Laundering Data' (*The Banker*, 25 November 2020).

¹⁷¹ Information Commissioner's Office, 'Privacy and Innovation: Lessons Learnt from the FCA TechSprint' (October 2019) available at <https://ico.org.uk/about-the-ico/news-and-events/blog-privacy-and-innovation-lessons-learnt-from-the-fca-techsprint/>

compliance, regulators may mitigate the current “expectation gap” in the fight against money laundering. The gatekeeper narrative does not always coincide with substantive changes on the ground and is subject to interpretation as to the scope of the duties it triggers. This is the case with the Quincecare duty which has gained momentum in the past few years. The narratives that emphasise the public role of banks unearthing fraud and other economic crimes are evident in court decisions but have not yet produced a conclusive scope of the duties that come with that role. The extent of a proactive investigatory role of banks is yet to be fully defined by the courts.

In summary, the gatekeeper narrative, in its nature, tells a story of a shift in the conception of banks by society, regulators, legislators and banks themselves. Banks are no longer viewed simply as passive enablers and facilitators of money laundering and fraud but as participants who play an active positive role in preventing and mitigating the risk of fraud and money laundering.