



*The Law Library of Congress*

# REPORT FOR CONGRESS

July 2012

---

Global Legal Research Center  
LL File No. 2012-008260

## POSSIBLE ACTIONS RELATING TO THE LIBOR SCANDAL (Part One)

*Australia, Canada, China, the European Union,  
and the Russian Federation*

---

The Library of Congress  
James Madison Memorial Building, 101 Independence Avenue, S.E., Room LM-240  
Washington, DC 20540-3200  
(202) 707-6462 (phone), (866) 550-0442 (fax), [law@loc.gov](mailto:law@loc.gov) (email)  
<http://www.loc.gov/law>

## CONTENTS

<b>AUSTRALIA</b> .....	<b>1</b>
<i>Kelly Buchanan</i>	
<b>CANADA</b> .....	<b>9</b>
<i>Tariq Ahmad</i>	
<b>CHINA</b> .....	<b>14</b>
<i>Laney Zhang</i>	
<b>EUROPEAN UNION</b> .....	<b>18</b>
<i>Theresa Papademetriou</i>	
<b>RUSSIAN FEDERATION</b> .....	<b>23</b>
<i>Peter Roudik and Virab Khachatryan</i>	

LAW LIBRARY OF CONGRESS

AUSTRALIA

POSSIBLE ACTIONS RELATING TO THE LIBOR SCANDAL

*Executive Summary*

*While Libor is used as the benchmark rate for some transactions involving significant investors resident in Australia, smaller investments and loans are largely based on the domestic equivalent of Libor and therefore unlikely to be broadly affected by the rate rigging scandal. The Australian industry and regulators have not expressed concern about the activities of banks operating in Australia with regard to similar manipulation and no investigations have been reported. An Australian law firm has reported that it is working with clients to determine whether a class action suit should be brought against Barclays and other banks. Causes of action in this context could include statutory provisions that prohibit misleading or deceptive conduct as well as tort actions such as deceit. Questions relating to intent, causation, reliance, and evidence of losses may be relevant in these cases.*

**I. Use of Libor in Australia**

Libor is used as the benchmark rate for some global transactions and investments by Australian-based entities. According to the Wall Street Journal, “Libor forms the basis of over-the-counter currency-hedging tools, like interest-rate and cross-currency swaps.”<sup>1</sup> Referring to central bank data, the article states that, as of March 2012, “banks in Australia held a total of A\$2.16 trillion in OTC foreign exchange swaps and A\$8.52 trillion of OTC interest-rate swaps on their books.”<sup>2</sup> However, Libor’s domestic equivalent, the Bank Bill Swap (BBSW) rate is generally the benchmark rate for borrowing costs and Australian dollar debt within the Australian financial system.<sup>3</sup>

In the wake of the Libor rigging revelations, the body that administers the BBSW, the Australian Financial Markets Association (AFMA), has highlighted differences in the way the Australian rate is formulated that it says make it less prone to manipulation.<sup>4</sup> In particular, the

---

<sup>1</sup> Caroline Henshaw, *Update: Australian Investors Mull Legal Options Over Libor*, THE WALL STREET JOURNAL (July 9, 2012), [http://online.wsj.com/article/BT-CO-20120709-702302.html?mod=WSJ\\_qtoverview\\_wsjlatest](http://online.wsj.com/article/BT-CO-20120709-702302.html?mod=WSJ_qtoverview_wsjlatest).

<sup>2</sup> *Id.*

<sup>3</sup> See *Bank Bill Swap (BBSW) Reference Rates Explained*, AUSTRALIAN FINANCIAL MARKETS ASSOCIATION (AFMA), <http://www.afma.com.au/data/bbsw/bbswexplained.html> (last visited July 12, 2012).

<sup>4</sup> Nathan Lynch, *The Bank Bill Swap Rate: Could the LIBOR Scandal Happen in Australia*, UNSW Center for Law, Markets & Regulation, <http://www.clmr.unsw.edu.au/article/ethics/white-collar-crime,-aml,-bribery-%26-corruption/bank-bill-swap-rate-could-libor-scandal-happen-australia> (last visited July 13, 2012). For detailed

Australian participants that contribute data to the BBSW rate-setting process are asked about the actual rates they are observing for physical transactions in the market for Prime Bank paper at 10:00 a.m. each day, rather than being asked for the rate that a bank could trade its own paper as occurs with the Libor process.<sup>5</sup>

Six of the fourteen banks that participate in the BBSW process have been implicated in the Libor scandal. Barclays is not a member of the BBSW panel.<sup>6</sup> However, AFMA has stated that “these are the Australian-regulated operations of the institutions under investigation and the process in Australia is very different.”<sup>7</sup> It also said that there is “a strict industry governance process” in place in relation to the BBSW and controls in place to minimize the impact of any conflicts.<sup>8</sup> The executive director of AFMA stated that the “quality of BBSW rate contributions has been consistently high, with few outlying rates reported.”<sup>9</sup>

## II. Regulatory and Criminal Actions

Banks and other financial institutions that operate in Australia are licensed and supervised by the Australian Prudential Regulatory Authority (APRA) which “promotes financial stability by requiring these institutions to manage risk prudently so as to minimise the likelihood of financial losses to depositors, policy holders and superannuation fund members.”<sup>10</sup> A number of legislative instruments regulate and apply to APRA’s role and activities.<sup>11</sup> At a recent conference, held after the fining of Barclays by United States and United Kingdom regulators over the Libor scandal, the chairman of APRA highlighted the need for new global banking rules that would largely be based on the Basel reforms.<sup>12</sup> This might include provisions

---

information on the BBSW procedures see AFMA, Bank Bill Swap (BBSW) Reference Rate Procedures (June 2012), <http://www.afma.com.au/afmawr/assets/main/lib90031/bank%20bill%20swap%20%28bbsw%29%20reference%20rate%20procedures.pdf>.

<sup>5</sup> *Id.* There are currently four qualifying prime banks in Australia.

<sup>6</sup> Eric Johnston, *No Problems with Australia’s Libor Equivalent, Says its Overseer*, THE SYDNEY MORNING HERALD (July 3, 2012), <http://www.smh.com.au/business/no-problems-with-australias-libor-equivalent-says-its-overseer-20120702-21dvn.html>.

<sup>7</sup> Lynch, *supra* note 4.

<sup>8</sup> *Id.* According to AFMA, “[g]overnance of BBSW processes is the responsibility of the Market Governance Committee (MGC), an elected Committee representing the broad market. MGC regularly reviews the management of BBSW rate conventions and processes, and authorises changes to conventions that support the BBSW process.” *Bank Bill Swap (BBSW) Reference Rates Explained*, *supra* note 3.

<sup>9</sup> Eric Johnston, *Local Lending Rate Tool is “Sound”, Despite Role of UK Scandal Banks*, THE SYDNEY MORNING HERALD (July 3, 2012), <http://www.smh.com.au/business/local-lending-rate-tool-is-sound-despite-role-of-uk-scandal-banks-20120702-21ddu.html>.

<sup>10</sup> *Supervision*, AUSTRALIAN PRUDENTIAL REGULATORY AUTHORITY (APRA), <http://apra.gov.au/AboutAPRA/Pages/Supervision.aspx> (last visited July 13, 2012). Details about APRA’s approach to supervision are set out in APRA, *The APRA Supervision Blueprint* (Jan. 2010), <http://apra.gov.au/AboutAPRA/Documents/APRA-Supervision-Blueprint-FINAL.pdf>.

<sup>11</sup> *See Legislation that Applies to APRA’s Activities*, APRA, <http://apra.gov.au/AboutAPRA/Pages/APRA-Legislation.aspx> (last visited July 13, 2012).

<sup>12</sup> Eric Johnston, *Bank Watchdog Throws Weight Behind Tougher Rules*, THE AGE (July 12, 2012), <http://www.theage.com.au/business/bank-watchdog-throws-weight-behind-tougher-rules-20120711-21w7i.html>;

relating to additional scrutiny by the regulator. According to reports, the Australian Bankers Association accepts that the actions of banks overseas affects the reputation of the industry in Australia, but states that regulatory changes are needed in other countries rather than in Australia where the same problems have not arisen.<sup>13</sup>

In addition to the supervisory role performed by APRA, the financial sector and securities market in Australia is monitored by the Australian Securities and Investment Commission (ASIC). In particular, ASIC regulates “Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.”<sup>14</sup>

Consumer protection provisions relating to financial services or financial products can be found in Division 2 of Part 2 of the Australian Securities and Investments Commission Act 2001 (ASIC Act).<sup>15</sup> Under this legislation, ASIC has “powers to protect consumers against misleading or deceptive and unconscionable conduct affecting all financial products and services.”<sup>16</sup> Among ASIC’s powers are the ability to “investigate suspected breaches of the law and in so doing require people to produce books or answer questions at an examination”; “issue infringement notices in relation to alleged breaches of some laws”; “seek civil penalties from the courts”; and “commence prosecutions.”<sup>17</sup>

To date there have been no reports that Australian regulators are intending to initiate investigations that might lead to criminal or civil proceedings against banks in relation to the Libor scandal, and the regulators and industry members have not expressed any concerns about similar practices occurring in Australia.<sup>18</sup>

---

Eric Johnston, *Regulator Urges Long View on Capital Reforms*, THE SYDNEY MORNING HERALD (July 12, 2012), <http://www.smh.com.au/business/regulator-urges-long-view-on-capital-reforms-20120711-21wap.html>.

<sup>13</sup> Lexi Metherell, *Bankers Concede Need for Sector Fix*, ABC News (July 11, 2012), <http://www.abc.net.au/news/2012-07-11/bankers-concede-need-for-sector-fix/4124414>; Lexi Metherell, *Barclays Scandal Opens Way for Reform*, ABC News (July 9, 2012), <http://www.abc.net.au/pm/content/2012/s3542097.htm>.

<sup>14</sup> *Our Role – Who We Regulate*, AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC), <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Our%20role#who> (last visited July 12, 2012).

<sup>15</sup> Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act), <http://www.comlaw.gov.au/Details/C2012C00398>.

<sup>16</sup> *Misleading & Deceptive Conduct*, AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC), <http://www.accc.gov.au/content/index.phtml/itemId/815335/> (last visited July 12, 2012).

<sup>17</sup> *Our Role – Our Powers*, ASIC, <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Our%20role#powers> (last visited July 12, 2012).

<sup>18</sup> See Peter Ryan, *Rates Fixing Scandal Widens*, ABC NEWS (Radio Transcript, July 4, 2012), <http://www.abc.net.au/news/2012-07-04/rates-fixing-scandal-widens/4109746>; Lynch, *supra* note 4; Scott Murdoch, *Barclays Debacle “Couldn’t Happen Here”*, THE AUSTRALIAN (July 6, 2012), <http://www.theaustralian.com.au/business/financial-services/barclays-debacle-couldnt-happen-here/story-fn91wd6x-1226418318662>; David Uren, *Banks “Can’t Regulate Against Recklessness”*, THE AUSTRALIAN (July 12, 2012), <http://www.theaustralian.com.au/business/economics/banks-cant-regulate-against-recklessness/story-e6frg926-1226423868183>.

### III. Private Actions by Investors

A number of reports have referred to an Australian law firm being approached by potential clients who have purchased Libor-referenced financial instruments in relation to building a class action lawsuit against Barclays or other banks involved in manipulating the rate.<sup>19</sup> A representative of the firm has stated that it is monitoring the results of the overseas inquiries before it brings an action and that “it will be some months before we complete the due diligence process.”<sup>20</sup> The firm also indicated that the Libor scandal is “more likely to have directly affected big Australian companies and sophisticated investors rather than smaller borrowers” since Australian retail lending rates are not based on Libor.<sup>21</sup> However, the firm is not ruling out a future case involving retail investors, although it notes that “proving how they would have been directly affected by the Libor scandal would be much more difficult.”<sup>22</sup> The reports do not state what causes of action are being considered.

Australian banks have largely not commented on the extent to which they may have been impacted by the manipulation of Libor, but the National Australian Bank said it is conducting internal investigations on the matter while the Bank of Queensland stated that it had not been affected.<sup>23</sup>

#### 1. Misleading or Deceptive Conduct under the ASIC Act

Private actions in Australia can be brought under the ASIC legislation referred to above under provisions that prohibit “misleading or deceptive conduct”<sup>24</sup> in relation to the provision of

---

<sup>19</sup> See, e.g., Scott Murdoch, *Law Firm Threatens Libor Class Action Against Barclays*, THE AUSTRALIAN (July 10, 2012), [http://www.theaustralian.com.au/business/financial-services/law-firm-threatens-libor-class-action-against-barclays/story-fn91wd6x-1226422018354?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+TheAustralianBusNews+%28The+Australian+%7C+Business+%7C+News%29](http://www.theaustralian.com.au/business/financial-services/law-firm-threatens-libor-class-action-against-barclays/story-fn91wd6x-1226422018354?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+TheAustralianBusNews+%28The+Australian+%7C+Business+%7C+News%29); Lexi Metherell, *Australian Lawyers Look at Libor Suit*, ABC NEWS (July 6, 2012), <http://www.abc.net.au/news/2012-07-06/australian-libor-lawsuit/4115240>; *Law Firm Eyes Aust Class Action Over Libor Scandal*, BUSINESS SPECTATOR (July 10, 2012), <http://www.businessspectator.com.au/bs.nsf/Article/Law-firm-eyes-Aust-class-action-over-Libor-scandal-pd20120709-W2QBR?OpenDocument&src=hp6>; *Law Firm Threatens Libor Class Action*, TRADINGCHARTS.COM (July 10, 2012), [http://futures.tradingcharts.com/news/futures/Law\\_firm\\_threatens\\_Libor\\_class\\_action\\_181594772.html](http://futures.tradingcharts.com/news/futures/Law_firm_threatens_Libor_class_action_181594772.html); Caroline Henshaw, *supra* note 1.

<sup>20</sup> Leanne Mezrani, *Slaters Threatens LIBOR Class Action*, Lawyers Weekly (July 12, 2012), <http://www.lawyersweekly.com.au/news/slaters-threatens-libor-class-action>. See also Scott Murdoch, *supra*.

<sup>21</sup> Lexi Metherell, *Lawyers Looking for Local LIBOR Losses*, ABC News (July 6, 2012), <http://www.abc.net.au/pm/content/2012/s3540730.htm>.

<sup>22</sup> *Australian Lawyers Look at Libor Suit*, RADIO AUSTRALIA (July 6, 2012), <http://www.radioaustralia.net.au/international/2012-07-06/australian-lawyers-look-at-libor-suit/975238>.

<sup>23</sup> Lexi Metherell, *supra* note 21.

<sup>24</sup> ASIC Act s 12DA.

financial services, which includes “dealing in a financial product.”<sup>25</sup> Financial products include such things as securities, derivatives, deposit taking facilities, and credit facilities.<sup>26</sup>

With regard to the jurisdiction of Australian courts, the ASIC provisions apply to Australian resident companies and also to conduct in Australia or between Australia and places outside Australia.<sup>27</sup> It has been held, for example, that communication by telephone or facsimile from England to Australia and a representation made outside Australia but received in Australia, where the representor knew and expected that the representation would be received in Australia, amounted to engaging in conduct in Australia.<sup>28</sup>

The relevant provisions in the ASIC Act can be seen as prohibiting conduct having a particular effect.<sup>29</sup> Whether particular conduct “is of the prohibited character has frequently been said to be a question to be determined in all the circumstances of the case.”<sup>30</sup> The general nature of the provisions means that “the range of acts or omissions which may breach the prohibition on misleading or deceptive conduct is extremely wide.”<sup>31</sup> Furthermore, the provisions do not contain an element of intent or dishonesty, and also do not require that a plaintiff show that the defendant knew or was reckless to the falsity of a representation such as is required in fraud cases. Thus the provisions are of “significantly wider ambit than other analogous general law causes of action.”<sup>32</sup>

There is also no express reference in the provisions to requirements relating to proving misleading or deceptive conduct. However, proving the elements of a breach of the provisions can be seen as involving establishing, on the balance of probabilities, that “(i) the impugned conduct was engaged in; (ii) the conduct conveyed a certain meaning; and (iii) the meaning conveyed was misleading or deceptive or likely to be so.”<sup>33</sup>

In terms of remedies, these include preventative or corrective orders as well as compensation for persons who have suffered loss or damage by a contravention of the prohibition on misleading or deceptive conduct.<sup>34</sup> The compensatory remedies “require proof of a causal link between a breach of the prohibition and the loss claimed and are subject to express limitation periods.”<sup>35</sup> The ASIC Act provides that an action for damages “may be commenced

---

<sup>25</sup> *Id.* s 12AB(1).

<sup>26</sup> COLIN LOCKHART, *THE LAW OF MISLEADING OR DECEPTIVE CONDUCT* 5 (2011). “Financial product” is defined in s 12BAA of the ASIC Act, “dealing” is defined in s 12BAB(7).

<sup>27</sup> *Id.* at 22.

<sup>28</sup> *Id.* at 29-30.

<sup>29</sup> *Id.* at 64.

<sup>30</sup> *Id.* at 65.

<sup>31</sup> *Id.* at 98.

<sup>32</sup> *Id.* at 70.

<sup>33</sup> *Id.* at 85.

<sup>34</sup> ASIC Act s 12GF.

<sup>35</sup> Lockhart, *supra* note 26, at 213.

within 6 years after the day on which the cause of action that relates to the conduct accrued.”<sup>36</sup> Thus, in the Libor case, claims for damages might go back to conduct and losses in 2006, depending on when the case is filed.

Various cases have discussed the issue of causation. Findings have included that the “but-for” test is not determinative of causation; the conduct of the defendant “need not be the only cause of loss or damage in order for it to be compensable”; damages cannot be awarded for the loss if something other than a breach of the prohibition was the “real, essential, substantial, direct or effective cause”; and that causation for the purposes of the provisions is “not necessarily limited by the common law concept of inducement.”<sup>37</sup> In terms of reliance, while establishing reliance appears to be a means of proof of causation in claims under the legislation, “some doubt remains as to whether reliance must be proved to establish causation under that setting.”<sup>38</sup> Previous findings that might be relevant could include that reliance may be established “by evidence that the impugned conduct merely reinforced or confirmed a previous belief or understanding, or that the conduct constituting a breach, though only one of a number of representations made, was a ‘substantive consideration’ for entering an agreement.”<sup>39</sup>

There is also the question of showing the actual losses that resulted from the misleading or deceptive conduct, and therefore the amount of damages that should be awarded. It has not been possible in the time available to analyze the findings and rules in this context that might possibly be relevant to the Libor case in Australia. The general statement in the Act is that “a person who suffers loss or damage by conduct of another person that contravenes a provision [in the relevant subdivisions] may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.”<sup>40</sup> The law firm involved in the case is apparently examining the loss issue and has said that they are likely to be “in the billions of dollars.”<sup>41</sup>

## 2. Tort Actions

The ASIC Act does not abolish general causes of action for pure economic loss. Unlike United States law, under Australian law there is “no general principle of liability for even intentionally inflicted economic loss [, and thus] a plaintiff must bring the facts of his or her case within the narrower principles of a specific tort.”<sup>42</sup>

The torts of deceit and conspiracy are two of the possible causes of action in the Libor case. Unlike the statutory cause of action discussed above, both of these torts involve an element

---

<sup>36</sup> ASIC Act s 12GF(2).

<sup>37</sup> Lockhard, *supra* note 26, at 308.

<sup>38</sup> *Id.* at 309.

<sup>39</sup> *Id.* at 318.

<sup>40</sup> ASIC Act s 12GF(1).

<sup>41</sup> Lexi Metherell, *Australian Lawyers Look at Libor Suit*, ABC News (July 6, 2012), <http://www.abc.net.au/news/2012-07-06/australian-libor-lawsuit/4115240?section=business>.

<sup>42</sup> KIT BARKER ET AL., *THE LAW OF TORTS IN AUSTRALIA* 229 (5<sup>th</sup> ed., 2012).

of intent. There does not appear to be a definitive view of what is required for this element, however it is possible that “it does not matter whether it was [the defendant’s] predominant purpose to harm [the plaintiff], or that such harm was just *one* of [the defendant’s] purposes in the sense that harming [the plaintiff] was deliberately chosen as a necessary (inevitable) means to [the defendant’s] other ends, such as making a profit.”<sup>43</sup>

To establish deceit, the plaintiff must prove five elements: “(1) that D made a false representation; (2) that D was dishonest – lacking an honest belief in the representation’s truth; (3) that D intended P to rely upon the representation; (4) that P did in fact act in reliance on the representation; and (5) that P suffered damage as a result of this reliance.”<sup>44</sup>

Under this tort, it is not necessary to show that the representation was made directly or solely from the defendant to the plaintiff; “it can be made to a third party to pass on to the plaintiff, or it can be made to a group to which the plaintiff belongs, so that the plaintiff is just one of a number of persons the defendant intends to deceive.”<sup>45</sup> In terms of reliance, which is required in order to prove causation, the court will draw a factual inference that the plaintiff acted upon a representation if it is shown that the plaintiff “acted in the manner contemplated by the defendant making the representation ... or in a manner manifestly probable or most natural.”<sup>46</sup>

A plaintiff needs to show that its losses “flowed directly” from the fraudulent representation. Given that the objective of damages is to “put the plaintiff in the position he or she would have been in had the deceit not occurred,” where the deceit results in a purchase of an asset above its true market value “the basic measure of damages is the difference between the price paid and the lesser, true value of the asset at the date of purchase.”<sup>47</sup> A plaintiff can recover all damage directly resulting from a deceit and can also seek exemplary damages.<sup>48</sup>

The tort of conspiracy has been used “where one set of traders combines to cause economic loss to another set of traders” and therefore can be seen as having a function of “controlling the abuse of economic power and anti-competitive practices by trading ‘cartels’.”<sup>49</sup> One way that the tort can be committed is by two or more persons combining to commit an unlawful act, which consequently causes the plaintiff economic loss.<sup>50</sup> In this situation, it is sufficient that “*one* purpose of the conspirators is to cause P harm by means of the unlawful conduct, even if it is not their predominant or main purpose.”<sup>51</sup> The other way is that two or

---

<sup>43</sup> *Id.* at 232.

<sup>44</sup> *Id.* at 233.

<sup>45</sup> *Id.* at 237.

<sup>46</sup> *Id.* at 238.

<sup>47</sup> *Id.* at 239.

<sup>48</sup> *Id.* at 234.

<sup>49</sup> *Id.* at 282.

<sup>50</sup> *Id.* at 283.

<sup>51</sup> *Id.* at 288.

more persons conspire to injure a plaintiff by lawful means. In this case, “it is possible to avoid liability by showing that the motive of the conspirators in acting was self-interest: that is, the protection or advancement of legitimate trading, professional or economic interests common to the defendants.”<sup>52</sup>

As noted above, the law firm in Australia is monitoring the outcomes of overseas investigations, which may include conclusions as to whether there was agreement between the banks to manipulate Libor and also whether the activities amounted to criminal acts. Such findings could impact whether a claim of conspiracy is brought.

Prepared by Kelly Buchanan  
Chief, Foreign, Comparative, and  
International Law Division I  
July 2012

---

<sup>52</sup> *Id.* at 289.

## LAW LIBRARY OF CONGRESS

### CANADA

#### POSSIBLE ACTIONS RELATING TO THE LIBOR SCANDAL

##### *Executive Summary*

*Canada's Competition Bureau is currently investigating the Canadian branches of numerous foreign banks in connection with the Libor price-fixing scandal. It is investigating banks that were allegedly involved in "collusive conduct" in fixing the yen interbank lending rates. At this point there is no conclusion of findings nor have charges been framed.*

*The Competition Act is Canada's antitrust regulatory law. It contains both criminal and civil provisions against anticompetitive practices or behavior. Moreover, the law allows for a private right to sue those who are in violation of the criminal provisions of the law. Other criminal and civil actions may be relevant to this scandal as well.*

#### **I. Introduction**

The Competition Act<sup>1</sup> is Canada's antitrust law. The Act is administered and enforced by the Competition Bureau,<sup>2</sup> headed by the Commissioner of Competition.<sup>3</sup>

Recent news reports indicate that Canada's Competition Bureau is currently investigating the "Canadian operations of half a dozen foreign banks, including HSBC Bank, Royal Bank of Scotland, Deutsche Bank, JP Morgan Chase and Citibank," in relation to the Libor price-fixing scandal.<sup>4</sup> According to *The Wall Street Journal*,

Canada's top antitrust watchdog said it is investigating allegations of collusion in the setting of key benchmark interest rates, joining law-enforcement authorities across the globe in a probe of how the rates are set.

---

<sup>1</sup> Competition Act, R.S.C., 1985, c. C-34, <http://laws-lois.justice.gc.ca/eng/acts/C-34/index.html>.

<sup>2</sup> *Our Organization*, COMPETITION BUREAU, [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00125.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00125.html) (last modified Oct. 4, 2011).

<sup>3</sup> *Id.*

<sup>4</sup> John Greenwood, *Fallout from Libor Scandal Likely to Hit Canada's Financial Industry*, FINANCIAL POST (July 5, 2012), <http://business.financialpost.com/2012/07/05/fallout-from-libor-scandal-likely-to-hit-canadas-financial-industry/>.

A spokeswoman for Canada's Competition Bureau said Monday that the agency is investigating alleged collusive conduct into the setting of yen interbank lending rates.<sup>5</sup>

The Competition Bureau has granted UBS AG conditional immunity for cooperating in the investigation.<sup>6</sup> According to news reports, UBS AG, as a "cooperating party," told "the bureau that banks, at times facilitated by cash brokers, agreed to make artificially high or low submissions for the benchmark rate known as Yen Libor."<sup>7</sup> Much of this information was obtained from an affidavit filed by the Competition Bureau with the Ontario Superior Court in May.<sup>8</sup>

A Competition Bureau spokesperson said there is no conclusion of wrongdoing nor have charges been laid.<sup>9</sup>

## II. Regulatory Enforcement for Anti-competitive Practices

The Competition Act has both criminal<sup>10</sup> and civil provisions.<sup>11</sup> Under its criminal provisions, the Act prohibits, inter alia, conspiracy, conspiracy involving federal financial institutions, bid rigging, false or misleading representations, deceptive telemarketing, and pyramid selling.<sup>12</sup> Civil matters, on the other hand, are subject to remedial orders and/or penalties (only in respect to companies who have abused a dominant position in the marketplace) issued by the Competition Tribunal.

Civil "reviewable" practices are stipulated in Part VIII of the Act and include, inter alia, provisions on price maintenance, exclusive dealing, tied-selling, market restriction, abuse of

---

<sup>5</sup> Ben Dummett et al., *Canada Examines How Benchmark Rates Get Set*, WALL STREET JOURNAL (Feb. 14, 2012), [http://online.wsj.com/article/SB10001424052970204062704577221523732524142.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB10001424052970204062704577221523732524142.html?mod=googlenews_wsj).

<sup>6</sup> Elena Logutenkova, *UBS Says It Got Conditional Immunity In Canadian Libor Probe*, BLOOMBERG (Mar. 15, 2012), <http://www.bloomberg.com/news/2012-03-15/ubs-says-it-got-conditional-immunity-in-canadian-libor-probe.html>; see also *Cartels Update: UBS Granted Conditional Immunity in Ongoing LIBOR Price-fixing*, CANADIAN REGULATORY LAW: NEWS, RULES & TRENDS (Mar. 2012), <http://www.ipvancouverblog.com/2012/03/ubs-granted-conditional-immunity-in-ongoing-libor-price-fixing-investigation/>.

<sup>7</sup> Andrew Mayeda & Joshua Gallu, *JPMorgan, HSBC Among Firms Facing Canada Libor-Fixing Probe*, BLOOMBERG BUSINESS WEEK (Feb. 14, 2012), <http://www.businessweek.com/news/2012-02-14/jpmorgan-hsbc-among-firms-facing-canada-libor-fixing-probe.html>.

<sup>8</sup> *Cartel Update: Competition Bureau Investigates Alleged Interbank Lending Rate Coordination*, CANADIAN REGULATORY LAW: NEWS, RULES & TRENDS (Feb. 2012), <http://www.ipvancouverblog.com/2012/03/ubs-granted-conditional-immunity-in-ongoing-libor-price-fixing-investigation/>.

<sup>9</sup> Andrew Mayeda & Joshua Gallu, *JPMorgan, HSBC Among Firms Accused By Informant Bank In Canada Libor Case*, BLOOMBERG (Feb. 15, 2012), <http://www.bloomberg.com/news/2012-02-15/jpmorgan-hsbc-implicated-by-informant-bank-in-canada-libor-case.html>.

<sup>10</sup> Competition Act, R.S.C., 1985, c. C-34, pt. VI, <http://laws-lois.justice.gc.ca/eng/acts/C-34/index.html>.

<sup>11</sup> *Id.*, pt. VIII.

<sup>12</sup> *Id.* pt. VI

dominant position, and merger review.”<sup>13</sup> Moreover, the Act also allows for private actions against parties alleged to have been in breach of the criminal provisions of the Act.<sup>14</sup>

Price fixing (and other collusive arrangements or agreements) is a criminal offense under section 45 of the Competition Act, with penalties on conviction of up to fourteen years or a fine of up to Can\$25 million (about US\$24.6 million).<sup>15</sup> After recent amendments to the Act, collusion between competitors is now illegal per se, “without any need to prove undue lessening of competition as required under prior law.”<sup>16</sup>

Specifically, arrangements or agreements between federal financial institutions, or fixing “the rate of interest or the charges on a loan,” are also a separate indictable offense.<sup>17</sup> Moreover, “every director, officer or employee of the federal financial institution who knowingly makes such an agreement or arrangement on behalf of the federal financial institution is guilty of an indictable offence.”<sup>18</sup> Those in violation of section 49 are “liable to a fine not exceeding [Can.] ten million dollars or to imprisonment for a term not exceeding five years or to both.”<sup>19</sup>

False or misleading representations are an indictable offense under the Act. Section 52 provides that

[n]o person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.<sup>20</sup>

Parties guilty of the offense are liable on conviction to a fine “in the discretion of the court” or to imprisonment for a term not exceeding fourteen years.<sup>21</sup> If indicted on summary conviction, the fine cannot exceed Can\$200,000 and the term of imprisonment cannot exceed one year.<sup>22</sup>

Section 36 of the Act establishes a private right of action for loss or damage suffered as a result of another party’s breach of “any of the criminal provisions of Part VI of the Act, or failure

---

<sup>13</sup> *Id.*, pt. VIII.

<sup>14</sup> Competition Act § 36.

<sup>15</sup> *Id.* § 45.

<sup>16</sup> Peter Franklyn & Peter Glossop, *Ch. 6: Competition Law in Canada*, in *DOING BUSINESS IN CANADA* 26 (Osler, Hoskin & Harcourt, 2011), [http://www.osler.com/uploadedFiles/News\\_and\\_Resources/Publications/Guides/Doing\\_Business\\_in\\_Canada\\_-\\_2011/DBIC-Chapter6-revised-March%2021-2012.pdf](http://www.osler.com/uploadedFiles/News_and_Resources/Publications/Guides/Doing_Business_in_Canada_-_2011/DBIC-Chapter6-revised-March%2021-2012.pdf).

<sup>17</sup> Competition Act § 49.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* § 52.

<sup>21</sup> *Id.* § 52(5)(a).

<sup>22</sup> *Id.* § 52(5)(b).

to comply with an order made pursuant to the Act.”<sup>23</sup> According to the section, the recovery of damages is limited to actual or compensatory damages. The section states that recoverable damages are “an amount equal to the loss or damage proved to have been suffered.”<sup>24</sup> Moreover, the successful party in an action is entitled to “recover the costs of a proceeding, including its legal fees and disbursements.”<sup>25</sup> The Canadian law firm Blakes has stated,

[u]nlike in the U.S., this right limits the recoverable damages to losses that can be proven to have resulted from the violation of the Act or the failure to comply with the order in question. In addition to only allowing single damages, the relevant Canadian jurisprudence indicates that parties will not generally be able to recover other types of damages, such as punitive damages.<sup>26</sup>

It is also possible to commence class action suits under the Competition Act. Most provinces of Canada have enacted class action legislation, including Ontario, Quebec, British Columbia, Alberta, New Brunswick, Saskatchewan, Manitoba, and Newfoundland. According to Canadian competition lawyer Steve Szentesi, “[t]he introduction of class action legislation has led to a relative increase in competition law private actions in Canada, largely as a result of consolidating the considerable expenses of commencing competition law private actions.”<sup>27</sup>

With respect to determining jurisdiction over cross-border cases, Canadian courts have relied on the “real and substantial connection test.”<sup>28</sup> According to Mr. Szentesi,

The jurisdiction of Canadian courts to hear private actions under the Act is particularly relevant in the context of international price-fixing conspiracies, where the agreement may have been formed outside Canada with potential anti-competitive effects in Canada. There is now, however, authority for the proposition that where a conspiracy is formed abroad, with anti-competitive effects in Canada, a Canadian court will have jurisdiction. (Canada also has a standalone foreign-directed conspiracy provision.)<sup>29</sup>

However, in relation to the Libor scandal, legal experts believe it will be very challenging for courts to establish jurisdiction, particularly over banks in the UK, according to news reports.<sup>30</sup>

---

<sup>23</sup> *Competition Law*, BLAKES, <http://www.blakes.com/DBIC/guide/html/canada-08.htm> (last visited July 16, 2012).

<sup>24</sup> Competition Act § 36(1).

<sup>25</sup> *Id.*

<sup>26</sup> BLAKES, *supra* note 23.

<sup>27</sup> *Competition Law Private Actions in Canada – The Expanding Playing Field Following Competition Act Amendments and Plaintiff-favourable Class Action Decisions*, CANADIAN REGULATORY LAW: NEWS, RULES & TRENDS (Aug. 2010), <http://www.ipvancouverblog.com/2010/08/competition-law-private-actions-in-canada-%E2%80%93-the-expanding-playing-field-after-sweeping-competition-act-amendments-and-plaintiff-favourable-class-action-decisions/>.

<sup>28</sup> *Id.*

<sup>29</sup> *Competition Litigation*, CANADIAN REGULATORY LAW: NEWS, RULES & TRENDS, <http://www.ipvancouverblog.com/canadiancompetitionlaw-privateactions/> (last visited July 16, 2012).

<sup>30</sup> Greenwood, *supra* note 4.

## II. Criminal Liability Apart from the Competition Act

Fraud is also a criminal offense under Canada’s Criminal Code. According to section 380(1) of the Code, “[e]very one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service” is guilty of fraud.<sup>31</sup>

Fraud affecting the “public market” is a criminal offense “liable to imprisonment for a term not exceeding fourteen years.”<sup>32</sup>

## III. Civil Actions Apart from the Competition Act

In addition to claims brought under the Competition Act, plaintiffs often bring common law tort claims, including claims for deceit, conspiracy, and intentional interference with economic interests.<sup>33</sup> According to the law firm Blakes, tort claims can offer “a longer limitation period and may offer punitive damages or disgorgement of all revenues from wrongful conduct (a potentially greater liability than even treble damages).”<sup>34</sup>

Under the common law tort of deceit, damages are assessed according to the rule that “[p]laintiffs are entitled to be put back into the position in which they would have been had the false representation not been made.”<sup>35</sup> According to Professor Klar of the University of Alberta, “[a]lthough the authorities are not uniform . . . a plaintiff is entitled to the consequential damages suffered as a result of the fraudulent misrepresentation” in a deceit claim.<sup>36</sup> However, some judges have suggested that there should be a limit to damages recovered in accordance with the reasonable foreseeability test. In addition, according to Klar, “[i]n the appropriate case of sufficiently outrageous behavior, punitive damages may also be awarded” in a deceit claim.<sup>37</sup>

Under the common law tort of conspiracy, exemplary or punitive damages can also be awarded along with compensatory damages.<sup>38</sup>

Prepared by Tariq Ahmad  
Legal Research Analyst  
July 2012

---

<sup>31</sup> Criminal Code, R.S.C., 1985, c. C-46, § 380(1), <http://laws-lois.justice.gc.ca/eng/acts/C-46/>.

<sup>32</sup> *Id.* § 380(2).

<sup>33</sup> BLAKES, COMPETITION CLASS ACTIONS IN CANADA: THE BASICS 1 (June 2012), [http://blakesfiles.com/pub/English/competition/jun\\_2012/CCAC.pdf](http://blakesfiles.com/pub/English/competition/jun_2012/CCAC.pdf).

<sup>34</sup> *Id.*

<sup>35</sup> LEWIS N. KLAR, TORT LAW 687 (4th ed. 2008).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 679.

<sup>38</sup> *Id.* at 708.

## LAW LIBRARY OF CONGRESS

### CHINA

#### POSSIBLE ACTIONS RELATING TO THE LIBOR SCANDAL

##### *Executive Summary*

*In China, the benchmark interest rate is fixed by the People's Bank of China (POBC). No official statements made by the POBC or other primary regulators of the financial market were identified regarding possible regulatory actions in response to the Libor manipulation scandal.*

*Although Chinese domestic law does not appear to contain any provision specifically regulating the manipulation of interest rates, a number of provisions in the Criminal Law, administrative law, and other laws are possibly relevant.*

*The Criminal Law, for example, prohibits fabricating and spreading false information that affects securities or futures trading and thus seriously disrupts the securities or futures markets.*

*The Law on Regulation of and Supervision over the Banking Industry prohibits banks and other financial institutions from raising or lowering interest rates on deposits or loans in violation of relevant regulations. The Anti-Monopoly Law prohibits monopoly agreements and abuse of dominant positions; the manipulation of Libor may be subject to this Law if it is determined by the antimonopoly authority to be monopolistic conduct.*

*Punitive damages cannot be imposed for tort actions filed under Chinese law against the banks manipulating Libor, because the use of punitive damages is currently limited to product liability suits. However, if one of the parties to a tort is a foreign individual or company, or if the tort occurred outside of China, the applicable law would most likely be the law of the foreign country where the tort occurred, according to conflict of law rules.*

#### **I. Background**

In China, the People's Bank of China (POBC) is authorized by law to fix the benchmark interest rate as a method of implementing the country's monetary policies.<sup>1</sup> The impact of Libor manipulation on the domestic *Reminbi* (RMB) market may therefore not be as substantial as on

---

<sup>1</sup> The Law on the People's Bank of China (promulgated by the National People's Congress on Mar. 18, 1995, amended and effective Dec. 27, 2003), 15 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 2003 (Legislative Affairs Commission of the Standing Committee of the National People's Congress, Beijing) at 179.

free markets. China, however, may still be a victim of the scandal, as the Libor manipulation may negatively impact the following areas

- (1) Foreign currency loans: The interest on most of China's foreign currency loans is dictated by the Libor.
- (2) Foreign exchange reserve: China invests most of its US\$3.2 trillion foreign exchange reserve in the ten Libor currencies.
- (3) The real economy and securities market.<sup>2</sup>

This report surveys Chinese law, focusing on legal provisions that may be relevant to the Libor scandal and the potential legal liabilities for Libor manipulation. No domestic law provisions specifically regulating the manipulation of interest rates were identified, although a number of provisions in the criminal law, administrative law, and other laws may be relevant.

## II. Criminal Liability

The Criminal Law of China prohibits fabricating and spreading false information that affects securities or futures trading, and thus seriously disrupts the securities or futures market.<sup>3</sup> Application of the provision appears to be limited to the securities or futures markets, but not the financial market in general. Nevertheless, the manipulation of interest rates may directly cause the disruption of the securities and futures markets, and therefore may be subject to this provision. Furthermore, banks manipulating interest rates may argue for the lack of direct intent to adversely affect the securities or futures market. One might take the view, however, that adversely affecting the markets is a required result of the offense and actionable regardless of intent.

If convicted, violators may be sentenced to up to five years' imprisonment or criminal detention and a fine ranging from RMB10,000 yuan (about US\$1,567) to 100,000 yuan.<sup>4</sup> If the offender is an organization, the organization is subject to the fine, with the directly responsible persons of the organization being subject to a sentence of imprisonment or criminal detention.

## III. Regulatory Action

No official statements by the four primary regulators of the Chinese financial market were identified regarding possible regulatory actions to be taken in response to the Libor manipulation scandal. The primary regulators are the People's Bank of China,<sup>5</sup> China Banking Regulatory Commission,<sup>6</sup> China Securities Regulatory Commission,<sup>7</sup> and China Insurance

---

<sup>2</sup> Ouyang Liangyi, *Zhongguo Jixu Zhengduo Jinrong Huayu Quan*, *DIYI CAIJING RIBAO*, available at <http://economy.caixun.com/content/20120712/NE0376ka-all.html> (July 13, 2012).

<sup>3</sup> Criminal Law (as amended by the 1999 Amendment), art. 181, 11 LAWS OF CHINA 1999 at 259.

<sup>4</sup> *Id.*

<sup>5</sup> Official website: <http://www.pbc.gov.cn> (in Chinese; last visited July 16, 2012).

<sup>6</sup> Official website: <http://www.cbrc.gov.cn> (in Chinese; last visited July 16, 2012).

Regulatory Commission.<sup>8</sup> Likewise no responses by the country's foreign exchange authority, the State Administration of Foreign Exchange, were located.<sup>9</sup>

### A. Regulation of the Banking Industry

The Law on Regulation of and Supervision over the Banking Industry of China applies to banks and financial institutions established within the territory of the People's Republic of China, and those established outside of China upon the approval of the Chinese banking regulatory authority.<sup>10</sup> Among them, the banks and financial institutions that are wholly foreign-funded, Chinese-foreign joint ventures, or branches of foreign banks or financial institutions established in China may also be subject to other laws and regulations.<sup>11</sup> It is not clear, however, how these financial laws and regulations would apply to foreign banks established outside of China.

The Law prohibits banks and other financial institutions from raising or lowering interest rates on deposits or loans in violation of relevant regulations. Punishment of such activity includes ordered rectification, confiscation of the unlawful gains, and a fine of up to five times the unlawful gains if the gains are over RMB500,000 yuan (about US\$78,416), or a fine of up to RMB2,000,000 yuan (about US\$313,667) if the gains are under RMB500,000 yuan or if no gains are realized.<sup>12</sup> If the circumstances are "particularly serious," or if the bank or financial institution fails to rectify the situation as ordered, the banking regulatory authority may order suspension of the business or revoke the entity's business licenses.<sup>13</sup>

### B. Anti-Monopoly Law

The Anti-Monopoly Law of China prohibits monopolistic conduct in economic activities by natural persons, legal persons, and other organizations that engage in manufacturing or selling commodities, or providing services.<sup>14</sup> The Law may be applicable to monopolistic conduct outside the territory of China if such conduct eliminates or restricts competition on the domestic market.<sup>15</sup> To be specific, the Law prohibits monopoly agreements, such as an agreement on fixing or changing the prices of commodities (including common commodities and services)<sup>16</sup>

---

<sup>7</sup> Official website: <http://www.csrc.gov.cn> (in Chinese; last visited July 16, 2012).

<sup>8</sup> Official website: <http://www.circ.gov.cn> (in Chinese; last visited July 16, 2012).

<sup>9</sup> Official website: <http://www.safe.gov.cn> (in Chinese; last visited July 16, 2012).

<sup>10</sup> Law on Regulation of and Supervision over the Banking Industry (promulgated by the NPC Standing Committee on Dec. 27, 2003, amended Oct. 31, 2006), art. 2, 18 LAWS OF CHINA 2006 at 180.

<sup>11</sup> *Id.* art. 51.

<sup>12</sup> *Id.* art. 45.

<sup>13</sup> *Id.*

<sup>14</sup> Anti-Monopoly Law of China (promulgated by the NPC Standing Committee on Aug. 30, 2007, effective Aug. 1, 2008), art. 12, 19 THE LAWS OF CHINA 2007 at 110.

<sup>15</sup> *Id.* art. 2.

<sup>16</sup> *Id.* art. 12.

between competing businesses.<sup>17</sup> Companies holding dominant market positions are prohibited from abusing their dominant positions, such as selling at unfairly high prices or buying at unfairly low prices.<sup>18</sup>

Although manipulating interest rates is not specifically identified as monopolistic conduct, the antimonopoly authority under the State Council is authorized by the Law to determine “any other monopoly agreements” or “any other acts of abusing dominant market positions” that are subject to the Law.<sup>19</sup> Thus, the manipulation of Libor may still be subject to the Law if it is determined by the authority to be monopolistic conduct. If found to have violated the Law by concluding and implementing a monopoly agreement, or by abusing dominant market positions, the violator may be subject to a fine of 1% to 10% of its sales volume in the proceeding year.<sup>20</sup>

#### IV. Tort Liability

Although mainly following the civil law tradition, Chinese courts and lawmakers have adopted numerous common law concepts in the development of the country’s tort law system. The concept of punitive damages was recently written into the Tort Liability Law; application of such damages is currently limited to product liability actions, however.<sup>21</sup> Therefore, if tort actions are to be filed under Chinese tort law against the banks manipulating Libor, punitive damages may not be imposed by the courts.

Regarding conflict of laws, Chinese law follows the doctrine of *lex loci delicti* as a general rule in determining the applicable substantive law on a tort, which provides that the law of the place where the tort occurs applies, unless the two parties have a common habitual residence, or the parties reach an agreement to use another law after the occurrence of the tort.<sup>22</sup> Therefore, when one of the parties to a tort is a foreign individual or company, or if the tort occurred outside of China, the applicable law would most likely be the law of the foreign country where the tort occurred.

To date, no information has been identified concerning actions taken by Chinese banks or investors in response to the Libor manipulation scandal.

Laney Zhang  
Senior Foreign Law Specialist  
July 2012

---

<sup>17</sup> *Id.* art. 13.

<sup>18</sup> *Id.* art. 17.

<sup>19</sup> *Id.* arts. 13(6) & 17(7).

<sup>20</sup> *Id.* arts. 46 & 47.

<sup>21</sup> Tort Liability Law (adopted by the NPC Standing Committee on Dec. 26, 2009, effective July 1, 2010), art. 47, 21 LAWS OF CHINA 2009 at 197.

<sup>22</sup> Law on the Application of Law to Civil Relations Involving Foreign Interests (promulgated by the NPC Standing Committee on Oct. 28, 2010), art. 44, 22 LAWS OF CHINA 2010 at 212.

**LAW LIBRARY OF CONGRESS**

**EUROPEAN UNION**

**POSSIBLE ACTIONS RELATING TO THE LIBOR SCANDAL**

*Executive Summary*

*The London inter-bank offered rate (Libor) manipulation does not fall within the criminal conduct provided for in the European Union's pending Directive on Criminal Sanctions for Insider Dealing and Market Manipulation. Michel Barnier, the European Commissioner for Internal Market and Services, intends to propose that Libor manipulation be included as a crime.*

*In addition, in October 2011, the European Commission began inspections at the offices of several companies allegedly involved in the financial derivative products linked to the Euro interbank offered rate (Euribor). Moreover, in April 2011, the European Commission launched two antitrust investigations involving possible collusion and abuse of a dominant position involving credit default swaps. Antitrust rules are contained in articles 101 and 102 of the Treaty on the Functioning of the European Union. In response to the financial crisis of 2008, a new Regulation No. 236/2012 on Short Selling and Certain Aspects of Credit Default Swaps was adopted.*

**I. Insider Trading – The Libor Investigation**

In 2011, the European Commission adopted a Regulation on Insider Dealing and Market Manipulation (Market Abuse)<sup>1</sup> and a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation.<sup>2</sup> Both pieces of legislation are currently pending before the European Parliament and the Council.

Article 4 of the proposed Directive requires that EU Member States designate the following conduct as market manipulation, and make it a crime, when it is committed intentionally:

- giving false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract;

---

<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse), COM (2011) 651 final (Oct. 20, 2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0651:FIN:EN:PDF>.

<sup>2</sup> Proposal for a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation, COM (2011) 654 final (Oct. 20, 2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0654:FIN:EN:PDF>.

- securing the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level;
- entering into a transaction, placing an order to trade, or any other activity in financial markets affecting the price of one or several financial instruments or a related spot commodity contract, which employs a fictitious device or any other form of deception or contrivance;
- dissemination of information which gives false or misleading signals as to financial instruments or related spot commodity contracts, where those persons derive, for themselves or another person, an advantage or profit from the dissemination of the information in question.<sup>3</sup>

The alleged crime of manipulation of interbank lending rates is not included in the crimes listed in article 4 of the proposed Directive. Michel Barnier, the EU Commissioner for Internal Market and Services, expressed his commitment to criminalize the conduct of those financial institutions involved in LIBOR by adding a new proposal to the pending legislation on market abuse and insider trading.<sup>4</sup> Mr. Barnier also stated that results of a pending investigation of the Libor scandal by the European Commission will be published at the end of July 2012.<sup>5</sup>

Once the Directive is adopted, the EU Member States are required to transpose its provisions into national law within a certain deadline. Cases involving insider manipulation, including the manipulation of interbank lending rates, will be dealt with in the domestic courts. Because criminal provisions have no retroactive effect, the effect of the Directive on the current scandal appears to be limited.

## II. Antitrust Rules – Libor and Credit Default Swaps

Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)<sup>6</sup> contain the basic EU competition rules. Article 101 prohibits anticompetitive agreements and article 102 bans abuse of a dominant position. Regulation No. 1/2003 implements the competition rules and is enforced by the national competition authorities and the European Commission.<sup>7</sup>

---

<sup>3</sup> *Id.*

<sup>4</sup> *EU's Barnier Pushes for Criminal Sanctions for Libor Abuse*, REUTERS (July 9, 2012), <http://www.reuters.com/article/2012/07/09/us-eu-libor-barnier-idUSBRE86808V20120709>. See also *The Rotten Heart of Finance, A Scandal over Key Interest Rate is About to Go Global*, THE ECONOMIST (July 7, 2012), <http://www.economist.com/node/21558281>.

<sup>5</sup> *Bank of England Deputy Denies Ordering Rate-Rigging*, RTE NEWS (July 9, 2012), <http://www.rte.ie/news/2012/07/09/eu-rate-fixing-probe-over-libor-due-in-weeks-business.html>.

<sup>6</sup> Treaty on the Functioning of the European Union (TFEU), in Consolidated Version of the Treaty on the Functioning of the European Union, 2010 O.J. (C 83) 49, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>.

<sup>7</sup> Council Regulation (EC) No. 1/2003 of December 16, 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF>.

Article 101 prohibits all agreements between businesses, including decisions and concerted practices incompatible with the internal market that may affect trade between EU Members and also restrict, distort, or prevent competition. In particular the prohibition covers those agreements that

- Directly or indirectly fix purchase or selling prices;
- Limit or control production, markets or investment;
- Share markets or sources of supply;
- Placing trading parties at a competitive disadvantage through application of dissimilar conditions to equivalent transactions; and
- Making the conclusion of a contract subject to acceptance by other parties of additional obligations which have no link with the subject of such contracts.<sup>8</sup>

Agreements or decisions that fall within the prohibition of article 1 are automatically void. There are some exceptions to the above rule, however.<sup>9</sup>

Article 102 declares incompatible with the internal market any abuse by one or more businesses of a dominant position and prohibits it. Such abuse may, in particular, consist of

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or development at the expense of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive advantage; and
- making the conclusion of a contract subject to acceptance by the other parties of additional obligations not related to the subject of such contracts.

On October 2011, the European Commission begun inspections without a prior notification at the offices of companies involved in the financial derivative products sector connected to the Euro interbank offered rate (Euribor) in several Member States.<sup>10</sup> The purpose of the inspections is to gather evidence on possible restrictive business practices including cartels, which are prohibited under article 101 of the TEFU.

On April 2011, the European Commission initiated two antitrust investigations of credit default swaps (CDS). The first case involves eighteen investment banks (JP Morgan, Bank of America, Merrill Lynch, Barclays, BNP Paribas, Citigroup, Commerzbank, Crédit Suisse, First

---

<sup>8</sup> *Id.*

<sup>9</sup> TFEU art. 101, paras. 1–3.

<sup>10</sup> Press Release, Europa, Antitrust: Commission Confirms Inspections in Suspected Cartel in the Sector of Euro Interest Rate Derivatives (Oct. 19, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/711&format=HTML&aged=1&language=EN&guiLanguage=en>.

Boston, Deutsche Bank, Goldman Sachs, HSBC, Morgan Stanley, Royal Bank of Scotland, UBS, Wells Fargo Bank/Wachovia, Crédit Agricole, and Société Générale) and Markit, the main provider of information in the credit default swap market. In reviewing the case, the Commission will examine whether there is possible collusion and possible abuse of a dominant position in the financial market in violation of antitrust rules.

The second investigation involves agreements entered into by nine banks (Bank of America Corporation, Barclays Bank PLC, Citigroup Inc., Crédit Suisse Group AG, Deutsche Bank AG, Goldman Sachs Group Inc., JP Morgan Chase & Co., Morgan Stanley, and UBS AG) and ICE Clear Europe, which is the main clearinghouse for CDS. The crux of the investigation is whether the agreements granted preferential tariffs and profit-sharing arrangements to the nine banks to use ICE as a clearinghouse to the detriment of other competitors.<sup>11</sup>

In 2010, the European Commission, in response to the financial crisis of 2008, proposed to improve the regulation of credit default swaps within the framework of European market regulation. Thus, a new Regulation was adopted in 2012, No. 236/2012 on Short Selling and Certain Aspects on Credit Default Swaps.<sup>12</sup> Regulation No. 236/2012 defines “credit default swap” as “a derivative contract in which one party pays a fee to another party in return for a payment or other benefit in the case of a credit event relating to a reference entity and of any other default, relating to that derivative contract, which has a similar economic effect.”<sup>13</sup>

Article 14 of Regulation No. 236/2012 places restrictions on uncovered sovereign credit default swaps. It established the requirements that a natural or legal person enter into a sovereign credit default swap transaction only in cases where “that transaction does not lead to an uncovered position in a sovereign credit default swap as referred to in Article 4.” An “uncovered position” is defined as the case where the sovereign credit default swap does not serve to hedge against

- (a) the risk of default of the issuer where the natural or legal person has a long position in the sovereign debt of that issuer to which the sovereign credit default swap relates; or
- (b) the risk of a decline of the value of the sovereign debt where the natural or legal person holds assets or is subject to liabilities, including but not limited to financial contracts, a portfolio of assets or financial obligations the value of which is correlated to the value of the sovereign debt.<sup>14</sup>

Furthermore, article 26 of Regulation No. 236/2012 provides for restrictions of sovereign credit default swap transactions in exceptional circumstances. Thus, it empowers competent

---

<sup>11</sup> Press Release, Europa, Anti-trust: Commission Probes Credit Default Swaps Market (Apr. 29, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/509&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>12</sup> Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on Short Selling and Certain Aspects of Credit Default Swaps, 2012 O.J. (L 86) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:EN:PDF>.

<sup>13</sup> *Id.* art. 2(c).

<sup>14</sup> *Id.* art. 14.

national authorities to enter into sovereign credit default swap transactions or may limit the value of sovereign credit default swap positions that those persons are permitted to enter into where

- a) there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States: and
- b) the measure is necessary to address the threat and will not have a detrimental effect on the efficacy of financial markets which is disproportionate to its benefits.<sup>15</sup>

The competent national authorities are required to notify the European Securities and Market Authority (ESMA) on a quarterly basis in case of sovereign credit default swaps.<sup>16</sup> The ESMA was established in 2010 to protect the public interest through its contributions to the short-, medium-, and long-term stability of the financial system of the EU.<sup>17</sup> Among its key tasks is improving the functioning of the internal market, ensuring transparency of financial markets, and applying equal terms to competition.<sup>18</sup>

Prepared by Theresa Papademetriou  
Senior Foreign Law Specialist  
July 2012

---

<sup>15</sup> *Id.* art. 26.

<sup>16</sup> *Id.* art. 11.

<sup>17</sup> Regulation (EU) No. 1095/2010 Establishing a European Supervisory Authority (European Securities and Markets Authority), 2010 O.J. (L 331) 84, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:331:0084:0119:EN:PDF>.

<sup>18</sup> *Id.* art. 1(1), (5).

**LAW LIBRARY OF CONGRESS**

**RUSSIAN FEDERATION**

**POSSIBLE ACTIONS RELATING TO THE LIBOR SCANDAL**

*Executive Summary*

*Russian legislation does not specifically address the issue of interest rate manipulation but it includes a number of provisions that might be relevant to the issue of regulating the manipulation of financial markets in general. A financial institution and its officers can be subject to civil, criminal, and administrative liability for the violation of rules of financial operations and for damage caused to other organizations or individuals.*

**I. Criminal Liability**

Russian legislation does not specifically address the issue of interest rate manipulation but it includes a number of provisions that might be relevant to the issue. The closest is the ban on financial market manipulation introduced in 2010 by the Federal Law on Countering Illegal Use of Insider Information and Market Manipulation.<sup>1</sup> The Law prohibits the intended dissemination of false information in order to affect or maintain the price of financial instruments, currency, or commodities at a level that would be “significantly” different if false information were not disseminated.<sup>2</sup>

This provision is reflected in article 185-3 of the Russian Criminal Code, which establishes punishment for such actions if they result in the infliction of serious damage to individuals, organizations, or the state.<sup>3</sup> Punishment may include a fine of up to the equivalent of US\$150,000 or the three-year income of the accused person, whichever is higher; mandatory labor; or imprisonment for up to four years with work restrictions for specific positions during the following three years. The same actions result in double the amount of fines and imprisonment for up to seven years when committed by an organized group or if the inflicted damage is extremely serious.<sup>4</sup>

---

<sup>1</sup> SOBRANIE ZAKONODATELSTVA ROSSIISKOI FEDERATSII [SZ RF] [Collection of Russian Federation Legislation] (official gazette, in Russian) 2011, No. 29, Item 4291.

<sup>2</sup> *Id.* art. 5.1.

<sup>3</sup> “Serious damage” is defined by the Criminal Code as an amount exceeding the equivalent of US\$80,000; monetary amounts exceeding the equivalent of US\$300,000 are recognized as “extremely serious damage.” Criminal Code of the Russian Federation art. 185-3, SZ RF, 2011, No. 50, Item 7362.

<sup>4</sup> *Id.*

According to a scholarly article published in a Russian law journal, article 185-3 can be applied in a situation where false information was submitted in order to enhance confidence toward a bank's economic situation and keep the price of the bank's securities stable.<sup>5</sup>

Under Russian law, legal entities cannot be subjected to criminal liability. Criminal prosecution can only be directed towards individual directors of a company.<sup>6</sup> If a company's officials perform their managerial functions in way that harms the legal interests of the organization and for the purpose of pursuing benefits for themselves or other persons, or causing damage to other persons, and if their actions result in sufficient damage, they might be held liable.<sup>7</sup>

## II. Civil Liability and Tort

Issues related to civil liability for harm inflicted are regulated by the Civil Code of the Russian Federation. Article 8(6) of the Civil Code states that civil rights and duties emerge as a result of causing harm to a person, and article 15 contains provisions relating to the recovery of damages. Damages include the expenses that the victim of a violation actually incurred, or incurred in order to recover his violated rights, the loss of or damage to property, and lost profit.<sup>8</sup> Full compensation for actual damage is required under article 18 of the Civil Code. Punitive damages are not foreseen by Russian law.

As tort is a common law concept, it is not part of the Russian civil law. "As a civil law jurisdiction, Russian law adheres to the doctrine of delict, i.e., non-contractual obligations."<sup>9</sup> According to attorneys Olga Anisimova and Alexei Barnashov, general liability under the Russian Civil Code is

fault-based and requires the following four elements to be present with the burden of proof for the first three being on the plaintiff: (1) breach of duty/illegality by the defendant; (2) damage suffered by the plaintiff; (3) causation – the damage being caused directly by the illegal act or omission; and (4) fault, either intentional or through the negligence, of the defendant.<sup>10</sup>

When the action causing damage and the damage itself belong to various countries, conflict of laws norms should be applied to determine the applicable legislation. According to article 1219(1) of the Civil Code, in such cases Russian courts must apply the law of the country where the action causing the damage occurred. In cases where the damage occurred in a country other than the country where the action took place, the law of the country where the damage

---

<sup>5</sup> N.A. Podolnyi, *Basics of Financial Markets Manipulations Investigation*, ROSSIISKII SLEDOVATEL, 2010, available at [http://www.juristlib.ru/book\\_8017.html](http://www.juristlib.ru/book_8017.html) (in Russian; last visited July 13, 2012).

<sup>6</sup> Olga Anisimova & Alexei Barnashov, *Russia*, in INTERNATIONAL PRODUCT LIABILITY LAW 665 (Gregory Fowler ed., 2003).

<sup>7</sup> Criminal Code art. 204.

<sup>8</sup> Civil Code of the Russian Federation, SZ RF 1996, No. 9, Item 773.

<sup>9</sup> Anisimova & Barnashov, *supra* note 6, at 664.

<sup>10</sup> *Id.* at 665.

occurred may be applied, if the violator foresaw that the damage might manifest in that country.<sup>11</sup>

### III. Administrative Regulation

The Central Bank of the Russian Federation, a regulatory agency that supervises banking institutions in the country, is required to revoke the license of a bank if facts of market manipulation are found in its practice more than once in a year.<sup>12</sup> After the Law on Countering Illegal Use of Insider Information and Market Manipulation was passed in 2010, the Code of Administrative Violations was amended to add provisions extending liability for price manipulation of securities to members of the board, and a financial institution's controlling and accounting authorities. Additionally, the amount of fines for legal entities was increased.<sup>13</sup>

While the recent proposal of the EU Financial Services Commissioner Michel Barnier to increase penalties for manipulation of indexes<sup>14</sup> was widely discussed and supported in the Russian media, no legislative actions to implement similar penalties in Russia have been taken.

Prepared by Peter Roudik,  
Director of Legal Research,  
with the assistance of Virab Khachatryan,  
Law Library Intern  
July 2012

---

<sup>11</sup> Civil Code of the Russian Federation, Part III, SZ RF 2011, No. 49, Item 4552.

<sup>12</sup> Federal Law on Banks and Banking Activity art. 20(11), *last amended version published in SZ RF 2011*, No. 50, Item 7351.

<sup>13</sup> SZ RF 2011, No. 29, Item 4291, art. 24.

<sup>14</sup> Caroline Connan & Mark Deen, *Barnier Seeks to Widen EU Rules to Bar Libor Manipulation*, BLOOMBERG NEWS (July 8, 2012), <http://www.bloomberg.com/news/2012-07-08/barnier-seeks-to-widen-eu-market-abuse-rules-to-include-libor.html>.