

# Coventry Law Journal

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# ARTICLES

## CRIMINAL LAW

### **Coronavirus and fraud in the UK: from the responsabilisation of the civil society to the deresponsibilisation of the state**

Dr Lorenzo Pasculli\*

#### **Introduction**

England, summer 2020 – in the middle of the coronavirus pandemic. In Camden, London, Mohammed – a 20-year old student – is sending texts messages. More than a thousand text messages. One reads: ‘UKGOV: You are eligible for a Tax Refund as a result of the COVID-19 pandemic. Please fill out the following form so that we can process your refund.’ Another reads: ‘Due to the current pandemic we are issuing a refund for your last bill. Please verify your details so we can process your refund.’ The plan is to use the personal details of the recipients to steal their money. The scheme will claim almost fifty victims and cause them a loss of more than £10,000.<sup>1</sup> At the same time, in Solihull, a seasoned businessman – he’s 57 – shuts his laptop, a troubled expression on his face. We’ll call him George – although his identity hasn’t been revealed. George has just submitted a fraudulent claim within Coronavirus Job Retention Scheme (CJRS) that might result in a colossal loss (£495,000) for the UK Government.<sup>2</sup> (Later, the authorities will suspect his involvement in multi-million-pound tax fraud and money laundering).<sup>3</sup> Back in London, Jim Winters, Head of Fraud at Barclays, scratches his head as he reads the latest findings from his team, who flags a 66 per cent increase in reported scams in the first six months of 2020 compared with the last six months of 2019, with a 60 per cent increase in fraud volumes only between May and July, as certain lockdown measures were relaxed and customers became more willing to spend<sup>4</sup>.

Meanwhile, from dozens living rooms and bedrooms across the United Kingdom (UK), comes the muffled tapping sound of frantic typing, as Her Majesty’s Revenue and Customs (HMRC) staff working from home strive to keep pace with the flood of reports coming through the HMRC Fraud Hotline<sup>5</sup>. In just about two months, from the launch of the CJRS in April, up until the end of June, the HMRC will receive more than 4,400 reports of suspected fraud linked

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<sup>1</sup> Crown Prosecution Service ‘CPS Warns - Don't Get Caught by COVID Fraud’ (*CPS* 17 July 2020) < <https://www.cps.gov.uk/london-south/news/warns-dont-get-caught-covid-fraud> > accessed 5 December 2020.

<sup>2</sup> Emma Agyemang, ‘Businessman Arrested Over Job Retention Scheme Fraud’ *Financial Times* (London, 9 July 2020) < <https://www.ft.com/content/45a00e4f-c716-458f-9b92-126695fdb088> > accessed 5 December 2020.

<sup>3</sup> Joanna Partridge ‘Man Arrested in Solihull Over Suspected £500k Furlough Fraud’ *The Guardian* (London, 9 July 2020) < <https://www.theguardian.com/politics/2020/jul/09/man-arrested-in-solihull-on-suspected-half-million-pound-furlough> > accessed 5 December 2020.

<sup>4</sup> Matthew Vincent ‘UK Financial Scams Surge During Coronavirus Lockdown’ *Financial Times* (London, 19 August 2020) < <https://www.ft.com/content/fcce8128-4cf8-428b-ac28-3e9d90f66c96> > accessed 5 December 2020.

<sup>5</sup> HMRC ‘HMRC Fraud Hotline – Information report’ (*gov.uk* 2020) < [https://www.tax.service.gov.uk/shortforms/form/TEH\\_IRF](https://www.tax.service.gov.uk/shortforms/form/TEH_IRF) > accessed 4 December 2020.

to the scheme,<sup>6</sup> The same tapping can be heard in the homes of many Action Fraud employees, as they address the 2,866 reports on COVID-19 related fraud received in only a month (from 7 June 2020 to 7 July 2020), with a total loss of £11,316,266 has been reported lost by victims of coronavirus-related scams.<sup>7</sup>

Punctual as a Swiss clock, a predicted<sup>8</sup> fraud upsurge has hit pandemic-stricken Britain. The sudden move of our lives online paved the way to new opportunities for fraud. The personal and economic harms are enormous<sup>9</sup>. The UK is responding with a two-fold approach mirroring the overall response to economic crime and a more general trend in crime control. On the one hand, the Government still relies on traditional law enforcement. On the other hand, it seeks to encourage individuals, businesses and public agencies to take responsibility in controlling and preventing crime by changing their practices,<sup>10</sup> a strategy known as ‘responsibilisation’.<sup>11</sup> Examples of this are information campaigns, compliance models, due diligence and risk assessment and management. With the many limitations placed by the pandemic on law enforcement, including the closure of many courts and reduced police and prosecution capabilities, much emphasis has been placed on these strategies. But do they work?

While literature in the last few decades has broadly analysed the social implications of responsibilisation on crime control in general, not many studies have focused on the specific area of financial crime.<sup>12</sup> There’s an even more urgent need to assess responsibilisation strategies with specific regard to fraud in the context and the coronavirus pandemic. The purpose of this study is to assess the UK response to Covid19-related fraud risks in light of the literature on responsibilisation. We will do so through a comparative review of different policies and practices by various government agencies. The social and policy implications of such an analysis can be many. On the short term, it could be helpful to improve Covid19-related anti-fraud policies and practices. On a longer term and a broader level, it could help improve, on the one hand, the overall response of the UK to fraud and financial crime and, on the other hand, the future responses to such crime in the context of pandemics and other disasters. Moreover, given that responsibilisation strategies are not exclusive to the UK, hopefully, this paper can provide valuable insights for other jurisdictions. In the first part of our study, we will

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<sup>6</sup> Partridge (n 3).

<sup>7</sup> Action Fraud ‘Victims of Coronavirus-Related Scams Have Lost Over £11 Million’ (*actionfraud.police.uk* 8 July, 2020) < <https://www.actionfraud.police.uk/covid19> > accessed 4 December 2020.

<sup>8</sup> National Crime Agency (NCA) ‘Beware Fraud and Scams During Covid-19 Pandemic Fraud’ (*nationalcrimeagency.gov.uk* 26 March 2020) < <https://nationalcrimeagency.gov.uk/news/fraud-scams-covid19> > accessed 4 December 2020; Michael D’Ambrosio and Terry Wade, ‘There’s Another Coronavirus Crisis Brewing: Fraud’ (*The Washington Post*, 14 April 2020) < <https://www.washingtonpost.com/opinions/2020/04/14/theres-another-coronavirus-crisis-brewing-fraud/> > accessed 4 December 2020.

<sup>9</sup> cf Richard Walton, Sophia Falkner and Benjamin Barnard *Daylight Robbery. Uncovering the True Cost of Public Sector Fraud in the Age of COVID-19* (Policy Exchange 2020) < <https://policyexchange.org.uk/wp-content/uploads/Daylight-Robbery.pdf> > accessed 4 December 2020.

<sup>10</sup> Adam Crawford ‘Networked Governance and the Post-regulatory State? Steering, Rowing and Anchoring the Provision of Policing and Security’ (2006) 10 *Theoretical Criminology* 449.

<sup>11</sup> David Garland ‘The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society’ (1996) 36 *The British Journal of Criminology* 445, 452-455 and David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001).

<sup>12</sup> See, for instance, Shahrzad Fouladvand ‘Corruption, Regulation and the Law: The Power not to Prosecute under the UK Bribery Act 2010’ in Nicholas Ryder and Lorenzo Pasculli, *Corruption, Integrity and the Law: Global Regulatory Challenges* (Routledge 2020) 71 and Lorenzo Pasculli and Nicholas Ryder ‘The global anti-corruption framework: Lights, shadows and prospects’ in Nicholas Ryder and Lorenzo Pasculli (eds) *Corruption, Integrity and the Law: Global Regulatory Challenges* (Routledge 2020), 3-13.

present our methodology. In the second part, we will present a critical analysis of the literature on responsabilisation. In the third part, we will provide a short overview of the Government response to fraud risks during the coronavirus pandemic. In the third part, we will critically assess both the practical and the deeper societal implications of such a response. In the fifth part, we will propose some recommendations for reform. We will then draw our conclusion.

## Methodology

This review is based on a comparative analysis of a selected number of policy instruments in the UK as reported in many secondary sources in a multidisciplinary perspective. Why a comparative review? A first glance at these instruments reveals a degree of compartmentalisation. Different government bodies offer different tools and advice related to their specific territorial jurisdiction or subject-related remit – for instance, local governments inevitably focus on local risks, the National Cyber Security Centre (NCSC) focuses on cyber-fraud, while the COVID-19 Counter Fraud Response Team (CCFRT) focuses on policy-related fraud risks. A certain level of compartmentalisation is expected in the complexity of contemporary socio-economic life, but it this might also hinder the understanding of broader developments in fraud (and crime) control at a national level and their social implications. A comparative review supported by a literature review should help paint such a broader picture and assess its impact on society.

Our review relies on research conducted for two inquiries of the House of Commons Treasury Committee respectively on the economic impact of coronavirus in June 2020,<sup>13</sup> and economic crime in November 2020.<sup>14</sup> We relied on secondary sources only. To ensure the highest reliability we have considered only official data, reports, policy documents and online materials from the national Government and local authorities. We started from the general website of the UK Government (*gov.uk*), which also incorporates sources from specific agencies, such as HMRC, and then we have examined sources from agencies and regulators that have primary institutional responsibility for the response to fraud, such as Serious Fraud Office (SFO), the National Crime Agency (NCA), the Crown Prosecution Service (CPS), the Financial Conduct Authority (FCA), Action Fraud, and Take Five, the NCSC, and other agencies that might be less directly involved in the prevention of fraud, especially during the pandemic, such as the National Health Service (NHS), National Trading Standards (NTS) and The Pensions Regulator. Finally, we have scanned the official webpages of a sample of different county councils. Our analysis did not include sources at city council level.

A multidisciplinary literature review, illustrated in the next paragraph, will support our analysis. Since the pandemic is a recent phenomenon, there are not many academic papers directly assessing the sources we will analyse – which is why we hope our analysis might be helpful. Nevertheless, general sociological, criminological and legal literature on crime control and the causes and responses to fraud and financial crime can be of great help in guiding our assessment.

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<sup>13</sup> Treasury Committee ‘Economic impact of coronavirus’ (*parliament.uk* 2020) < <https://committees.parliament.uk/work/224/economic-impact-of-coronavirus/> > accessed 5 December 2020; Lorenzo Pasculli ‘Written evidence submitted by Dr Lorenzo Pasculli’ EIC0792 (23 June 2020) < <https://committees.parliament.uk/writtenevidence/7740/html/> > accessed 5 December 2020.

<sup>14</sup> Treasury Committee ‘Economic crime’ (*parliament.uk* 2020) < <https://committees.parliament.uk/work/726/economic-crime/> > accessed 5 December 2020; Lorenzo Pasculli ‘Written evidence submitted by Dr Lorenzo Pasculli’ (27 November 2020), unpublished yet.

This study has some limitations. Firstly, it only covers secondary sources. Research on primary data would be required to test our findings. Secondly, the Government's response to any issue related by the pandemic is constantly evolving at a rather speedy pace. The bulk of our analysis was conducted in June 2020. We have tried to update it to more recent developments until the time of our submission (December 2020). But we expect further changes may take place by the time of publication. Nevertheless, we believe our analysis will maintain its usefulness, especially in assessing policies and practices that are not exclusively related to the pandemic but reflect more general contemporary developments in the control of fraud and financial crime.

### **Responsibilisation and its discontents**

The UK response to fraud is part of the more general response to economic crime.<sup>15</sup> The latter can be summarised into two main strategies: law enforcement and 'responsibilisation'. Law enforcement encompasses prevention, investigation and prosecution of economic crime by state agencies, such as the SFO, the CPS and the judiciary. Responsibilisation seeks to compensate for the failure of the state to effectively control increasingly pervasive and volatile forms of criminality by devolving crime control responsibilities to individuals and private organisations.<sup>16</sup> The failure of traditional state-centred strategies is particularly evident in the field of financial crime and fraud, especially in their cyber manifestations, which are deeply affected by the profound economic and societal changes brought about by the globalisation<sup>17</sup>. Policing financial crimes presents special problems because of the social status of some suspects and the relative inaccessibility of most offences to routine observation and traditional police methods.<sup>18</sup>

Responsibilisation strategies are not limited to financial crime. They are the result of a deeper and complex process of adaptation of crime control to new social conditions.<sup>19</sup> This process has seen the emergence of 'new modes of governing crime'.<sup>20</sup> Programmes of offender rehabilitation are abandoned in favour of new programmes of actions directed not towards individual offenders, but towards the conduct of potential victims, to vulnerable situations, and to 'those routines of everyday life which create criminal opportunities as unintended by-product'.<sup>21</sup> The primary actor in the 'business of crime control' is no longer the state, but non-state agencies or organisations, to which the state delegates the competence of reducing criminal opportunities.<sup>22</sup> The state retains its 'steering' role – that is, policy decision-making – while 'rowing' – that is, service delivery<sup>23</sup> – is increasingly delegated to the civil society. This is part of a broader shift in state governance towards what Braithwaite calls the 'New

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<sup>15</sup> See HM Treasury and Home Office *Economic Crime Plan 2019-2022* (gov.uk 2019) < <https://www.gov.uk/government/publications/economic-crime-plan-2019-to-2022/economic-crime-plan-2019-to-2022-accessible-version> > accessed 3 December 2020.

<sup>16</sup> cf Garland (n 11).

<sup>17</sup> cf Fouladvand (n 12), Pasculli and Ryder (n 12) and Lorenzo Pasculli 'The Global Causes of Cybercrime and State Responsibilities. Towards an Integrated Interdisciplinary Theory' (2020) 2(1) *Journal of Ethics and Legal Technologies* 48-74 < <https://jelt.padovauniversitypress.it/system/files/papers/JELT-02-01-03.pdf> > accessed 3 December 2020.

<sup>18</sup> M. Levi 'Policing financial crimes' in Henry N. Pontell, and Gilbert L. Geis (eds) *International Handbook of White-Collar and Corporate Crime* (Springer 2006) 588-606.

<sup>19</sup> Garland (n 11).

<sup>20</sup> *ibid* 450.

<sup>21</sup> *ibid* 451.

<sup>22</sup> *ibid* 452.

<sup>23</sup> On 'steering' and 'rowing' see David Osborne and Ted Gaebler *Reinventing Government* (Penguin 1992).

Regulatory State’, emerged with the Thatcher-Major and Bush-Reagan governments.<sup>24</sup> This shift has been also captured by Foucault’s governmentality theory, which highlighted the dispersal of surveillance and discipline through a multiplicity of controls and the active involvement of citizens in the governance of their own conduct.<sup>25</sup>

Responsibilisation relies on different techniques. For the purposes of this paper, we can group these into two main categories: on the one hand, public information campaigns to alert individuals and organisations of fraud risks and encourage them to adopt all the necessary precautions; on the other hand, the imposition of duties on private organisations, public bodies and certain individuals, such as company executives, leaders and professionals, for the adoption of specific measures to prevent and counter financial crime and fraud. The implementation of such measures is supervised by both non-governmental self-regulatory organisations, such as professional associations, and governmental regulators, such as the FCA in the UK. The privatisation of crime control responsibilities is accompanied by a managerialist and business-like approach in criminal justice<sup>26</sup>. Moreover, since the focus is on the removal of crime opportunities, risk control plays a major role in responsabilisation<sup>27</sup>. Indeed, many techniques aim at the prompt identification of crime risks and their effective assessment and mitigation. It must be clear, however, that these new adaptations in crime control have not led to dismiss traditional state law enforcement. In a somehow contradictory fashion, the state is not always willing to admit its failures and engage in forms of ‘denial’ which brings it to reassert its punitive power through ‘law and order’ ‘tough on crime’ rhetoric and policies<sup>28</sup>. However, scholars report an increasing shift in the enforcement of criminal law towards non-police agencies, such as financial regulators.<sup>29</sup>

The Economic Crime Plan 2019-2020 developed by the Home Office and the Treasury<sup>30</sup> is an excellent example of this dichotomy. According to the Plan, the Government’s response to economic crime involves many diverse private sector organisations and collaborative private-public partnerships.<sup>31</sup> Key stakeholders include banking, finance, accountancy, legal and real estate firms with obligations under the Money Laundering Regulations 2017<sup>32</sup>. Public-private partnerships are a recurring component of each strategic priority outlined in the plan. Reflecting the prominence of a risk-based approach typical of responsabilisation, two of these strategic priorities are dedicated to risk assessment and management, both at a national level and in the private sector: Strategic Priority One seeks to expand the national risk assessments (NRAs) of money laundering and terrorist financing to include a wider range of economic crimes and develop further public-private partnerships to undertake joint and collective threat assessments

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<sup>24</sup> John Braithwaite ‘The new regulatory state and the transformation of criminology’ (2000) 40(2) *British Journal of Criminology* 222-238.

<sup>25</sup> Michel Foucault *Discipline and Punish: The Birth of the Prison*, (Allen Lane 1977) and Michel Foucault ‘The subject and power’ (1982) 8(4) *Critical Inquiry* 777-795.

<sup>26</sup> Garland (n 11) 455-456; Ronen Shamir ‘The age of responsabilization: on market-embedded morality’ (2008) 37(1) *Economy and Society* 1-19.

<sup>27</sup> Tim Goddard, ‘Post-welfarist risk managers? Risk, Crime Prevention and the Responsibilization of Community-based Organizations’ [2012] *Theoretical Criminology* 1; Pat O’Malley ‘Risk, power and crime prevention’ (1992) 21(3) *Economy and Society* 251-268; Pat O’Malley *Crime and Risk* (Sage 2010).

<sup>28</sup> cf Garland (n 11) 459-461.

<sup>29</sup> Fouladvand (n 12) 71.

<sup>30</sup> HM Treasury and Home Office (n 15).

<sup>31</sup> *ibid.* paras 1.30-1.31.

<sup>32</sup> Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

on economic crime;<sup>33</sup> Strategic Priority Five seeks to enhance the management of economic crime risk in the private sector<sup>34</sup>.

The second strategic priority seeks to improve information-sharing between the public and private sectors as a means to enhance both risk/threat analysis and law enforcement.<sup>35</sup> Other strategic priorities aim at enhancing powers, procedures, tools and capabilities not only of law enforcement and the justice system but also of the private sector. Public and private sectors are thus forever married in the control of financial crime: ‘Historically, these capabilities have been viewed as separate, with insufficient consideration of how they can be combined and used collectively. We think there is substantial scope to enhance the public-private partnership around how our collective capabilities can be used. For example, the investigation of fraud is a specialist skill, and consequently lends itself to skill transfer or exchange between public and private sectors, where both sectors can learn from each other.’<sup>36</sup> The international strategy outlined in the seventh chapter of the Plan is also focused mostly on ‘understanding the threat’ (information-sharing and risk assessment) and strengthening transnational law enforcement capabilities.

These developments raise many concerns. A major one is that it might lead the state to neglect (or forget) its responsibilities for the removal of those societal conditions that foster criminality through welfare interventions.<sup>37</sup> The almost obsessive emphasis on micro-management of risks and situations implies a considerable diversion of focus and resources from broader social policies aimed at removing the root causes of criminality. A previous interdisciplinary literature review suggests that a distinction can be drawn between proximate causes and remote causes of crime (these are ideal types: in reality the boundaries between them are nuanced).<sup>38</sup> *Proximate causes* are individual and situational factors that can encourage or facilitate criminal behaviour. These include motivations, opportunities and, especially in the case of fraud and financial crime, rationalisation. Motivations are symbolic constructions that make certain goals and activities desirable.<sup>39</sup> Opportunities are situations that make criminal behaviours possible, such as access to targets/victims, availability of means and the lack of adequate controls.<sup>40</sup> Rationalisation – the third component of Donald Cressey’s famous ‘fraud triangle’<sup>41</sup> – is the neutralisation of the moral and cognitive dissonances caused by criminal behaviour.<sup>42</sup> *Remote causes* are the deeper biological, cultural, socio-psychological, economic and politico-institutional developments that determine or aggravate criminal motivations or opportunities.<sup>43</sup>

For instance, writing about corruption – but the reasoning applies to any financial crime – Ashforth and Anand add to rationalisation the mutually reinforcing processes of institutionalisation – the embedding and routinising of corrupt practices in organizational structures and processes – and socialisation – the inducement of newcomers to view corruption

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<sup>33</sup> HM Treasury and Home Office (n 15) paras 2.5-2.6.

<sup>34</sup> Ibid. paras 6.1-6.26.

<sup>35</sup> Ibid. paras 3.1.

<sup>36</sup> Ibid. para 5.10.

<sup>37</sup> cf Garland (n 11).

<sup>38</sup> Pasculli ‘The Global Causes of Cybercrime’ (n 17) 51-52.

<sup>39</sup> David Cantor and Kennet C. Land ‘Unemployment and Crime Rates in the Post-World War II United States: A Theoretical and Empirical Analysis’ (1985) 50 *American Sociological Review* 317–332.

<sup>40</sup> Lawrence E. Cohen and Marcus Felson ‘Social Change and Crime Rate Trends: A Routine Activity Approach’ (1979) 44 *American Sociological Review* 588–608.

<sup>41</sup> Donald R. Cressey *Other People’s Money* (Wadsworth 1953).

<sup>42</sup> Graham Sykes and David Matza ‘Techniques of neutralization: A theory of delinquency’ (1957) 22(6) *American Sociological Review* 664–670.

<sup>43</sup> Pasculli ‘The Global Causes of Cybercrime’ (n 17).

as permissible, if not desirable.<sup>44</sup> These go beyond specific situations or individuals and are rooted in more complex socio-cultural and organisational patterns. Other remote causes are prompted by global developments, such as the globalisation of markets and the expansion of economic opportunities or the advance and diffusion of new technologies.<sup>45</sup> Amongst these, the excessive cultural and institutional emphasis on financial success and social prestige and the lack of means to achieve them can be particularly significant in the causation of economic crime, as suggested by anomie and strain theory in all their variations. Anomie is a situation of ‘normlessness’, in which society fails to regulate the naturally unlimited desires of individuals.<sup>46</sup> Industrialisation first and then global neoliberalism, with its discourses of economic growth, free markets, individualism, consumerism, privatisation and deregulation, have created new needs, desires and fashions. But equal legal means to pursue them are still unavailable to many.<sup>47</sup> Such divergence between means and ends produces a sense of deprivation and frustration in those who fail to achieve the globally valued goals of success.<sup>48</sup> With the right opportunities, such strains can not only compromise mental health (anomie’s theory was used by Durkheim to explain suicide) but also motivate criminal behaviours and especially financial crime.<sup>49</sup>

However, removing structural obstacles to legitimate opportunities is not enough to reduce crime rates when all the major social institutions primarily support the quest for material success and fail to promote alternative definitions of self-worth and achievement.<sup>50</sup> Goals must be questioned, other than means. This framework is further complicated by the advent of cyber technologies which not only provide opportunities and instruments for financial criminality and weaken formal and informal controls (proximate causes) but also amplify the reach and intensity of material goals of success<sup>51</sup>. Remote causes do not only operate at a societal level. Pioneering studies suggest that there may be significant correlations between crime, including financial crime, and biological conditions, often rooted in the way our brain works<sup>52</sup>. For instance, neurosciences support and provide a biological explanation to the criminological idea that the perceived lack of victims and short-sighted or impulsive decision-making are often

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<sup>44</sup> Blake E. Ashforth and Vikas Anand ‘The Normalization of Corruption in Organizations’ (2003) 25 *Research on Organizational Behaviour* 1 and Vikas Anand, Blake E. Ashforth and Mahendra Joshi ‘Business as Usual: The Acceptance and Perpetuation of Corruption’ (2004) 18(2) *Academy of Management Executive* 39.

<sup>45</sup> *ibid.* and Lorenzo Pasculli and Nicholas Ryder ‘Corruption and globalization. Towards an interdisciplinary scientific understanding of corruption as a global crime’ in Lorenzo Pasculli and Nicholas Ryder (eds) *Corruption in the Global Era: Causes, Sources and Forms of Manifestation* (Routledge 2019).

<sup>46</sup> Émile Durkheim *Suicide: A Study in Sociology* (trs A. Spaulding and George A. Simpson, Routledge 1897, 2002).

<sup>47</sup> Joseph Stiglitz *Globalization and Its Discontents* (Norton 2002); Joseph Stiglitz, *The Price of Inequality* (Norton 2012).

<sup>48</sup> Robert K. Merton ‘Social Structure and Anomie’ (1938) 3(5) *American Sociological Review* 672–682; Robert K. Merton *Social Theory and Social Structure* (Free Press 1968).

<sup>49</sup> Nikos Passas ‘Anomie and Corporate Deviance’ (1990) 14 *Contemporary Crises* 157–178; Nikos Passas ‘Global Anomie, Dysnomie, and Economic Crime: Hidden Consequences of Neoliberalism and Globalization in Russia and around the World’ (2000) 27(2) *Social Justice* 16–44. See also Robert Agnew ‘Foundation for a General Strain Theory of Delinquency’ (1990) 30 *Criminology* 47–87; Robert Agnew ‘The Nature and Determinants of Strain: Another Look at Durkheim and Merton’ in Nikos Passas and Robert Agnew (eds) *The Future of Anomie Theory* (Northeastern University 1997) 27–51; Robert Agnew *Why Do Criminals Offend? A General Theory of Crime and Delinquency* (Roxbury 2005).

<sup>50</sup> Steven F. Messner and Richard Rosenfeld ‘Markets, Morality, and an Institutional-Anomie Theory of Crime’ in Nikos Passas and Robert Agnew (eds) *The Future of Anomie Theory* (Northeastern University Press 1997) 207–227 and Steven F. Messner and Richard Rosenfeld *Crime and The American Dream* (5th edn, Wadsworth 2013).

<sup>51</sup> Pasculli (n 17) 55.

<sup>52</sup> Adrian Raine *The Anatomy of Violence. The Biological Roots of Crime* (Penguin 2013) 175-180.

behind the commission of financial crimes.<sup>53</sup> These studies suggest that a better knowledge of our biological processes can usher more humane and cost-effective policies<sup>54</sup>, such as ‘prefrontal workout’ and customised rehabilitation of offenders<sup>55</sup>. Without digging any further into the remote causes of fraud and financial crime, it is evident that the combination of responsabilisation and law enforcement merely addresses the proximate causes of crime. Information-sharing, awareness-raising and risk management, on the one hand, and policing, prosecution and sanctions, on the other hand, intervene directly on situational opportunities and controls, and, less directly, on immediate criminal motivations and pressures, but do little to resolve the deepest social drivers of criminality. These require broader welfare interventions aimed at levelling social inequalities, promoting education and the physical and mental wellbeing of individuals, and an overall reflection on the values promoted by society and its institutions. Otherwise, the responsabilisation of civil society will result in the deresponsibilisation of the state.<sup>56</sup>

Another concern is that the large transfer of crime control responsibilities to private organisations – mostly businesses – and the business-like approach to criminal justice entails a commodification of security,<sup>57</sup> and even of legal prescriptions.<sup>58</sup> This can have several adverse consequences. Firstly, it might exacerbate anomie by fuelling cultural emphasis on market-oriented goals, methods, targets, and institutions. Secondly, the emphasis on commercial risk mitigation has created a growing industry which works through logics and mechanisms which serve to expand the demand for private security services. The suggestion that political responses alone are insufficient and risks can only be effectively contained by ‘bespoke’ commercial services might contribute to the perpetuation of a culture of risk in which the demand for security can never be satisfied and guarantees continuous profits.<sup>59</sup> Finally, once security becomes a commodity it tends to be distributed by market forces, rather than according to need, thus leaving the poorest and least powerful in our societies unprotected.<sup>60</sup>

### **The response of the UK Government to fraud risks during the pandemic: an outline**

The UK approach to Covid19-related fraud risks reflects the dichotomy law enforcement-responsibilisation. Law enforcement during the pandemic has suffered inevitable limitations. The criminal justice system continued to operate, although partially. As of 23 June 2020, 93 courts were still not open to the public.<sup>61</sup> The CPS has prioritised the prosecution of all

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<sup>53</sup> cf Eugene Soltes *Why They Do It. Inside the Mind of the White-Collar Criminal* (Public Affairs 2016) 18-19 and David Eagleman *Incognito. The Secret Lives of the Brain* (Canongate 2011) 112 and David Eagleman *The Brain. The Story of You* (Canongate 2015) 118-143.

<sup>54</sup> Eagleman *The Brain* (n 53) 141.

<sup>55</sup> Eagleman *Incognito* (n 53) 180-186.

<sup>56</sup> Pasculli (n 17) 62–65.

<sup>57</sup> cf Garland (n 11) 463 and Elke Krahmman ‘Security: Collective Good or Commodity?’ (2008) 14(3) *European Journal of International Relations* 379-404.

<sup>58</sup> Shamir (n 26) 2, citing Orly Lobel ‘The renew deal: The fall of regulation and the rise of governance in contemporary legal thought’ (2004) 89 *Minnesota Law Review* 342.

<sup>59</sup> Elke Krahmman ‘Beck and Beyond: Selling Security in the World Risk Society’ (2011) 37(1) *Review of International Studies* 349-372.

<sup>60</sup> Garland (n 11) 463.

<sup>61</sup> From 17 July 2020, the government is no longer publishing the tracker list as most courts and tribunals buildings are now open in line with public health advice. The numbers in this paper are based on the government’s court and tribunal tracker list as published at < <https://www.gov.uk/guidance/courts-and-tribunals-tracker-list-during-coronavirus-outbreak#changes-to-status-23-june-2020> > accessed 23 June 2020.

COVID-19-related cases<sup>62</sup>, including fraud and dishonesty offences against vulnerable victims and the SFO is continuing its investigations.<sup>63</sup> This prioritisation should ensure that, despite the constraints of the current circumstances, resources are allocated to the investigation and prosecution of COVID-19-related fraud.

As for responsabilisation, our review suggests us to distinguish between measures adopted in the private sector and measures adopted in the public sector. Private sector responsabilisation targets mainly individual citizens and businesses. Public sector responsabilisation addresses leaders and fraud experts in government bodies and local authorities that are administering emergency programmes on behalf of the Government.<sup>64</sup> Some responsabilisation measures are common to both private and public sectors. These are awareness-raising and information campaigns – mostly online – to help citizens, businesses and potential victims and are encouraged to take any precaution to minimise fraud risks. The central Government website ([gov.uk](http://gov.uk)) has published various webpages to COVID-19-related anti-fraud advice for individuals,<sup>65</sup> businesses,<sup>66</sup> charities,<sup>67</sup> and public bodies.<sup>68</sup> In addition, various government agencies, such as the CPS and NCA,<sup>69</sup> the FCA,<sup>70</sup> the NHS,<sup>71</sup> NTS,<sup>72</sup> the NCSC,<sup>73</sup> The Pensions Regulator,<sup>74</sup> Action Fraud,<sup>75</sup> and Take Five<sup>76</sup> have published their own online advice, often

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<sup>62</sup> National Police Chiefs' Council (NPCC) 'Interim CPS Charging Protocol – Covid-19 crisis response' ([cps.gov.uk](http://cps.gov.uk) 2020) < [https://www.cps.gov.uk/sites/default/files/documents/legal\\_guidance/Interim-CPS-Charging-Protocol-Covid-19-crisis-response.pdf](https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Interim-CPS-Charging-Protocol-Covid-19-crisis-response.pdf) > accessed 2 December 2020.

<sup>63</sup> Serious Fraud Office (SFO) 'Covid-19 update' ([sfo.gov.uk](http://sfo.gov.uk) 7 May 2020) < <https://www.sfo.gov.uk/2020/05/07/covid-19-update/> > accessed 2 December 2020.

<sup>64</sup> Cf. Cabinet Office 'Guidance. Fraud control in emergency management' ([gov.uk](http://gov.uk) 26 March 2020) < <https://www.gov.uk/government/publications/fraud-control-in-emergency-management-covid-19-uk-government-guide> > accessed 2 December 2020.

<sup>65</sup> Home Office 'Coronavirus (COVID-19): Advice on how to protect yourself and your business from fraud and cyber-crime' ([gov.uk](http://gov.uk) 27 April 2020) < <https://www.gov.uk/government/publications/coronavirus-covid-19-fraud-and-cyber-crime/coronavirus-covid-19-advice-on-how-to-protect-yourself-and-your-business-from-fraud-and-cyber-crime> > accessed 2 December 2020; HM Revenue & Customs 'Check a list of genuine HMRC contacts' ([gov.uk](http://gov.uk) 2020) < <https://www.gov.uk/guidance/check-a-list-of-genuine-hmrc-contacts> > accessed 2 December 2020.

<sup>66</sup> Home Office (n 65); The Insolvency Service 'Be vigilant against coronavirus scams' ([gov.uk](http://gov.uk) 26 March 2020) < <https://www.gov.uk/government/news/coronavirus-covid-19-increased-risk-of-fraud-and-cybercrime-against-charities> > accessed 2 December 2020;

<sup>67</sup> The Charity Commission 'Coronavirus (COVID-19): increased risk of fraud and cybercrime against charities' ([gov.uk](http://gov.uk) 12 May 2020) < <https://www.gov.uk/government/news/coronavirus-covid-19-increased-risk-of-fraud-and-cybercrime-against-charities> > accessed 2 December 2020.

<sup>68</sup> Cabinet Office (n 64).

<sup>69</sup> CPS 'Beware fraud and scams during COVID-19 pandemic' ([cps.gov.uk](http://cps.gov.uk) 25 March 2020) < <https://www.cps.gov.uk/cps/news/beware-fraud-and-scams-during-covid-19-pandemic> > accessed 2 December 2020; NCA (n 8).

<sup>70</sup> FCA 'Avoid coronavirus scams' ([fca.org.uk](http://fca.org.uk) 1 May 2015) < <https://www.fca.org.uk/news/news-stories/avoid-coronavirus-scams> > accessed 2 December 2020.

<sup>71</sup> NHS Counter Fraud Authority 'Protecting the NHS from fraud during COVID-19' ([cfa.nhs.uk](http://cfa.nhs.uk) 2020) < <https://cfa.nhs.uk/fraud-prevention/COVID-19-guidance/> > accessed 2 December 2020.

<sup>72</sup> NTS 'Beware of COVID-19 scams' ([nationaltradingstandards.uk](http://nationaltradingstandards.uk), 24 March 2020) < <https://www.nationaltradingstandards.uk/news/beware-of-covid19-scams/> >

<sup>73</sup> NCSC 'Coronavirus (Covid-19): NCSC Guidance' ([ncsc.gov.uk](http://ncsc.gov.uk) 2020) < <https://www.ncsc.gov.uk/> > accessed 2 December 2020.

<sup>74</sup> The Pensions Regulator 'Avoid pension scams' ([thepensionregulator.gov.uk](http://thepensionregulator.gov.uk) 2020) < <https://www.thepensionregulator.gov.uk/en/pension-scams> > accessed 2 December 2020.

<sup>75</sup> Action Fraud 'Covid-19 related scams – News and resources' ([actionfraud.police.uk](http://actionfraud.police.uk) 26 March 2020) < <https://www.actionfraud.police.uk/covid19> > accessed 2 December 2020 (the page has now been archived).

<sup>76</sup> Take Five 'Covid-19 fraud and scams' ([takefive-stopfraud.org.uk](http://takefive-stopfraud.org.uk) 2020) < <https://takefive-stopfraud.org.uk/coronavirus-fraud-and-scams/> > accessed 2 December 2020.

articulated in different webpages. County and city councils have also introduced online guidance against fraud.

In addition to such campaigns, more specific action target private organisations and public bodies. As for private bodies, various government agencies and regulators have made available specific tools to support businesses in implementing adequate precautions and internal controls to prevent them or their employees from becoming victims of fraud or to commit fraud. The NCSC, for instance, published a clear and well-structured Guidance on Home Working<sup>77</sup> which includes links to many helpful practical tools, such as a clear infographic<sup>78</sup> and further guidance. The FCA's webpage 'Avoid coronavirus scam'<sup>79</sup> is also effective: short and well organised, it contains specific guidance on different fraud schemes with links to helpful tools such as the Financial Services Register,<sup>80</sup> the FCA Warning List,<sup>81</sup> and ScamSmart.<sup>82</sup> Most of these tools support and complement the implementation of crime control duties and responsibilities imposed on companies and their executives by pre-existing regulation – so there's nothing innovative about them.

The responsabilisation of the public sector has been more creative. To help the public sector understand its fraud risks – especially those generated by stimulus spending – and design adequate countermeasures, the Cabinet Office's centre of the Counter Fraud Function has established the Covid-19 Counter Fraud Response Team (CCFRT). The team is proactively monitoring the Covid-19 fraud threat utilising expertise, intelligence and analytics from its partnerships with law enforcement, the public sector, the private sector and our international relationships with the Five-Eyes countries. It is combining this intelligence with expert fraud risk assessment of the stimulus spending to help the public sector understand its fraud risks and to design and develop countermeasures, alerts and guidance. By doing this, the CCFRT aims at making the funding go further and support more of the community through the pandemic. Once again, the focus is on risk assessment, but, interestingly, the CCFRT is applying the risk-based approach to policy design and delivery.

### **The limits of the two-fold responsabilisation-law enforcement approach**

Our comparative review exposes many failings in the Government's response to Covid-19-related fraud risks. On a more superficial level, many practical flaws that can hinder crime control activities, both from civil society and from state law enforces – these include, for instance, excessive fragmentation and poor coordination between different measures, confusing or inaccessible advice or limited enforcement capabilities. These mostly depend on how the responsabilisation-law enforcement strategies have been implemented by the Government. On a deeper level, the limits of the Government's overall approach can have a more substantial and long-lasting impact on society, by failing to address the root causes of crime and even by aggravating criminogenic conditions. These seem to be more intrinsic flaws

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<sup>77</sup> NCSC 'Home working: preparing your organisation and staff' (*ncsc.gov.uk* 2 April 2020) < <https://www.ncsc.gov.uk/guidance/home-working> > accessed 2 December 2020.

<sup>78</sup> NCSC 'Home working: Managing the cyber risks' (*ncsc.gov.uk* 2020) < <https://www.ncsc.gov.uk/files/home%20working%20v1.pdf> > accessed 2 December 2020.

<sup>79</sup> FCA (n 70).

<sup>80</sup> FCA 'The Financial Services Register' (*fca.org.uk* 2020) < <https://register.fca.org.uk/s/> > accessed 2 December 2020.

<sup>81</sup> FCA 'About the FCA Warning List' (*fca.org.uk* 14 August 2017) < <https://www.fca.org.uk/scamsmart/about-fca-warning-list> > accessed 2 December 2020.

<sup>82</sup> FCA 'Be a ScamSmart investor' (*fca.org.uk* 2020) < <https://www.fca.org.uk/scamsmart> > accessed 2 December 2020.

of the developments in crime control analysed above. Below we will illustrate these shortcomings with the support of the findings of our review.

### *Law enforcement*

Apart from the above-mentioned court closures and limited police and prosecution capabilities during the pandemic, a major obstacle to effective prosecution is that there are too many reporting channels. These include Action Fraud's hotline and online reporting tool,<sup>83</sup> Citizens Advice's channels, the NCSC's email address [report@phishing.gov.uk](mailto:report@phishing.gov.uk), FCA's Consumer Helpline,<sup>84</sup> or online reporting form,<sup>85</sup> the SFO's online reporting form,<sup>86</sup> HMRC's various reporting channels,<sup>87</sup> plus the long and confusing list of prescribed entities for whistleblowing.<sup>88</sup> This makes it difficult for certain groups of citizens, particularly the most vulnerable ones – such as the elderly, or those with limited access to or experience of the Internet – to identify the right reporting channel. Reporting to the wrong channel requires to spend additional time and resources to redirect the victim towards the appropriate channel and can cause delays in investigations. Moreover, some of these channels are providing a reduced service. From June 2020 until the time at which we're writing (December 2020), Action Fraud's website has been warning that 'Due to the ongoing COVID-19 situation, unfortunately, our contact centre is currently providing a reduced service. If you do need to chat to us, we have a small number of advisors on hand to help but please be advised that waiting times will be longer. We apologise for any inconvenience caused. If your UK business, charity or organisation is currently under cyber-attack and data is potentially at risk please call 0300 123 2040 immediately and press 9. You can continue to make reports of fraud in the normal way via the website.' There are many problems with such a message. First, it can encourage fraud. Second, it can discourage reporting. Third, it creates a perception of inequality between individuals and organisations, reflecting the assumption that the interests of business are valued more than those of citizens. As a result, it can foster anomie, frustration and social mistrust.

Regulators also struggle to cope with their law enforcement duties, particularly in response to stimulus fraud. HMRC is responsible for investigating cases of irregular CJRS and Self-Employment Income Support Scheme (SEISS) payments and can audit retrospectively any claim<sup>89</sup>. To facilitate this, HMRC set up an online form for the reporting of HMRC-administered coronavirus (COVID-19) relief scheme fraud,<sup>90</sup> and urged anyone concerned that

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<sup>83</sup> Action Fraud 'Reporting fraud and cyber-crime' (*actionfraud.police.uk* 2020) <

<https://www.actionfraud.police.uk/reporting-fraud-and-cyber-crime> > accessed 4 December 2020.

<sup>84</sup> FCA 'Contact us' (*fca.org.uk* 25 April 2016) < <https://www.fca.org.uk/contact> > accessed 4 December 2020.

<sup>85</sup> FCA 'Report a scam to us' (FCA, 1 October 2020) <https://www.fca.org.uk/consumers/report-scam-us> > accessed 4 December 2020.

<sup>86</sup> SFO 'Reporting serious fraud, bribery and corruption' (*sfo.gov.uk* 2020) < <https://www.sfo.gov.uk/contact-us/reporting-serious-fraud-bribery-corruption/> > accessed 4 December 2020.

<sup>87</sup> HMRC 'Report fraud to HMRC' (*gov.uk* 2020) < <https://www.gov.uk/government/organisations/hm-revenue-customs/contact/report-fraud-to-hmrc> > accessed 4 December 2020.

<sup>88</sup> Department for Business, Energy & Industrial Strategy 'Whistleblowing: list of prescribed people and bodies' (*gov.uk* 13 February 2020) < <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2/whistleblowing-list-of-prescribed-people-and-bodies> > accessed 4 December 2020.

<sup>89</sup> Pete Duncan and Nicholas Lord 'Furlough, fraud and the Coronavirus Job Retention Scheme' (*Policy@Manchester Blogs*, 22 June 2020) < <http://blog.policy.manchester.ac.uk/posts/2020/06/furlough-fraud-and-the-coronavirus-job-retention-scheme/> > accessed 4 December 2020.

<sup>90</sup> HMRC 'HMRC Fraud Hotline' (n 5).

their employer might be abusing the scheme to report them.<sup>91</sup> More recently, facing increasing numbers of reports (almost 1900 as of 29 May 2020),<sup>92</sup> the Finance Act 2020 gives HMRC new powers to recover irregular payments and impose penalties for those who make deliberately incorrect claims and fail to notify the HMRC within the prescribed terms. Unfortunately, HMRC lacks the capacity for random audits. The sheer volume of demands attracted by Scheme,<sup>93</sup> together with the capacity constraints created by its implementation,<sup>94</sup> makes effective and extensive preventive auditing improbable and costly, meaning that most investigation will have to be retrospective.<sup>95</sup> The model also places excessive reliance on employee reporting. Despite the number of reports received by HMRC so far, researchers suggest that many cases could go unreported due to the many barriers to individual reporting.<sup>96</sup> Furloughed employees might feel ‘blackmailed into working’ and fear to lose their job by not doing so,<sup>97</sup> or by reporting the company. Even if anonymity was assured, employers might refrain from reporting for fear that the withdrawal of government funding or the imposition of sanctions might put the company out of business,<sup>98</sup> or force it to stop paying their colleagues.<sup>99</sup> Finally, there is insufficient psychological and personal support for those who wish to report. The above-mentioned barriers can affect the mental wellbeing of employees. HMRC encourages reporting, but there is no evidence of any special care measures to support employees victimised by furlough frauds or those who have reported their employees.

### *Responsibilisation of the private sector*

The information and guidance published are far from ideal, especially for private citizens. They are highly fragmentary, scattered as they are throughout the Internet. We have counted at least 20 webpages from national agencies, without considering the further advice published by most county councils, city councils and police forces. While a certain level of diversification is required to address different fraud risks and different sectors, the fragmentariness of guidance from government bodies at all levels is excessive and can compromise its effectiveness in many ways. The unnecessary multiplication and complexity of online sources make any relevant information difficult to access and understand. Even expert researchers would struggle to identify all the relevant sources and reconstruct a coherent set of messages. Moreover, the choice of the Internet as the primary (if not exclusive) means of information is debatable, as not everyone, and especially vulnerable groups, can easily access it or use it properly. We could find no evidence of information campaigns launched through other media (press, television and radio). Such piecemeal advice is not only difficult to access, but it is also confusing and contradictory as its various sources are not appropriately coordinated. The information provided differs from one website to another, and so does its format. Some websites are very

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<sup>91</sup> Sarah Butler ‘Nearly 800 reports of people defrauding UK furlough scheme’ *The Guardian* (London, 13 May 2020) < <https://www.theguardian.com/politics/2020/may/13/nearly-800-reports-of-people-defrauding-uk-furlough-scheme> > accessed 4 December 2020.

<sup>92</sup> Jessica Beard ‘Employers given 30 days to “confess” to abusing furlough bailout scheme’ *The Telegraph* (12 June 2020) < <https://www.telegraph.co.uk/money/consumer-affairs/employers-given-30-days-confess-abusing-furlough-bailout-scheme/> > accessed 4 December 2020.

<sup>93</sup> Hilary Osborne and Julia Kollewe ‘140,000 UK companies apply for coronavirus job furlough scheme’ *The Guardian* (London, 20 April 2020) < <https://www.theguardian.com/money/2020/apr/20/fears-of-flood-as-uks-covid-19-furlough-scheme-opens> > accessed 4 December 2020.

<sup>94</sup> Financial Times ‘HMRC suspends some tax investigations due to pandemic’ *Financial Times* (15 April 2020) < <https://www.ft.com/content/70471597-dc42-4c70-aff2-d7e03eeabdac> > accessed 4 December 2020.

<sup>95</sup> Duncan and Lord (n 89).

<sup>96</sup> *ibid.*

<sup>97</sup> Butler (n 91).

<sup>98</sup> Duncan and Lord (n 89).

<sup>99</sup> Butler (n 91).

specific, others are more generic. Many sources do not follow the general ‘Stop, Challenge and Protect’ approach adopted by the Government in the *gov.uk* and Action Fraud websites.<sup>100</sup> The Cambridgeshire County Council webpage<sup>101</sup> even refers citizens to the website Which?,<sup>102</sup> which is not backed or checked by the Government and offers commercial products and services. Moreover, different sources suggest different reporting channels. The Suffolk County council website,<sup>103</sup> for instance, does not advise citizens to report fraud cases to Action Fraud, but only to call National Citizen’s Advice helpline. Moreover, some of the online advice is incomplete and out of date. Some *gov.uk* webpages are months old and date back to spring 2020,<sup>104</sup> despite a second lockdown was called in November. Other online guidance does not cover some important fraud risks. None of the main anti-fraud agencies or relevant government bodies has published informative videos on COVID-19-related fraud risks and some of the videos currently available are years old. The latest video uploaded on YouTube by Action Fraud dates back to August 2019,<sup>105</sup> while the latest video uploaded by Financial Fraud Action UK dates back to February 2018.<sup>106</sup> Some websites include broken links to other webpages: from June to November 2020 the Staffordshire County council website,<sup>107</sup> for instance, referred to a wrong link to Take Five’s advice.<sup>108</sup> The NHS’s COVID-19 counter fraud guidance<sup>109</sup> is mostly addressed to NHS staff, rather than the general public and it does not mention the risks of fraud related to the ‘Test and Trace’ system flagged by the Local Government Association.<sup>110</sup> Such risks are briefly mentioned in the general ‘Test and Trace’ webpage<sup>111</sup> but no extensive advice is provided. Similarly, we could not find any official guidance on the recently uncovered scam designed to steal personal and financial details of millions of self-employed workers using the SEISS.<sup>112</sup>

As we mentioned above, the guidance for business appears to be overall more impactful. However, the FCA published an ambiguous message on its website concerning the controls

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<sup>100</sup> Home Office (n 65) and Action Fraud (n 75).

<sup>101</sup> Cambridgeshire County Council ‘Coronavirus (COVID-19) Beware of Coronavirus scams’ (*cambridgeshire.gov.uk* 2020) < <https://www.cambridgeshire.gov.uk/residents/coronavirus/beware-of-coronavirus-scams> > accessed 3 December 2020.

<sup>102</sup> Which? ‘How to spot an email scam’ (*Which?* 2020) < <https://www.which.co.uk/consumer-rights/advice/how-to-spot-an-email-scam> > accessed 3 December 2020.

<sup>103</sup> Suffolk County Council ‘Report a business or scam during coronavirus (COVID-19) pandemic’ (*suffolk.gov.uk* 2020) < <https://www.suffolk.gov.uk/coronavirus-covid-19/latest-information/report-business-scam-coronavirus> > accessed 3 December 2020.

<sup>104</sup> See, for instance, nn 63-77 above.

<sup>105</sup> Action Fraud ‘Commander Baxter interview on BBC Radio 4 Today programme’ (*YouTube* 15 August 2019) < <https://youtu.be/oAynaIz224> > accessed 3 December 2020.

<sup>106</sup> Financial Fraud Action UK ‘Take Five Phase 2 – Brandon – Manchester’ (*YouTube* 23 February 2018) < [https://youtu.be/RLABIRQO\\_pk](https://youtu.be/RLABIRQO_pk) > accessed 3 December 2020.

<sup>107</sup> Staffordshire County Council ‘Cybercrime and fraud’ (*staffordshire.gov.uk* 2020) < <https://www.staffordshire.gov.uk/Coronavirus/Cyber-crime-and-fraud.aspx> > accessed 23 June 2020. That page is now unavailable, as has been replaced by the following: < <https://www.staffordshire.gov.uk/Coronavirus/Help-and-support/Cyber-crime-and-fraud.aspx> > accessed 3 December 2020.

<sup>108</sup> < <https://takefivestopfraud.org.uk/news/scam-alert-coronavirus/> > accessed 3 December 2020.

<sup>109</sup> NHS Counter Fraud Authority (n 71).

<sup>110</sup> Local Government Association ‘Test and Trace scam alert issued by councils’ (*local.gov.uk* 20 June 2020) < <https://www.local.gov.uk/test-and-trace-scam-alert-issued-councils> > accessed 3 December 2020.

<sup>111</sup> NHS ‘Help the NHS alert your close contacts if you test positive for coronavirus’ (*nhs.uk* 2020) < <https://www.nhs.uk/conditions/coronavirus-covid-19/testing-and-tracing/nhs-test-and-trace-if-youre-contacted-after-testing-positive-for-coronavirus/> > accessed 3 December 2020.

<sup>112</sup> FTAdviser ‘Self-employed targeted with new tax scam’ (*FTAdviser* 20 June 2020) < <https://www.ftadviser.com/companies/2020/06/10/self-employed-targeted-by-new-tax-scam/> > accessed 3 December 2020.

that companies are expected to adopt during the coronavirus crisis.<sup>113</sup> While the FAC clearly states that ‘firms should not seek to address operational issues by changing their risk appetite’, it also recognises that ‘firms may need to re-prioritise or reasonably delay some activities’, including ‘customer due diligence reviews, or reviews of transaction monitoring alerts’. This would be considered ‘reasonable’ by FCA as long as ‘the firm does so on a risk basis’ (e.g. not for high-risk activities, such as terrorist financing) and plans to return to the business as usual review process as soon as possible. The ambiguous wording leaves firms a considerable discretion to determine what activities are ‘low’ and ‘high’ risk and can encourage relaxation of controls on risks of criminal offences, such as many fraudulent schemes, that might not be as ‘high’ as terrorist financing, but can still cause considerable harm to private customers and vulnerable individuals.

### *Responsibilisation of the public sector*

The risk-based approach adopted by CCFRT is promising and welcome. Research from various disciplines suggests that policy and regulation can inadvertently create or increase risks of crime,<sup>114</sup> by unintendedly providing opportunities for criminal schemes or strengthening criminal motivations or otherwise aggravating other criminogenic factors.<sup>115</sup> Stimulus programmes such as the CJRS and SEISS are excellent examples of policies having legitimate purposes which also create the risk of fraudulent exploitation.<sup>116</sup> To mitigate the unintended criminogenic effects of regulation, researchers have suggested regulatory risk assessment mechanisms to evaluate and mitigate any crime risks entailed by any proposed regulation (so-called ‘crime proofing’).<sup>117</sup> A similar risk-based approach has been adopted to proof legislation against corruption risks throughout Eastern Europe.<sup>118</sup>

Recent studies recommend an even broader approach targeting not only written regulation but also policymaking and administrative and judicial decision-making and including appropriate training and capacity-building for lawmakers and policymakers at large.<sup>119</sup> The approach

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<sup>113</sup> FCA (n 70).

<sup>114</sup> Hans-Jörg Albrecht et al (eds), *Criminal Preventive Risk Assessment in the Law-Making Procedure* (Max Planck Institute for Foreign and International Criminal Law 2002) and Ernesto U. Savona et al, ‘Proofing EU Legislation against Crime’ (2006) 12(3-4) *European Journal on Criminal Policy and Research* (double thematic issue).

<sup>115</sup> Lorenzo Pasculli ‘Foreign Investments, the Rule of Corrupted Law and Transnational Systemic Corruption in Uganda’s Mineral Sector’ in Rafael Leal-Arcas (ed) *International Trade, Investment and the Rule of Law* (Eliva Press 2020) 84-110.

<sup>116</sup> cf Russell Morgan and Ronald V. Clarke, ‘Legislation and unintended consequences for crime’ (2006) 12(3-4) *European Journal on Criminal Policy and Research* 189–211.

<sup>117</sup> Ernesto U. Savona et al (n 114); Ernesto U. Savona et al *A Study on Crime Proofing. Evaluation of the Crime Risk Implications of the European Commission’s Proposals Covering a Range of Policy Areas* (Università degli Studi di Trento, Università Cattolica del Sacro Cuore, Transcrime 2006) < [http://www.transcrime.it/wp-content/uploads/2013/11/Final\\_Report-A\\_study\\_on\\_Crime\\_Proofing.pdf](http://www.transcrime.it/wp-content/uploads/2013/11/Final_Report-A_study_on_Crime_Proofing.pdf) > accessed 4 December 2020; Francesco Calderoni, Ernesto U. Savona and Serena Solmi *Crime Proofing the Policy Options for the Revision of the Tobacco Products Directive* (Transcrime, Università degli Studi di Trento 2012); Stefano Caneppele, Ernesto U. Savona and Alberto Aziani *Crime Proofing of the New Tobacco Products Directive* (Transcrime, Università degli Studi di Trento 2013)

<sup>118</sup> Alexander Kotchegura ‘Preventing Corruption Risk in Legislation: Evidence from Russia, Moldova, and Kazakhstan’ (2018) 41(5-6) *International Journal of Public Administration* 377; Tilman Hoppe *Anti-Corruption Assessment of the Laws (“Corruption Proofing”). Comparative Study and Methodology* (Regional Cooperation Council 2014).

<sup>119</sup> Pasculli (n 115) and Lorenzo Pasculli ‘*Corruptio Legis*: Law as a Cause of Systemic Corruption. Comparative Perspectives and Remedies also for the Post-Brexit Commonwealth’ (2017) *Proceedings of 6th Annual International Conference on Law, Regulations and Public Policy (LRPP 2017)*, 5-6 June 2017, Singapore (Global Science and Technology Forum 2017) 189.

adopted by the CCFRT seems to go precisely in this direction: the CCFRT helps leaders and policymakers to understand and assess fraud risks related to the stimulus policies and helping public bodies design and deliver adequate countermeasures. Nevertheless, there are various shortcomings. The first concern a lack of transparency and accountability. It is very difficult to assess the CCFRT's work as few sources about it are publicly available. The CCFRT does not have a dedicated webpage and the only information accessible online is included in a handful PDF documents scattered in various random websites (e.g. gov.uk,<sup>120</sup> NHS websites.<sup>121</sup> the British Vehicle Rental & Leasing Association (BVRLA)'s website).<sup>122</sup> One of these documents claims that the CCFRT 'have built an expert team who can provide a variety of expertise',<sup>123</sup> but there is no indication of who these experts are, what their background is and how they were appointed. The first issue of a newsletter (April 2020) can be found in the MIAA/NHS website,<sup>124</sup> but there is no trace of further issues. The lack of transparent information prevents full, impartial scrutiny by independent experts, relevant stakeholders and the general public, reduces the opportunities for improvement and prevents the dissemination of good practices beyond the public sector. A second problem concerns the limited scope of the CCFRT's work. This focuses especially on protecting public money, rather than protecting businesses and individuals. The Counter Fraud Measures Toolkit, released by the CCFRT,<sup>125</sup> suggests various due diligence measures, such as identity and account verification, to avoid irregular payments, but fails to address the risk that scammers exploit support schemes to try to steal money from people;<sup>126</sup> as it happened in a case of scam designed to steal personal and financial details of millions of self-employed workers through fake HMRC text messages and website.<sup>127</sup> Moreover, the CCFRT focuses primarily on stimulus spending, but crime and fraud risks can be triggered by many other types of government policies and schemes.

There is also a lack of *ex post* evaluation. The measures to assess and control fraud risks suggested by the Counter Fraud Measures Toolkit cover only the phases of policy design and implementation. A systematic mechanism to assess the crime and fraud risks triggered by government policies after their termination is still missing. *Ex post* assessments are fundamental to learn from past mistakes and avoid repeating them – that is, to become

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<sup>120</sup> Cabinet Office 'Fraud control in emergency management: COVID-19 UK Government guide' (*gov.uk* 26 March 2020) < <https://www.gov.uk/government/publications/fraud-control-in-emergency-management-covid-19-uk-government-guide> > accessed 4 December 2020.

<sup>121</sup> MIAA Anti-Fraud Service 'Anti-fraud client briefing 2' (*MIAA* 2020) < <https://www.miaa.nhs.uk/media/Briefings/Corona/Fraud%20Briefing%20Note%20.pdf> > accessed 4 December 2020; Government Counter Fraud Function 'COVID-19 Counter Fraud Response Team' (*cfa.nhs.uk* 2020) < [https://cfa.nhs.uk/resources/downloads/fraud-awareness/covid-19/COVID-19\\_Fraud\\_Response\\_Team.pdf](https://cfa.nhs.uk/resources/downloads/fraud-awareness/covid-19/COVID-19_Fraud_Response_Team.pdf) > accessed 4 December 2020.

<sup>122</sup> Government Counter Fraud Function 'COVID-19 Mandate Fraud' (*bvrla.co.uk* 2020) < <https://www.bvrla.co.uk/uploads/assets/9e0d92a8-c292-41af-9f4e50ab71c2a95e/COVID19-Mandate-Fraud-Guidance.pdf> >

<sup>123</sup> Government Counter Fraud Function (n 121).

<sup>124</sup> Government Counter Fraud Function 'COVID-19 Counter Fraud Response Team NEWSLETTER Issue #1 / April 2020' (*cfa.nhs.uk* 2020) < [https://cfa.nhs.uk/resources/downloads/fraud-awareness/covid-19/COVID-19\\_Fraud\\_Team\\_Newsletter\\_April\\_2020.pdf](https://cfa.nhs.uk/resources/downloads/fraud-awareness/covid-19/COVID-19_Fraud_Team_Newsletter_April_2020.pdf) > accessed 4 December 2020.

<sup>125</sup> Government Counter Fraud Function 'COVID-19 Financial Support Schemes Counter Fraud Measures Toolkit' (*miaa.nhs.uk* 2020) < <https://www.miaa.nhs.uk/media/Briefings/Corona/COVID-19%20Financial%20Support%20Schemes.pdf> > accessed 4 December 2020.

<sup>126</sup> FTAdviser 'FCA warns on coronavirus scams' (*FTAdviser* 27 March 2020) < <https://www.ftadviser.com/regulation/2020/03/27/fca-warns-on-coronavirus-scams/> > accessed 4 December 2020.

<sup>127</sup> FTAdviser 'Self-employed targeted with new tax scam' (*FTAdviser* 10 June 2020) < <https://www.ftadviser.com/companies/2020/06/10/self-employed-targeted-by-new-tax-scam/> > accessed 4 December 2020.

acquainted with risks that had not been anticipated in the design and implementation of a policy and be able to address them in future policymaking<sup>128</sup>. The CCFRT's engagement with foreign and international institutions is also limited. The Team claims to use 'intelligence and analytics' from partnerships with Five Eyes countries. These are the members of the Five Eyes Intelligence Oversight and Review Council (FIORC)<sup>129</sup> and the International Public Sector Fraud Forum (IPSFF);<sup>130</sup> the UK, Australia, Canada, New Zealand, and the USA. It is unclear why the CCFRT should limit its international partnerships to such countries. Surely intelligence from other (and closer) jurisdictions, such as European states, and international organisations, such as the European Anti-Fraud Office (OLAF), is equally important. Furthermore, although the CCFRT claims to use intelligence from partnerships with the public and private sectors, there is no evidence of engagement with scientific research and academia. The CCFRT's Counter Fraud Measures Toolkit does not rely on the findings of previous research on crime risk assessment of policy and regulation. Instead, it is largely based on IPSFF's Principles for Effective Fraud Control in Emergency Management and Recovery,<sup>131</sup> – which does not refer to academic literature at all. There is no evidence of any involvement of academics in the work of the CCFRT. Perhaps, some of the above shortcomings could have been avoided by preventatively consulting academic experts.

### *The offender vanishes*

The greatest failure of the above-mentioned government strategies is the lack of efforts to mitigate criminal motivations or the remote causes of fraud. While there is a commitment to prevent victimisation through awareness-raising and risk management (responsibilisation) and to dissuade offenders through the threat of traditional law enforcement, there is no trace of any commitment to a serious understanding of the cultural, social, economic and psychological conditions that can trigger or aggravate individual motivations to commit fraud during the pandemic. Nor can we assume that such commitment is included in the overall government strategy against financial crime. The Economic Crime Plan 2019-2022 does not include any action or strategic priority aimed at understanding and assessing any such development. 'Understanding the threat' merely refers to the identification and assessment of situational risks. Crime prevention is thus reduced to prevention of victimisation, situational prevention and deterrence, with the exclusion of any broader or deeper social intervention. This is a clear, albeit perhaps unnecessary, confirmation of Garland's suggestion that the rehabilitative ideal is indeed in decline.<sup>132</sup> The offender, with their issues, needs and reasons (or lack thereof), disappears in the thousand pieces of advice for potential victims and micro-activities to securitise things, practices and situations. It might also be a product of an implicit assumption, based on the level of sophistication of certain fraudulent schemes, fraudsters and financial criminals are relatively educated and socially integrated. This assumption might be true for

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<sup>128</sup> Pasculli 'Corruptio legis' (n 119).

<sup>129</sup> The National Counterintelligence and Security Centre 'Five Eyes Intelligence Oversight and Review Council (FIORC)' (*dni.gov* 2020) < [https://www.dni.gov/index.php/ncsc-how-we-work/217-about/organization/icig-pages/2660-icig-fiorc#:~:text=Five%20Eyes%20Intelligence%20Oversight%20and%20Review%20Council%20\(FIORC\),Kingdom%2C%20and%20the%20United%20States.](https://www.dni.gov/index.php/ncsc-how-we-work/217-about/organization/icig-pages/2660-icig-fiorc#:~:text=Five%20Eyes%20Intelligence%20Oversight%20and%20Review%20Council%20(FIORC),Kingdom%2C%20and%20the%20United%20States.) > accessed 4 December 2020.

<sup>130</sup> Cabinet Office 'International Public Sector Fraud Forum guidance' (*gov.uk* 10 February 2020) < <https://www.gov.uk/government/publications/international-public-sector-fraud-forum-guidance> > accessed 4 December 2020.

<sup>131</sup> International Public Sector Fraud Forum 'Fraud in Emergency Management and Recovery Principles for Effective Fraud Control' (*gov.uk* February 2020) < [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/864310/Fraud\\_in\\_Emergency\\_Management\\_and\\_Recovery\\_10Feb.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864310/Fraud_in_Emergency_Management_and_Recovery_10Feb.pdf) > accessed 4 December 2020.

<sup>132</sup> David Garland 'The Limits of the Sovereign State' and *The Culture of Control* (n 11).

fraudulent schemes at the expenses of stimulus programmes, as much as for other high-profile frauds, but it does not imply that even such offences can be motivated by a criminogenic mix of individual strains (financial, biological, psychological etc.) and social developments. Indeed, the pandemic has aggravated some of the factors, such as social and economic inequality,<sup>133</sup> which, more than destitution itself, can cause psychological pressures that can drive individuals to crime,<sup>134</sup> especially of financial nature.

One could argue that addressing the root causes of fraud and financial crime requires time and the temporariness and urgency of the pandemic does not allow for planning and implementing broader and long-standing social programmes, such as education or mental care, which should instead be pursued by other policy areas not necessarily related to crime. But, in fact, not all root causes require sophisticated and long-lasting initiatives, as we shall see in the next paragraph. Nor can the complexity of the causes of crime or the challenges of studying them be a valid excuse for inaction. As we saw, social sciences and even natural sciences already provide important indications for policy and more investment on and engagement with academic research can help identify specific objectives and actions.

## **Recommendations**

We suggest the following measures to remedy the above shortcomings.

### *Guidance and information*

Any information, guidance and advice on COVID-19-related fraud risk issued by national and local government agencies should be coordinated and accessible through one comprehensive and constantly updated online portal to avoid unnecessary repetitions, confusion and multiplication of sources. A good example of a similar portal is provided by the centralised coronavirus information website published by the USA.<sup>135</sup> Advice which is applicable across the country and any sector should be given by the central Government through the above portal, which should, in turn, refer to the website of other entities (e.g. local councils, sectorial regulators or organisations) for specific advice relevant to particular geographical or policy areas. Information and guidance should not only be provided online but also through extensive campaigns via more traditional media, such as newspapers, radio and television, to the benefit of the elderly and other groups who might be unable to access the Internet. Governmental agencies and regulators should refrain from publishing ambiguous messages that can inadvertently discourage reporting, encourage relaxation of corporate crime controls or fuel criminal motivations. Public communication campaigns should focus not only on potential victims but also on potential offenders, with a view to reducing criminal motivations and criminogenic mindsets and discourses, as we will explain more in detail in the last paragraph of this section.

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<sup>133</sup> Abi Adams-Prassl, Teodora Boneva, Marta Golin and Christopher Rauh ‘Inequality in the impact of the coronavirus shock: Evidence from real time surveys’ (2020) 189 *Journal of Public Economics* and Abi Adams-Prassl, Teodora Boneva, Marta Golin and Christopher Rauh ‘Inequality in the impact of the coronavirus shock: New survey evidence for the UK’ (2020) 10 *Cambridge-INET Working Paper Series / 2023 Cambridge Working Papers in Economics* < <https://www.repository.cam.ac.uk/bitstream/handle/1810/305395/cwpe2023.pdf?sequence=1> > accessed 4 December 2020.

<sup>134</sup> Pasculli (n 17) 53-54.

<sup>135</sup> The White House, Centers for Disease Control and Prevention (CDC) and Federal Emergency Management Agency (FEMA) ‘Find answers about Coronavirus’ (2020) < <https://faq.coronavirus.gov/> > accessed 4 December 2020.

### *Reporting channels*

Reporting channels should be rationalised. There should be a central national online portal for those who wish to report any kind of financial crime. The portal could include a preliminary questionnaire relying on AI to direct the applicant to the appropriate authority according to the type of fraud to be reported (Action Fraud, HMRC, FCA, SFO etc.). This centralised system could be used also to receive reports of misconduct from whistle-blowers. A similar, although pretty basic, online questionnaire is incorporated in the SFO website.<sup>136</sup> A national whistle-blowers authority should be established to coordinate, advice and supervise prescribed entities, act (at least) as last-resort reporting channel when other channels prove ineffective and advice and support whistle-blowers. The United States' (US) Office of the Whistleblower, the Dutch Whistleblowers Authority are good examples of such institutions.

### *Policy risk management*

The work of the CCFRT should be better publicised, possibly through a dedicated website and by making any relevant policy document (newsletter, toolkits etc.) released by the Team publicly available online to allow thorough public scrutiny and continuous improvement through external feedback. The focus of the CCFRT should be expanded to cover not only risks of irregular payments of public money but, more broadly, any risk of criminal harm caused to the public sector, as well as to private individuals and organisations, by frauds related to any other government policy/scheme. *Ex post* risk assessment mechanisms should be introduced to understand the risks created by government policies that could not be foreseen during the design and implementation stages. The work of the CCFRT should benefit from a broader international partnership (beyond the Five-Eyes) and continuous engagement with academia. The Government could also consider establishing (or developing the CCFRT into) a national coordinating authority dedicated to improving the detection, prevention, investigation, and prosecution of criminal conduct related to natural and man-made disasters and other emergencies, such as the coronavirus, similar to the US National Centre for Disaster Fraud (NCDF)<sup>137</sup>. Given that any government policy and regulation in any area can inadvertently create/increase risks not only of fraud but of any other crime, the Government should take advantage of the experience of the CCFRT to start establishing permanent mechanisms to perform a thorough crime risk assessment of any policy and regulation before and after their adoption and to adopt appropriate measures to control such risks.

### *Tackling the root causes of financial crime*

The UK Government's approach to fraud and economic crime should address all the possible causes of crime, not just opportunities. The two-fold approach responsabilisation-law enforcement should be integrated with a third component dedicated to the identification, understanding and mitigation of remote causes of financial crime. This requires both short-term and long-term interventions. On the short term, solid communication campaigns can be used to counter the anomic focus on financial success and social prestige with messages promoting notions of self-worth and self-achievement based on human dignity, integrity, honesty, and solidarity. Public communication can also be helpful to remind potential offenders that support is available to them and that there are alternatives to crime. But this support cannot be merely financial. As we saw above, stimulus programmes alone can be an opportunity for fraud, as much as an opportunity for legitimate financial recovery. Clear and continuing

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<sup>136</sup> SFO (n 86).

<sup>137</sup> The United States Department of Justice 'National Centre for Disaster Fraud (NCDF)' (*justice.gov* 2020) < <https://www.justice.gov/disaster-fraud> > accessed 4 December 2020.

information on the importance of mental wellbeing should and on the availability, even during the pandemic, of free and accessible care is essential. At a socio-psychological level, more efforts are required to counter the processes of rationalisation, socialisation and institutionalisation of fraud. Communication, information, education and training can be employed to counter the opportunistic and profit-oriented mind sets that both facilitate and are fuelled by such normalisation processes. On the longer term, the Government should take stock of the lessons learned during the pandemic about the fragility of our socio-economic system and the dangers of overemphasising business-like approaches and financial interests. The Government should conduct a thorough assessment of the failures of current social policies and start planning appropriate welfare measures to address the deepest criminogenic conditions of the British society, such as social inequality, lack of integration, the cognitive distortions caused by an excessive emphasis on economic life and interests, and the social distortions caused by the commodification of essential services and values – not only in crime control but also in other areas, such as, for instance, education. Research is also paramount. Mechanisms and platforms for better integration of policy and academia should be established and the Government should invest more in interdisciplinary scientific research on the remote causes of crime.

## **Conclusions**

The coronavirus pandemic has exposed the limits of the UK Government's approach to fraud, financial crime and crime in general, confirming the worries and predictions of many scholars. Such limits go beyond practical or situational shortcomings, such as the inevitable restrictions to law enforcement capabilities imposed by the pandemic or by poor policy design and implementation. Instead, they are rooted in the inherent insufficiency of the two-fold approach responsabilisation-law enforcement approach to effectively and comprehensively address the problem of crime, especially easily normalised forms of crime such as fraud and especially in times of crisis. Strained law enforcement agencies and regulators struggle to cope with the high numbers of reported frauds. As a result, both deterrence and retribution are undermined. On the other hand, the fixation on the surgical identification, dissection and rectification of a myriad of micro-situations that can entail a risk of crime is both illusory and deceiving. For as the state keeps his eyes focused on this or that situation, he loses sight of the greatest risk factor: human beings, with their complex and delicate histories, biologies, psychologies, and social interactions.

If the state hopes to effectively prevent fraud and financial crime, it must go back to the offender. The approach to crime control should be three-fold. Law enforcement and responsabilisation must be complemented by the identification and removal of the remote causes of crime. This is especially important for fraud and financial crime, which often defy traditional criminological theories and require more research and new approaches. Common places and assumptions on the motivations of fraudsters and financial criminals must be challenged through engagement with the scientific community. 'Understanding the threat' must acquire a new meaning. Not only understanding situational risks and opportunities but especially understanding motivations and deeper social, cultural, psychological and even biological developments that drive financial crime. Forgetting the offender is never a good idea.

