ABSTRACT

The need for effective supervision of capital markets is becoming all the more evident in the aftermath of the recent LIBOR and rate rigging scandals. Financial regulators or indeed bank regulators cannot perform such a function effectively without the involvement of auditors in the supervisory process. A challenging task awaits the incoming Bank of England Governor, Mark Carney – particularly given the reduced involvement of auditors in the bank supervisory process since the time of assumption of the Financial Services Authority's bank supervisory functions. However, he (as well as other recent financial reforms) may prove to be the much needed boost required in the bank and indeed, financial supervisory process.

This paper is aimed at highlighting why the transfer of bank supervision back to the Bank of England is required if further progress is to be made in the effective regulation and supervision of the financial services sector. It also highlights shortcomings which exist and need to be addressed if the Bank of England is to perform its tasks efficiently as well as regain the momentum and advantages it had acquired before its supervisory powers were transferred to the Financial Services Authority.

Key Words: monetary policy, supervision, Bank of England, FSA, external auditors, regulation, financial stability, Financial Crisis, Basel Core Principles, audits, capital markets, central banks

Why the Transfer of Bank Supervisory Powers Back to The Bank of England is A Step in the Right Direction: Revisiting the Role of External Auditors in Bank and Financial Services Supervision

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A. Introduction

- „As a result of the recent banking crisis, the UK government announced a number of proposed changes to the UK financial regulatory structure. Following the proposed changes, the Bank of England will become the single authority with responsibility for preserving financial stability and providing protection to the wider economy as a whole. In addition, under the proposed Financial Services Bill, the FSA will cease to exist in its current form and will be replaced by three new bodies - the Financial Policy Committee, the Prudential Regulation Authority and the Financial Conduct Authority."

As highlighted in the publications and the book "The Role of the External Auditor in Bank Regulation and Supervision,"[1] the Financial Services Authority (FSA)'s statutory objective of maintaining confidence in the financial system is one that gave rise to concern. This largely being as a result of the reduced role which the Financial Services Authority's predecessor, the Bank of England, assumed in the supervisory process since 1997. Principle 19 of the Basel Core Principles highlights the importance of supervisors in acquiring and sustaining a thorough knowledge not only of individual banks and banking groups being regulated, but also of the banking system in its entirety. Such supervisory role is considered to be a role which in my opinion, the Bank of England would have carried out more effectively than the then designated supervisor, the Financial Services Authority (FSA).

The FSA assumed responsibility for the regulatory functions of the Supervision and Surveillance Division of the Bank of England and these functions are those functions under the Banking Act 1987. The Banking Act 1987 chapter 22, Part 1 section 1(1) gave to the Bank of England powers and the duty to supervise banks. Other banking supervisory functions which the Bank of England

1 See both versions „The Role of the External Auditor in Bank Regulation and Supervision: A Comparative Analysis Between the UK, Germany, Italy and the US" and „The Role of the External Auditor in Bank Regulation and Supervision: A Global Perspective" Lambert Academic Publishing No. ISBN 978-3-8473-7160-1

Act 1998[2] transferred to the FSA are the functions of the Bank of England under the Banking Coordination Regulations 1992 and section 101(4) of the Building Societies Act 1986. Non banking supervision functions under listing of money market institutions and functions relating to listing of persons providing settlement arrangements were also transferred.[3]

The effectiveness of the arrangement (whereby the FSA sought to achieve the objective of maintaining confidence in the financial system and the Bank of England continued responsibility for overall stability of the financial system) in dealing with systemic risks, was put to the test following the collapse of Northern Rock. The major criticism of the crisis at Northern Rock related to the tripartite arrangement between the Bank of England, the FSA and the Treasury. The apparent lack of clarity as regards the allocation of responsibilities between these authorities was revealed following the "buck-passing" and failure by appropriate authorities to promptly spot problems at Northern Rock. The Northern Rock crisis highlighted problems and flaws inherent in the tripartite arrangement between the Treasury, the Financial Services Authority and the Bank of England for dealing with financial stability.[4]

> „Responsibility for the supervision of securities settlement systems and central counterparties will transfer to the Bank of England (the Bank) from the Financial Services Authority (FSA) following the enactment of the Financial Services Bill. The transfer of responsibility is currently expected to take effect on 1 April 2013." [5]

Hence, the Bank of England has been involved in (but not responsible for) the bank supervisory process through the process whereby it exchanges information with the FSA for bank supervisory purposes. In that sense, it still makes vital contribution to the regulatory and supervisory process.

The exchange of information between the Bank of England and the FSA has constituted a vital principle[6] since the Bank of England stood in a position whereby it could provide necessary information required for the FSA to function more effectively. Effective and regular communication is therefore required in order to ensure that the Bank provides timely, accurate and complete information when required and requested for. The FSA's role, in the maintenance of confidence in

2 Chapter 11 Part III section 21
3 ibid
4 See W Buiter 'The Lessons from Northern Rock' *The Financial Times* Nov 13 2007
5 See Bank of England, „The Bank of England's Approach to the Supervision of Financial Market Infrasturctures" December 2012 <http://www.bankofengland.co.uk/publications/Documents/news/2012/nr161.pdf>
6 For more on these principles see the Memorandum of Understanding between HM Treasury, the Bank of England and the Financial Services Authority (2006) paragraph 1

the financial system has been vital since supervision of the financial system is a function which cannot be alienated from the function of the overall stability of the financial system. Furthermore, in order to supervise banks more effectively, knowledge of the workings of monetary dynamics is an essential tool.

The flaws in the tripartite arrangement between the Bank of England, the FSA and the Treasury, as revealed during the Nothern Rock crisis, are however, not the only consequences which emanated as a result of the transfer of bank supervision from the Bank of England to the FSA in 1997. Reduced communication between bank supervisors and external auditors was also a significant consequence which contributed to various issues which will later be higlighted in this paper. The introduction of section 39 reporting accountants' reports in the Banking Act 1987 and related bilateral[7] and trilateral[8] meetings had given the Bank of England, the Financial Services Authority's predecessor, additional powers for comprehensive and expert investigation of accounting and other records and internal control systems.[9] Under the FSA, contact between auditors and itself declined from being routine and annual to an exceptional matter.[10] This decline resulted from the FSA's risk-based approach to supervision.[11] The change from section 39 reporting accountants' reports to section 166 skilled persons' reports also played a part.[12] As a result, in contrast to the Bank of England which regularly used auditors/reporting accountants to help with supervision, the FSA frequently used its own front-line supervisors for risk assessment purposes.[13]

The main benefit of an indirect system of supervision[14] whereby the external auditor acts as an intermediary between the regulator and the regulated institutions is that it provides for the most effective means of obtaining and evaluating crucial information relating to the well-being of the financial institution.[15] The FSA needed to develop better links with the market and consumers. From the Treasury Committee's First Report on Barings Bank and International Regulation, it was highlighted that the Bank of England, the FSA's predecessor, could not perform its main objective

7 Between the Bank of England and banks
8 Between the Bank of England, banks and auditors
9 I P Dewing and P O Russell, *The Role of Auditors, Reporting Accountants and Skilled Persons in UK Financial Services Supervision* Institute of Chartered Accountants of Scotland (2005) 105
10 Ibid pp 105 -107
11 ibid
12 ibid
13 Ibid p 107
14 The external auditors perform direct supervisory functions whilst the supervisor has indirect oversight responsibility and performs direct supervisory functions on important and not so regular occasions. See Huepkes 'The External Auditor and the Bank Supervisor' p 2
15 E Huepkes, 'The External Auditor and the Bank Supervisor' p 12

of protecting the financial system without assessment of the functioning of the firms in the market. Same applies to the FSA. In order to achieve its objectives to the financial system, public, market and consumers, the FSA needed to develop closer links with the market and consumers.

As well as developing better links with the market and consumers, the FSA has also required early warning indicators – indicators which its predecessor, the Bank of England was possibly better equipped with.[16] So who could have helped to provide some solutions to the gap left as a result of the Bank of England's reduced involvement in the banking supervisory process? Whilst external auditors cannot provide early warning signals or perform market surveillance in the same capacity as central banks or regulators, they have valuable and vital third party knowledge of firms and the FSA would benefit immensely by exploiting such priceless expertise and knowledge. As a result, the external auditor could provide vital information and perform numerous specialised tasks at an individual firm level – if not at an industry level.[17]

External auditors are better placed to carry out such procedures because of their expertise in analysing risks associated with internal controls in banks and firms, their ability to validate processes in the measurement of credit, market and operational risks under Basel II[18] and their ability to undertake other specialised functions which are particularly necessary in a business environment in which computer technology and diverse risks have evolved. The FSA places great reliance on the cooperation of regulated firms to provide information which is timely, accurate and complete in order to be able to gauge whether a firm is complying with its requirements. Auditors can help facilitate efficiency within the supervisory process as they are also required under the FSMA to inform the FSA of certain matters of concern and have to provide annual reports to the FSA. The FSA in its proximity to the market and consumers would also need to be mindful of not getting 'captured' by those it is supposed to be regulating.

However, the FSA's effectiveness in carrying out its bank supervisory functions has been impacted tremendously, not only because it is less equipped to handle the responsibility than the Bank of England, but because its risk based approach to supervision has also reduced the involvement of those who could have assisted it in effectively exercising its functions – namely, the external

16 External auditors are not equipped to perform market surveillance in the same capacity as central banks or regulators. The Bank of England's early warning indicators are based on monetary information provided by banks and other financial institutions under the Bank of England Act 1998. The external auditor could not gain access to such information. Market surveillance (industry level) is much wider than the relationship which the external auditor has with the firm (individual firm level). The FSA's early warning indicators are in form of annual Financial Outlook reports for the domestic and international market place.

17 These tasks include the performance of tests of controls, sampling/substantive procedures and verification of financial statements

18 See EHG Huepkes, ' The External Auditor and the Bank Supervisor: " Sherlock Holmes and Doctor Watson?" (2005) 7 (1/2) Journal of Banking Regulation 11

auditors.

B. Arguments in Support of and Against the Separation of Monetary Policy From Bank Supervision

There have been numerous debates relating to whether responsibilities for monetary policy setting and supervision should be combined or alienated. William Keegan highlights various situations whereby „a reunion of responsibility for monetary policy and financial regulation“ have been called for.[19] He also makes references to comments from outgoing and previous central bank chiefs such as Mervyn King and William McChesney Martin.[20] These comments could be inferred to highlight the importance of close collaboration between monetary setting policies and supervisory responsibilities. Following the recent global Financial Crisis, the significance of such collaboration has been brought to greater light. Prior to the Crisis however, there had been many arguments in favour of an alienation between monetary policy setting responsibilities and those responsibilities related to supervision.[21]

As also highlighted in "The Role of the External Auditor in Bank Regulation and Supervision,“ and according to Briault, proponents of the 1997 transfer to the FSA may argue in relation to a conflict of interest, and that a situation whereby the central bank acts as lender of last resort and sets monetary policies as well as supervisor, may give rise to conflict of interest.[22]

However, Briault asserts that arguments against combining responsibilities for monetary policy and banking supervision in a single institution are unsustainable and that the real issue is whether the synergies in combining banking regulation with monetary policy are greater or less than the alternative synergies arising from the creation of a single financial services regulator. He goes on to say that there may however be justification in some developing and transition countries, where the central bank stands (almost) alone as an institution with independence from political interference

19 See W Keegan, „The Bank of England is Back in Charge: Let's Hope it's Concentrating“ <http://www.guardian.co.uk/business/2010/jun/20/william-keegan-bank-of-england-supervision> (last accessed 23 December 2012)

20 „Mervyn King echoed and added to the dictum of a past Federal Reserve chairman, William McChesney Martin, when he said in his speech: "Just as the role of a central bank in monetary policy is to take the punchbowl away just as the party gets going, its role in financial stability should be to turn down the music when the dancing gets a little too wild.“

21 Also see K Whelan, „Should Monetary Policy Be Separated From Bank Supervision?“ December 2012 <http://www.europarl.europa.eu/document/activities/cont/201212/20121210ATT57788/20121210ATT57788EN.pdf >

22 C Briault, 'The Rationale for a Single National Services Regulator' (1999) 2 Financial Services Authority London Occasional Paper 28

and also has the resources to recruit and retain high calibre staff. He adds that in those circumstances, the effectiveness of financial services regulation could be compromised if this function were removed from the central bank.

Benefits in having a single regulator for financial services (as exemplified and embodied by the FSA) amongst other things, included better management of risks generated by various types of businesses and their associations. This is an attribute which cannot be provided by the central bank – whether or not it performs just the sole function of monetary policy setting or additional supervisory responsibilities. Likewise the knowledge and expertise of the central bank is something which cannot be generated by a single regulator. The main issue should be whether a particular jurisdiction benefits more or less from having a single regulator in comparison to having a functional regulator. In my opinion, the function of monetary policy setting is one which should be carried out by the central bank alone. In addition, the question of achieving the right design of regulatory structure of a particular jurisdiction will need to be examined against the background of a particular financial structure of each country rather than being generalised.[23]

According to Goodhart and Schoenmaker, there are many reasons in favour of the central bank also acting as supervisor[24] and these are as follows:

> That the central bank must have concern for the efficient working of the payments system and that as a result, it should also supervise and regulate at least the main money-market commercial banks at the heart of the system;
>
> That any rescue or liquidity crises will usually require quick injection of cash-which can only be done by the central bank. For this reason, it is argued that the central bank and supervisory body work closely together and that this can best be achieved through internalising the supervisory body within the central bank; and
>
> That separation would involve wasteful duplication as there is bound to be a lot of overlap between areas of interest of and information required by and accessible to both the supervisor and the central bank.

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23 Also see C Goodhart and D Schoenmaker, ' Institutional Separation Between Supervisory and Monetary Agencies' (Financial Markets Group Special Papers 1992) 161

24 C Goodhart and D Schoenmaker, ' Institutional Separation Between Supervisory and Monetary Agencies ' (Financial Markets Group Special Papers 1992)140-141; CAE Goodhart, *The Emerging Framework of Financial Regulation* (1998) 249

Arguments for separation include: [25]

> Where government financing is required for any large rescue, politicians and the Ministry of Finance are likely to be involved. For this reason, it is important for the central bank to become more independent in the conduct of monetary policy and less politically involved in its supervisory role;
>
> That bank failures affect credibility and the central bank requires credibility in conducting its monetary policies; and
>
> Where concerns for the micro-level health and stability of parts of the banking system might affect the aim of the central bank's conduct of monetary macro-policy – that is, where there is conflict of interest between the combination of monetary and regulatory function.

As well as the importance and significance of a consideration of the central bank's level of involvement in political matters, the significance of political interference has been highlighted in the manner and conduct whereby the Bank's supervisory powers were transferred to the FSA in 1997. Greater checks and mechanisms should exist to ensure that the Government does not decide on its own in the future, in respect of matters relating to sudden, surprising announcements and subsequent transfer of supervisory powers from the Bank of England to another authority. It might have seemed then (during the initial announcement of the transfer of powers in 1997), that the Bank had fallen short of its expectations and that a single regulator was in a better position to manage cross sector services risks more effectively – however, as will be highlighted in the following section, there were other underlining factors which were also contributory to problems faced by the FSA's financial and supervisory structures, amongst which include: the lack of bank resolution and deposit protection regimes. It could be argued that such possible shortcomings should have been considered and investigated before transferring powers to the FSA.

In the FSA's publication, „The Bank of England, Prudential Regulation Authority: Our Approach to Banking Supervision", several important lessons and shortcomings were drawn and acknowledged from previous regulatory failures:[26]

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25 See ibid

26 FSA, „The Bank of England, Prudential Regulation Authority: Our Approach to Banking Supervision" http://www.bankofengland.co.uk/publications/Documents/other/financialstability/uk_reg_framework/pra_approach.pdf page 7 of 27

„The FSA's supervisory approach prior to the financial crisis of 2007 rested on three assumptions. First, that the Basel capital framework was suitably calibrated and thus adherence to its capital standard would ensure an institution's stability; second, that access to wholesale market liquidity could always be achieved; and third, that senior management judgement and market discipline should not be 'second guessed' by supervisors. The FSA's supervisory focus was thus on ensuring that firms had credible systems and controls to equip management to exercise its responsibility. The presumption was that supervisors should not be exercising judgement on what might happen in the future; this was for management. So supervisors limited their interventions to requiring compliance with detailed standards only if they were technically breached.

In other words, the supervisory approach was in essence reactive and it was designed and built around the premise that regulators should only intervene following observable failings relative to a set of rules rather than seek to prevent potential failure in the future.

The pre-crisis regime also lacked the necessary tools to support the orderly failure of a bank. There was no bank resolution regime and the deposit protection regime was not sufficient to ensure depositor confidence. Both of these two failings have been addressed in recent legislation."

The FSA has also acknowledged that a transfer of bank supervisory powers back to the Bank of England does not serve as a guarantee that future crises would be prevented – since bank related crises had also occurred during the Bank's regime as supervisor. In response to the need to ensure that adequate facilities are in place to facilitate the work of the Bank of England as well as to strengthen the new regulatory system, further measures and investigations have been undertaken and are still being undertaken.[27]

In particular, several criticisms have been highlighted in relation to the Bank of England's inability to address certain issues during the recent Financial Crisis and these are as follows:[28]

- „That the Bank failed to take action as the credit bubble grew, and indeed stoked the excesses with too easy a monetary policy;
- That the inflation remit has been applied in an inconsistent, asymmetric and self-evidently ineffective manner. The MPC banked the external influences during the good years when it was depressing inflation, but asks us to look through these pressures now that it is adding to it;
- That the Bank compounded the loss of financial confidence in the early stages of the crisis by denying the banking system the liquidity support desperately needed to avert calamity.

27 See HM Treasury, „A New Approach to Financial Regulation: Securing Stability Protecting Consumers" January 2012 <http://www.hm-treasury.gov.uk/d/fin_fs_bill_policy_document_jan2012.pdf>. Also see Bank of England, „Bank of England's Approach to Supervision of Financial Infrastructures"<http://www.bankofengland.co.uk/publications/Documents/news/2012/nr161.pdf>

28 See J Warner, „The Bank's Astonishing Escape From the Financial Crisis" 28 May 2011<http://www.telegraph.co.uk/finance/comment/jeremy-warner/8543319/The-Bank-of-Englands-astonishing-escape-from-the-financial-crisis.html#>

Apparent fixation with the dangers of moral hazard caused the Bank to underestimate the seriousness of the crisis until it was too late;

- Lack of governance;
- Straying into the political sphere by apparently backing Conservative plans for front-end-loaded deficit reduction.“

In view of the above criticisms, several calls have been made for adequate investigations to be undertaken before thrusting even greater powers and responsibilities to the Bank of England. Even though it appears that the Bank of England is better equipped to deal with bank supervisory matters than the Financial Services Authority, it is not immune from flaws and weaknesses which have also impacted the FSA's credibility and ability to act prudently and effectively as a single financial services regulator.

Having highlighted the above criticisms, one of the major reasons which could be advanced in support of the Bank of England's capacity and ability to effectively exercise bank supervisory responsibilities – at least to a greater extent than the FSA, will be discussed in the following section.

C. How the Financial Services Authority (FSA) Regime Has Affected the Involvement of External Auditors in the Bank Supervisory Process

It is hoped that the transfer of bank supervision back to the Bank of England will signal the return of greater communication between auditors and bank supervisors – whose frequency of communication has declined during the FSA'S regime as supervisor. It was highlighted under the introductory section that as well as developing better links with the market and consumers, the FSA also required early warning indicators – indicators which its predecessor, the Bank of England was possibly better equipped with.

As well as the reduced level communication between external auditors and bank supervisors during the FSA's regime, another concern relates to the Bank of England's ability to regain the level of expertise it had in its dealings with the financial services industry. According to the Economist,[29] „One concern is that the bank has lost too much of the tacit knowledge of the workings of the

29 The Economist, „The Bank of England_The Old Lady Bulks Up: Britain’s Central Bank Is About to Become Even More Powerful. Its New Boss Will Find it Harder to Run“ September 1 2012 <http://www.economist.com/node/21561944>

financial-services industry needed to be a good all-round regulator. When the bank took over interest-rate policy from the Treasury in 1997, it gave up its role as manager of public debt as well as its job supervising banks. That reduced the contact between bank staff and the City. And the primacy of the inflation mandate diminished the status of the bank's financial-stability wing. Ambitious youngsters steered clear; some experienced staff left. When crisis struck, the bank was stuffed with smart economists but short of folk with a feel for finance. It will take time to restore the balance. A bigger worry now is that the proliferation of committees will lead to internal strife........"

The role and impact of audits, auditors and accounting in the bank supervisory process is further illustrated thus:

„Accounting and auditing is what underpins the capital markets, the uninitiated cannot see it."[30]

Furthermore, as stated in the Committee's Report,[31] „ Adequate and timely dialogue between bank auditors and supervisors is of the first importance. The provisions of the 1987 Act explicitly concerned communication between the auditors and the Bank of England, which was then the supervisory authority. The transfer in 1997 of this responsibility from the Bank to the Financial Services Authority meant that the relevant provisions needed to be reenacted in the legislation implementing the transfer, so as to ensure the necessary dialogue between the auditors and the FSA."[32]

Following an acknowledgement that „the FSA had also in made much less frequent use of skilled persons' reports as a routine supervisory tool [these having been another innovation of the 1987 Act], that the regular meetings that these had previously engendered helpfully reinforced the links between the auditor and supervisor, that the auditor has an important role to play in the regulatory framework, and that an effective relationship between the two parties needed to be re-established",

30 See House of Lords (Lords Select Committees) : Auditors: Market concentration and their role - Economic Affairs Committee_ CHAPTER 6: Bank audits and the financial crisis , See reference to Professor Beattie's remarks. <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeconaf/119/11909.htm>

31 Ibid paragraphs 155 and 159

32 „ It was also noted in the Committee's Report that „However, in practice the regular dialogue which had been working well following the passage of the 1987 Act appeared to fall into desuetude following the 1997 transfer of supervisory responsibility from the Bank to the FSA. Of the three troubled banks which subsequently had to be bailed out by the taxpayer—Northern Rock, HBoS and the Royal Bank of Scotland, the Committee was informed that in 2006, there was not a single meeting between the FSA and the external auditors of either Northern Rock (PwC) or HBoS (KPMG), and only one meeting between the auditor of RBS (Deloitte) and the FSA; and that in the whole of 2007 there was only one FSA/auditors meeting with each bank auditor. Even in 2008 there were only two meetings between the FSA and the auditors of Northern Rock and HBoS and none between the FSA and the auditors of RBS. As the FSA admitted to us, "the regular practice of auditor-supervisor meetings fell away gradually following the transition from the Bank of England to the FSA as banking supervisor." see ibid at paragraph 160

a draft code for the relationship between the external auditor and supervisor was duly published by the FSA for guidance consultation in February 2011.[33] Furthermore, it was conceded that a Code of Practice would be insufficient to address the issues at hand and that a statutory obligation would also be required.

D. Conclusion

There has always been a strong conviction and argument for the case that bank supervisory functions should have been left under the ambit of the Bank of England. The Bank was simply better endowed with greater expertise and knowledge of individual banks than any other authority could have acquired. A loss of a significant level of its supervisory functions not only resulted in reduced communication between bank supervisors and external auditors, but also deprived it of consolidating upon its vital capital knowledge of the workings of the financial (and particularly the banking) services industry. The reduced involvement of external auditors in the supervisory process has also dealt a significant blow in the efficient regulation of the financial services industry. The need for effective supervision of capital markets is becoming all the more evident in the aftermath of the recent LIBOR and rate rigging scandals. Financial regulators or indeed bank regulators cannot perform such a function effectively without the involvement of auditors in the supervisory process. A challenging task awaits the incoming Bank of England Governor, Mark Carney[34] – however, he (as well as other recently implemented reforms) may prove to be the much needed boost required in the bank, and indeed financial supervisory process.

33 See ibid paragraphs 162 -163

34 Who resumes his position as from the 1st July 2013

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