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Fighting Fraud and Financial Crime

A new architecture for the investigation and prosecution of serious fraud, corruption and financial market crimes

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Executive Summary

The present arrangements for fighting serious fraud, corruption and financial market crimes are lamentably deficient. The haphazard development of the Government agencies tasked with tackling these crimes has created a system of overlapping responsibilities for investigation and prosecution, a dispersion of powers and caused unnecessary duplication of manpower and specialist resources. Perhaps unsurprisingly then, our criminal justice system struggles to cope with complex fraud trials and if the perpetrators of these crimes are to be brought to account, important changes to the criminal law need to be made.

A dramatic rise in fraud? The National Fraud Authority (NFA) recently estimated that fraud costs the UK over £30 billion a year. Tax fraud is the highest single area of fraud loss, estimated at £15.2 billion and representing 3% of total tax liabilities. At the Department of Work and Pensions (DWP) alone, fraud loss is estimated at £1.1 billion.[1] Incredibly, the NFA's estimate is more than twice the widely accepted figure of £13 billion put forward by the Association of Chief Police Officers less than three years ago.[2] The increase is partly explained by more comprehensive reporting of fraud, but from whichever angle the statistics are viewed the UK is experiencing a dramatic increase in the incidence of fraud.

A myriad assortment of agencies. The present institutional mess for detecting, investigating and prosecuting these crimes includes the Serious Fraud Office (SFO), the Financial Services Authority (FSA), and two divisions of the Crown Prosecution Service (CPS) – the Fraud Prosecution Service (FPS) and the Revenue and Customs Division (RCD), as well as a multitude of other agencies with similar interests, such as the DWP, the NHS Counter Fraud Services (NHS CFS), and the Office of Fair Trading (OFT). As if this intricate web wasn't complicated enough, these agencies all operate under differing statutory frameworks, further exacerbating the problem. The wisdom of the Roskill Report published over twenty-five years ago, which highlighted the advantages of a unified agency, is even more pertinent today than it was then.

Setting an example? The problem has been exacerbated by a spate of instances where serious fraud, corruption and financial market crimes have not been prosecuted effectively at the highest level. When the highest fine imposed by the FSA on an individual miscreant, Philippe Jabre, was not only affordable, but allowed him to continue working in the hedge fund industry, what deterrent effect do civil prosecutions really have? If the public sees sophisticated fraudsters and financial criminals riding roughshod over laws designed to protect investors and maintain fair dealing in the corporate sector, the temptation to cheat on a smaller scale becomes harder to resist.

Moreover, the situation is hugely embarrassing for UK PLC. In October 2008 an OECD Working Group sharply criticised the UK's failure to bring its anti-bribery laws into alignment with the OECD Convention on Corruption, noting that over ten years after the UK ratified the Convention there had been no convictions of companies for foreign bribery.[3] The Government is currently introducing new bribery laws but these will be ineffective if introduced in isolation. The number of white collar criminals convicted by the SFO has halved in the previous ten years, notwithstanding the doubling of its running costs over the same period.[4]

Efforts to punish wrongdoing in the financial markets are equally unimpressive. In 2005/06 the financial penalties imposed by the US SEC exceeded those imposed by the FSA by a 30 to 1 ratio, which even after adjustment for differences in market capitalisation, still translates into a 10 to 1 ratio.[5] Additionally, in a newsletter published in April 2008 the FSA acknowledged that there were abnormal share price movements in almost 20% of City takeovers during 2007.[6] Some critics interpret the figures differently and suggest that insider dealing occurs in almost 25% of cases before takeover announcements are made.[7] Either way, the City of London's financial markets are not being adequately policed.

The SFO and the FSA have failed to respond to these criticisms, with both organisations pointing in diametrically opposite directions. The SFO has recently negotiated civil settlements in two corruption cases instead of initiating criminal prosecutions.[8] Meanwhile, the FSA has significantly increased the number of criminal prosecutions it has brought, in circumstances where it could have imposed civil fines for breach of its Code of Market Conduct.[9] Although these developments raise important issues regarding accountability, they have taken place in the absence of any public or Parliamentary debate.

There is an opportunity to utilise new tools. US-style deferred prosecution agreements (DPAs) would add another weapon to the armoury of a new agency. Under a DPA the prosecutor initiates a criminal prosecution but then agrees to defer its pursuit if the defendant, invariably a company, agrees to fulfil certain conditions within a period of time. Typically, these conditions require the company to acknowledge its involvement in the commission of the criminal offences, agreeing to pay a punitive fine, implement corporate reforms to prevent any repetition of the offending conduct, and to fully co-operate with the investigation. These have been used successfully in an extraordinarily wide range of circumstances, including breach of sanctions, bribery and corruption, mortgage and revenue fraud, as well as financial market crime.

We need to update criminal law and its procedure for the 21st century. Specific acts of culpable behaviour by identifiable directors have to be proven before a company can be held liable in criminal law. Whilst this approach was valid in the 19th century when a company's affairs were conducted by its directors, with the rapid expansion of corporations and globalisation of their operations, the application of this principle has become hopelessly unrealistic.

Similarly, in complex cases an investigating authority may find it necessary to seize over 100 computers from the head office of a large commercial enterprise. If the totality of this material were printed out, its height would rival the Eiffel Tower. In the Rastogi, Jain and Majumdar case, disclosure of unused material took two years to complete and involved, at different times, a team of five lawyers (the case controller, a QC, and three junior barristers), two investigators and thirteen paralegals.[10] As the amount of material stored in a digital form increases, this problem can only become more serious.

Reform of the institutional architecture for the investigation and prosecution of fraud and financial crime is long overdue. We recommend a new framework to confront these issues, including:

- A single "Financial Crimes Enforcement Agency" to tackle serious fraud, corruption and financial market crimes, either by consolidating the existing investigative and prosecutorial powers of the disparate agencies (SFO, FSA, CPS FPS & RCD, OFT) into a new body, or by enlargement of the Serious Fraud Office
- Where an alternative to immediate criminal prosecution is preferred, new powers to support criminal enforcement with US-style deferred prosecution agreements and financial penalties. In these cases there should also be associated measures to secure judicial approval and ensure public transparency
- Changes to criminal law to ensure companies can be held vicariously liable for the acts of their employees where the commission of serious fraud, corruption and financial market crimes are involved; and to relieve prosecutors of unduly burdensome practical requirements
- New Crown Court powers to make serious crime prevention orders, adjust property rights and confiscate assets, and hence widen the range of options available to Crown Courts and allow cases to be dealt with holistically. The use of "designer divorces" where a defendant ensures his wife seeks transfer of property rights before the institution of criminal proceedings, is just one of a number of evasion ploys that could be significantly reduced by these changes

Although it is vital that the investigation and prosecution of lower-level fraud is not overlooked, this paper does not make any recommendations in this regard since the remit of a new single agency would be focused on tackling serious fraud, corruption and financial market crimes.

The current mess

The principal Government agencies involved with the detection, investigation and prosecution of serious fraud, corruption and financial market crimes are the Serious Fraud Office (SFO), the Financial Services Authority (FSA) and two divisions of the Crown Prosecution Service (CPS) - the Fraud Prosecution Service (FPS) and the Revenue and Customs Division (RCD). There are also myriad other agencies interested in the investigation and prosecution of serious fraud and other forms of financial crime, such as the Department of Work and Pensions (DWP), NHS Counter Fraud Service (NHS CFS), and the Office of Fair Trading (OFT).

Financial Services Authority (Enforcement)

Investigation & Prosecution

Financial markets crime

- Insider dealing on the financial markets
- Providing false or misleading market information to investors
- Boiler room frauds
- Carrying on financial services business when not authorised

- **Budget:** £43.7 million
- **Personnel:** c.35

Serious Fraud Office

Investigation & Prosecution

Serious or complex fraud of a value above £1 million

- Selling bogus investments
- “Ponzi” frauds
- Hedge fund frauds
- Financial markets fraud (e.g. share ramping, publishing false information and asset stripping)
- Banking and mortgage frauds
- Boiler room frauds
- Public sector frauds
- Corruption

- **Budget:** £43.4 million
- **Personnel:** c.300

CPS Fraud Prosecution Service

Prosecution

Serious fraud and corruption of a value above £750,000

- Selling bogus investments
- “Ponzi” frauds
- Advance fee frauds
- Hedge fund frauds
- Boiler room frauds
- Corporate fraud
- Banking and mortgage frauds
- Public sector fraud
- Corruption

- **Budget:** c.£2 million
- **Personnel:** c.30

CPS Revenue & Customs Division

Prosecution

Revenue & Customs fraud

- VAT frauds
- Income tax frauds
- Corporation tax frauds
- Excise duty frauds

- **Budget:** Unavailable
- **Personnel:** c.100

City of London Police Economic Crime Directorate

Investigation

Serious fraud and corruption

- Selling bogus investments
- “Ponzi” frauds
- Advance fee frauds
- Boiler room frauds
- Corporate fraud
- Banking and mortgage frauds
- Corruption

- **Budget:** c.£8 million
- **Personnel:** c.140

Serious Fraud Office

The SFO has a statutory obligation to investigate and prosecute cases involving serious or complex fraud[11] with a budget in 2010 of £43.4 million.[12] As at May 2007, the SFO had a total civil service staff of 311 that included 56 lawyers and 128 civilian investigators.[13] The SFO's investigation powers are set out in the Criminal Justice Act 1987 and supplemented by provisions in a number of different statutes including the Serious Organised Crime and Police Act 2005. In addition, the SFO has been given power to bring civil actions in the High Court for the recovery of the proceeds of unlawful conduct[14] and also to obtain serious crime prevention orders in cases where there are reasonable grounds for believing that such an order is necessary to prevent, restrict or disrupt a person's involvement in serious crime.[15]

Asymmetry of statutory provisions

However, the ability to utilise these powers in corruption cases is slightly opaque. Section 1 of the Criminal Justice Act 1987 makes clear that the SFO can exercise its powers in cases involving serious or complex fraud, but there is no mention of these powers being exercisable in cases of corruption. In 2008 Parliament amended section 2 of the Criminal Justice Act 1987 to afford the SFO wider compulsory interrogation and document production powers in cases where it considers it expedient to discover information regarding instances of bribery or corruption which may have taken place overseas.[16]

It would be absurd if, after exercising these powers, the SFO was unable to proceed with the case by initiating a prosecution, and hence were a prosecution to arise, the courts would be unlikely to accept any challenge to the lawfulness of a prosecution on those grounds. Nonetheless, the lack of symmetry between the statutory provisions is unsatisfactory and exposes the absence of thought which has been afforded to the contemporary legislative framework for the investigation and prosecution of serious fraud and corruption cases.

Failure to secure convictions

In recent years, there has been extensive criticism of the SFO's inability to secure criminal convictions in its cases. In a review conducted by Jessica De Grazia in June 2008, the SFO's conviction rate of 61% of defendants between 2003 and 2007 was sharply criticised since it contrasted badly with the 72% conviction rate achieved by the CPS in 2007 and the 80% rate achieved by the FPS.[17]

De Grazia recommended a raft of internal management changes as well as reform of the law which dictates the scope of investigations and the disclosure of documents and data retained by the prosecuting authority but not served as evidence against the defendant in the case.[18] Subsequent to De Grazia's review, the conviction rate has continued to slide. During the year 2008-9, eighteen SFO cases came to trial. Of the sixty defendants prosecuted, twenty-four were acquitted, reducing the annual conviction rate to 60%.[19]

Case Study: Wickes plc

In May 1999 the SFO charged four directors of Wickes plc, a publicly listed company, with fraudulent trading. It was alleged the company's profits had been overstated by approximately £51 million after the company had booked suppliers' rebates against future sales in the current year's trading profits.[20]

- After a lengthy investigation and trial, three of the directors were acquitted in November 2002.
- The case took 184 days to try, more than 1 million documents were involved, and more than 100 witnesses came from destinations as diverse as South Korea and Canada. The case was estimated to have cost approximately £40 million of public funds.[21]
- In a separate trial the fourth director was acquitted in June 2003. A fifth director had also been charged but he was discharged from standing trial with no case to answer.
- The barrister leading the prosecution reportedly told the media that although four of the five defendants had admitted that a major fraud had occurred at their company, none of them had been convicted because each of them had said that they played no part in it.[22]

Use of financial settlements

There are indeed strong reasons in favour of imposing financial sanctions upon miscreant companies in appropriate cases. Significant public expense is spared where a full scale criminal investigation and trial are averted. There is certainty of outcome, the company is made to account for its unacceptable behaviour, and the imposition of a financial penalty punishes the company and deters others from committing similar misconduct. From the company's perspective, acknowledgement of wrongdoing stopping short of criminal conviction enables it to continue tendering for public works, supply and service contracts within the European Union.[23]

The problem for the SFO at the present time lies in the absence of a statutory framework which enables an adequate and efficacious financial settlement to be imposed in a manner consistent with the requirements of public transparency and accountability, and some might say, the Rule of Law.[24]

- The factual basis for a financial settlement is the result of private negotiations conducted between the SFO and the company in the absence of judicial oversight or approbation
- There is no requirement for the SFO to publish the full terms of the settlement
- There is a lack of transparency regarding the calculation of the amount of money to be paid by

the company by way of financial settlement

- The settlement may be concluded without the company making full admissions as to the true extent of its wrongdoing

- The maximum amount of a financial settlement is limited to disgorgement of the benefit received by the company from its unlawful conduct. The SFO has no ability to seek a financial sanction which exceeds this sum

- There is no statutory mechanism for the imposition of a deferred prosecution agreement which would serve as a vehicle for a financial settlement relating to the commission of serious criminal conduct

When the power for agencies to initiate a civil action in the High Court for the recovery of the proceeds of crime was conceived, the Government envisaged that the power would be deployed “where there is strong evidence of the criminal origins of the property, but insufficient evidence for criminal conviction of the owner.”[25] The action would also be used where the perpetrator of the criminal conduct could not be identified with any degree of certainty, or where he was beyond the jurisdiction and could not be brought to the UK for trial.

Surrogates for criminal enforcement?

Meanwhile, there has been extensive criticism of financial settlements made by the SFO in two cases involving allegations of overseas corruption in place of criminal prosecution. In the Balfour Beatty case, the company agreed to make a settlement payment of £2.25 million,[26] and more recently AMEC agreed to make a settlement payment of £4.9 million.[27]

On the 5th November 2009 the Attorney General issued guidance as to how civil recovery powers should be exercised and what circumstances could be taken into account when deciding whether to use non-conviction based powers.[28] It is not entirely clear from the limited information released to the public whether the settlements in the Balfour Beatty and AMEC cases fitted this profile since the perpetrators of the criminal conduct were clearly identifiable and it is clear that both companies accepted an element of culpability in this regard.[29] Actions for civil recovery have an important role to play as additional weapons in the armoury but they should not be surrogates for criminal enforcement.

The recent SFO settlement of the BAE Systems corruption investigation is no more than a variant on a theme.[30] Whilst the outcome may reflect an elegant solution bearing in mind the limited powers presently afforded to the SFO to combat sophisticated international corporate crime, the SFO settlement (£30 million) was only 12% of the company’s settlement with the US authorities ($400 million), with the company acknowledging culpability for a minor accounting offence only and no individuals being prosecuted.

Paradoxically, the deficiencies in the powers of the SFO stand in marked contrast to the structure established by Parliament for the FSA where the imposition of a financial sanction commonly reflects the FSA's response to an irregularity involving insider dealing or manipulation of the financial markets. Under section 66 of the Financial Services and Markets Act 2000 (FSMA) Parliament empowered the FSA to impose a penalty on a person guilty of misconduct. The FSA is statutorily obligated to produce a statement of policy on how it will decide to impose a penalty and the amount of the penalty,[31] and there is also provision for the FSA to refer a case to the High Court for a decision on whether to impose a financial penalty and if so, in what amount.[32]

Financial Services Authority (Enforcement Division)

In a speech in April 2009, Margaret Cole (FSA Enforcement Director) made clear her intention to increase the number of criminal prosecutions brought for insider dealing "because we are determined that criminals in suits masquerading as city professionals will be seen for what they are – and will face serious consequences".[33]

The FSA Enforcement Division's budget is now thought to have reached £43.7 million[34] following a substantial increase in its 2008-9 allocation of £37.9 million.[35] The FSA Enforcement Division employs 35 criminal law specialists including lawyers and other specialists.[36] The FSA's investigation powers are set out in FSMA and have been supplemented recently by authorising the FSA to utilise the plea bargain provisions in section 71 of the Serious Organised Crime and Police Act 2005.[37]

Limited statutory empowerment

At first blush, the financial equivalence between the FSA and the SFO's budgets is surprising; while the FSA is responsible for the regulation of the financial markets with the power to prosecute added by Parliament as an adjunct to its regulatory function,[38] the SFO is responsible for investigating and prosecuting all cases involving allegations of serious or complex fraud. But irrespective of the size of its budget, the FSA is encumbered by statutory limitations which inhibit its ability to perform as an effective mainstream prosecutor at the highest level.[39]

Although the Court of Appeal has recently declared that, contrary to the limited statutory empowerment to prosecute insider dealing cases under section 402 of FSMA, the FSA is able to bring prosecutions for other financial crime offences such as bribery and false accounting in its capacity as a private prosecutor,[40] the decision begs more questions than it answers.

Unlike the SFO:

- The FSA is not empowered to bring civil actions in the High Court for recovery of the proceeds of criminal conduct
- The FSA is unable to apply to the High Court for a serious crime prevention order against an individual or a company
- The FSA lacks the ability to exercise the new investigation powers applying in cases involving overseas corruption
- The FSA is not subject to the superintendence of the Attorney General in respect of the conduct of prosecutions
- The FSA is not financed from public funds but rather independently in a self-financing way, by charging fees to authorised firms carrying out regulated activities

Reliance on private sector funding

The absence of superintendence by the Attorney General and the reliance on private sector funding may not be significant in the case of an occasional prosecution brought by a private individual or entity, but in the case of a public body responsible for policing the financial markets it is more troubling.

As the Attorney General's Protocol on superintendence explains, prosecutors exercise functions which have a very significant impact on members of the public and ministers have a legitimate interest in the overall objectives and priorities which prosecuting authorities apply in the exercise of those functions.[41] Also, there will be cases where the Attorney General needs to be involved, for instance where it is necessary to safeguard national security or because a case is particularly sensitive, or reveals some wider systemic issue for criminal law or practice.

The concern would not be academic in a case where the FSA has to consider prosecuting one of its major financiers, and possibly even a City institution or employee with whom an executive or non-executive director of the FSA has an existing or historic connection. In an article published by Forbes, the author caustically noted that "of the 20 civil penalties the FSA has levied [for insider trading] since 2004, not one has been against a major investment bank".[42]

Failure as a market regulator?

Meanwhile, past performance suggests that the FSA has failed as a market regulator and criminal prosecutor. John Coffee, a leading US academic, has pointed out that in 2005/06, the financial penalties imposed by the United States Securities and Exchange Commission (SEC) exceeded those imposed by the FSA by a 30 to 1 ratio, which, even after adjustment for differences in market capitalization, still translates into a 10 to 1 ratio.[43] Coffee added that although insider trading appears to be relatively pervasive on the London Stock Exchange and increased significantly between 2000 and 2004, no major enforcement action was taken during this period.[44]

In 2007 the FSA was sharply criticized in the financial press for its failure to take enforcement action, the writers caustically commenting that based on the number of penalties imposed by the FSA, insider trading must barely take place in the UK.[45] More recently, in the wake of sharp price movements in HBOS shares in March 2008, Lord Stevenson (HBOS Chairman) complained to shareholders that "there is a strong case for believing that the UK is exceptionally bad at dealing with white-collar crime. Only two weeks ago I was in New York and two people were convicted of insider dealing. We appear not to pursue things in the same way".[46]

The paucity of insider dealing convictions is particularly troubling since the City of London is thought to be the second biggest stock market in the world. Certainly, a comparison with enforcement authorities in other European countries causes pause for thought. In Germany, prosecutors obtained 36 convictions for insider dealing since 2004, in France there were twelve convictions between 2004 and 2007, in Switzerland there were nine convictions between 2004 and 2006, and in the Netherlands, which has the smallest financial market, eight convictions have been secured since 2004.[47]

Case Study: Philippe Jabre *(GLG Partners)*

Philippe Jabre worked as an investment manager with a hedge fund, GLG, which managed around $11.5 billion on behalf of its clients. Jabre was highly experienced and a prominent figure in the hedge fund industry.

- In February 2003 Jabre short-sold ordinary shares to the value of $16 million ahead of an announcement of a new issue of convertible preference shares, notwithstanding that he had been warned previously not to trade since he had been given advance confidential information of the prospective issue
- Although Jabre traded the shares on the Tokyo market, the shares were also quoted on the London market and therefore the UK's market abuse regime applied.
- The FSA considered Jabre's misconduct to be "very serious".[48] The media reported the case as one involving a serious instance of insider dealing.[49]

- Jabre was fined £750,000 for market abuse. In 2006 Jabre subsequently moved to Geneva and established his own hedge fund.[50] More recently, he began work for another hedge fund in Switzerland where he was described as "one of the most savvy convertible bond managers around".[51]

The fine was the highest imposed by the FSA on an individual trader but its deterrent effect was not great. In an article published in 2008, the authors remarked that although the FSA presented the penalty as severe, "others pointed out that Jabre was well able to afford the fine".[52] And as the Treasury Committee noted in 1999 when the FSMA was passing through Parliament, when regulators rely on the civil route in cases of market abuse "what [cannot be] achieved by that route is the criminal punishment which a fraud prosecution would achieve".[53]

The Committee maintained that financial crime needed to be combated effectively and "although the FSA's new civil powers will be useful, we believe that criminal prosecutions should be set in train whenever the evidence is strong enough".[54]

Case Study: Simon Treacher *(BlueBay Asset Management)*

On 1st February 2010 the FSA imposed a fine of £140,000 on Simon Treacher, a portfolio manager employed by BlueBay Asset Management, one of the largest independent fund managers listed on the London Stock Exchange with $34.3 billion under management.

- Treacher had deliberately altered seven documents and provided them as support for mis-marked positions in portfolios managed by him, leading on one occasion to a portfolio being overvalued by $11.8 million
- BlueBay had to make compensation payments to investors as a result of Treacher's misconduct totalling $650,000
- Treacher altered the documents by printing legitimate broker quotes valuing the assets, carefully cutting out and pasting different figures onto the relevant valuation line, copying the altered document and then submitting the altered copied version as the original quote
- During the course of the FSA investigation Treacher gave misleading answers in respect of his method used to alter the documents and the processes by which documents were provided as support of month end prices. The FSA viewed his conduct as "particularly serious"[55]

The Financial Times commented that "in another jurisdiction Mr Treacher might be facing jail for trying to mislead BlueBay's customers, let alone the watchdog itself".[56] In point of fact, there is full provision in English law for Treacher to have been prosecuted, if the investigating authorities had sought this outcome. It is an offence contrary to section 17 of the Theft Act 1968 to falsify a document made for an accounting purpose, and under section 177(4) of FSMA it is a criminal offence to provide the FSA with misleading information. Meanwhile, there have been criticisms of the adequacy of the fine after it emerged that Treacher owned shares worth £21 million only months before his dishonesty was detected.[57]

Other Agencies

The CPS, working through the FPS, provides a specialist prosecution and advisory service for serious fraud and corruption cases in London and elsewhere in England and Wales. Typically the cases will be complex, sensitive, high profile or involve large sums of money in excess of £750,000 and include cases investigated by the Metropolitan Police Economic and Specialist Crime Division and City of London Police Economic Crime Department (ECD).[58]

The FPS budget is small compared with the SFO and the FSA, of around £2 million a year,[59] but the figures are not comparable because the FPS does not have any investigating capacity. Approximately 30 staff work within the FPS,[60] of whom around 15 are qualified lawyers.[61] It is difficult to discover accurate figures for the cost of operating the ECD but it appears to cost the City of London Corporation around £8 million a year, with a staff of around 140.[62]

There is no breakdown available for the amount of monies expended by the Metropolitan Police or the regional Constabularies on the investigation of fraud and corruption but the total cost of investigating and prosecuting these fraud and corruption cases must surely equate to if not exceed the SFO's operating costs. Information given to the De Grazia Review revealed that the FPS conducted cases involving 80 defendants during 2007.[63]

Many of these cases, in particular those investigated by the ECD, will have involved allegations of large-scale serious or complex fraud. Where cases have been investigated by local Constabulary forces, in the absence of forensic accountants or computer analysts employed internally by the force (or the FPS), it is not uncommon for expertise to be obtained from the private sector with the significant cost implications that this implies.

Differing statutory frameworks

Police investigation powers are contained in the Police and Criminal Evidence Act 1984, as amended (and in some cases supplemented) by the provisions set out in the Serious Organised Crime and Police Act 2005. It follows that the statutory framework for investigations conducted by the police into serious fraud, corruption and financial markets offences is completely different from the statutory framework within which the SFO operates, and different again from the statutory framework within which the FSA operates.

On 1st January 2010 the RCD was transferred to work within the CPS. As an independent body the RCD's predecessor body, the Revenue and Customs Prosecutions Office (RCPO), had allowed £35.7 million as its budget for 2010-11,[64] although much of its work was directed at drug-trafficking cases. Today, the RCD's remit is limited to prosecuting a range of specialist cases including direct and indirect tax fraud, evasion of the duty paid on tobacco, alcohol and oils, illegal arms trafficking, sanctions violations, and related money laundering offences.[65]

The statutory framework for criminal investigations conducted by officers of HM Revenue and Customs (HMRC) is different again. In addition to utilising powers in the Police and Criminal Evidence Act 1984 and the Serious Organised Crime and Police Act 2005, HMRC investigators may also exercise extensive evidence gathering powers in a variety of other statutes such as the Taxes Management Act 1970 and the Value Added Tax Act 1994. Historically, there have been a number of extremely large and complex prosecutions brought in cases involving revenue fraud. In June 1993 the boss of Nissan UK was convicted of a tax fraud involving over £56 million after a lengthy trial,[66] and in February 2006 a businessman, Ian Leaf, was sentenced to a term of 10 years imprisonment for defrauding the revenue of £54 million.[67]

Powers of referral

There are other agencies, such as the NHS CFS and the DWP, with an interest in the investigation and prosecution of serious fraud. The budget for the NHS CFS was £10.4 million for the year 2007-8, with the unit employing 170 staff during this period, of which 51 were financial investigators. Since 1998 the NHS CFS has recovered a total £55.5 million and successfully brought 457 criminal prosecutions. Fifty-seven of these prosecutions were brought in 2007-8, reflecting a 96% success rate.[68]

The DWP also has an interest in the prosecution of fraud and unlike other specialist agencies it prosecutes criminal cases in large numbers. Over 6,700 criminal prosecutions were brought against income support claimants for false declarations during 2006-7,[69] with the DWP prosecution division operating on a budget of £7 million during that time.[70] As at March 2007, the DWP prosecution division employed 134 members of staff, of whom 29 were qualified lawyers.[71]

Since many of the prosecutions brought by the NHS CFS and the DWP involve low level amounts, specialist investigation skills and forensic experience will not be required. But where a much larger and sophisticated fraud is involved, there is no reason why the case should not be referred to the SFO for investigation and subsequent prosecution. In 2009 the Attorney General published the Prosecutors' Convention setting out the responsibilities of prosecutors where more than one authority shares the power to take action. Sixteen prosecuting agencies are parties to the Convention.[72]

Differing sets of investigative powers

In 2002 the OFT was empowered to bring prosecutions in cartel cases. Since then, there has been one concluded prosecution and there are another two pending.[73] In one of the pending cases, involving alleged price-fixing on behalf of British Airways, the company reached a financial settlement with the OFT in August 2007 under which it agreed to pay a penalty of £121.5 million.[74] The prosecution is being pursued against four employees and former employees of the company.[75] Like the SFO, FSA and HMRC, the OFT has its own set of investigation powers contained in Part 6 of the Enterprise Act 2002. These powers include the ability to obtain and execute search warrants and undertake intrusive surveillance under the Regulation of Investigatory Powers Act 2000.[76]

The prosecution concluded by the OFT has been the subject of criticism for good reason. The defendants operated a marine hose manufacturing company in England and participated in a sophisticated cartel arrangement involving all the major manufacturers of marine hoses worldwide to secretly employ a full-time coordinator to allocate contracts and fix prices.

- The three defendants were arrested in the US and pursuant to an agreement made with the US Department of Justice they were permitted to return to England, on condition that they pleaded guilty to charges initiated by the OFT and received minimum sentences of 30 months imprisonment (Whittle),[77] 24 months (Allison)[78] and 20 months (Brammar)[79]

- The most objectionable aspect of the plea agreement related to a provision which provided that unless the Crown Court in England imposed these minimum sentences, the defendants agreed to return to the US to be sentenced by a US court

- In the event, the sentences slightly exceeded the minimum terms, with two defendants receiving 36 months imprisonment and the third defendant a term of 30 months imprisonment[80]

- The Court of Appeal reduced the terms of imprisonment to the minimum terms set out in the plea agreement but was unhappy at the nature of the arrangement to which the OFT had been a party: "We have our doubts as to the propriety of a US prosecutor seeking to inhibit the way in which counsel represents their clients in a UK court, but having heard no argument on the subject we shall express no concluded view."[81]

It is an unattractive feature of the English criminal justice system if defendants in a financial crime case are to be rendered to the US, only to be returned to England for prosecution and imprisonment on terms dictated by the US authorities.

A New Financial Crimes Enforcement Agency

The Government is alive to the waste of valuable resources generated by the involvement of multiple agencies and in April 2009 the Attorney General announced that RCPO would lose its independent status and operate from within the CPS in an effort "to provide a better, more resilient service as well as, clearly, to save public money".[82] In truth, the effects of this change are little more than cosmetic. Rumours have circulated that the SFO would merge with the CPS, SOCA or the ECD for a number of years but no Government announcement has been made to this effect.[83]

The Roskill model: advantages of a unified agency

In point of fact, the Government has opted for the wrong model when it comes to the investigation and prosecution of serious fraud, corruption and financial market crimes. Almost twenty five years ago the Fraud Trials Committee Report chaired by the late Lord Roskill highlighted the advantages of a unified agency responsible for all the functions of detection, investigation and prosecution of serious fraud cases because of the multiplicity of professional skills required when investigating and prosecuting complex cases of this nature. The model envisaged police officers, forensic accountants, computer experts, solicitors and barristers working together as members of a case team, allowing their respective skills and experiences to be engaged at the earliest opportunity.[84]

The SFO was established on this model,[85] and the arguments in favour of this collaborative approach remain more apposite today than they were twenty five years ago, with the growing importance of computer evidence. Rightly, the Roskill Review was not troubled by the fact that an organisation with a combined police and prosecutorial function might be seen to conflict with the rationale of an independent Crown Prosecution Service.[86]

This is not to say that the revenue authority (HMRC) and regulators such as the FSA and the OFT should not retain their regulatory functions, with the ability to impose civil sanctions for regulatory breaches where no issue of criminal enforcement arises. Plainly they should, but serious fraud, corruption and financial market crime cases raise different considerations. These cases need to be handled by a specialist body equipped with the necessary powers, skills and experience. Prosecutors should specialise in regulation and the application of risk-management compliance techniques. Investigators and prosecutors perform a different role, picking up the pieces where regulation has failed and invoking the criminal process to protect the public by maintaining confidence and deterring miscreants from breaking the rules.

It is high time the Government grasped this nettle and developed an effective approach to criminal enforcement, by sweeping away the existing arrangements which have been characterised by unnecessary and wasteful expenditure on duplication of function and resources.

Recommendations

- Establishment of a single new "Financial Crimes Enforcement Agency" (or enlargement of the SFO) to be responsible for the investigation and prosecution of serious fraud, corruption and financial market crimes

- Consolidation of existing investigation and prosecution powers from the disparate agencies (SFO, FSA, CPS FPS & RCD, OFT) in the new agency

- The new agency to be subject to the superintendence of the Attorney General

Deferred Prosecution Agreements

Consolidation of existing powers would enable a new unified agency to impose financial penalties in serious fraud and corruption cases as well as financial market crimes in appropriate cases where an alternative to immediate criminal prosecution is preferred.

This result could be achieved by utilising the procedure known in the US as a deferred prosecution agreement, or "DPA" for short. Under a DPA the prosecutor initiates a criminal prosecution but then agrees to defer its pursuit if the defendant, invariably a company, agrees to fulfil certain conditions within a period of time. Typically, these conditions require the company to acknowledge its involvement in the commission of the criminal offences, agreeing to pay a punitive fine, implement corporate reforms to ensure that there is no repetition of the offending conduct, and to fully co-operate with the investigation. In the unlikely event that a company defaults a prosecution can be pursued but experience in the US indicates that this rarely (if ever) happens.

In addition to the strong reasons already articulated in favour of imposing financial penalties in appropriate cases (sparing significant public expense by avoiding a full scale criminal investigation and criminal trial, certainty of outcome, making a company account for unacceptable behaviour, avoiding debarment from public works contracts), payment of a significant financial penalty makes additional funds available to the State, not only to defray the costs of operating the investigating and prosecuting agency but also to increase the amount of monies available to support a variety of worthy causes which can involve, for example, Community rehabilitation and urban regeneration schemes.

Looking across the Atlantic, the list of recent corporate crime enforcement cases is peppered with examples of swingeing financial penalties imposed on multi-national companies with turnover levels which, in some instances, exceeds the GDP of many smaller nation states. In these circumstances, the social benefit accruing from DPA’s is not to be dismissed lightly.

Wide scope for Deferred Prosecution Agreements – US examples

Breach of sanctions and fraud: On 16th December 2009 Credit Suisse AG (a Swiss bank) agreed to pay a financial penalty of $536 million to the US Department of Justice (DOJ). Half of the amount, $268 million, would be paid to the District Attorney and then divided between New York City and New York State. The penalty was imposed because Credit Suisse had violated New York State law by falsifying the records of New York financial institutions. The scheme enabled Credit Suisse’s Iranian, Libyan, Sudanese and other sanctioned clients to access the U.S. financial system in violation of US sanctions.[87]

Mortgage fraud: On the 1st July 2009 Beazer Homes USA agreed to pay a financial penalty of $50 million following its participation in a fraudulent scheme designed to increase its profit margin and sell the homes it had built. More particularly, Beazer had engaged in several fraudulent mortgage origination practices, including:

- Fraudulently retaining so-called “discount points” that should have been used to provide some home-buyers with a decreased interest rate
- Fraudulently informing some home-buyers that they were receiving a “gift” from a charity to cover their down-payment when, in truth, the price of the home was increased to offset the supposed “gift”
- Fraudulently circumventing the “Neighbourhood Watch” and “Credit Watch” programmes of the Department of Housing and Urban Development to avoid action from the Department of Housing and Urban Development in response to the high foreclosure rate of some Beazer offices
- Instituting a strategy of wilful blindness with regard to some stated income loans

Beazer agreed to pay $10 million immediately toward restitution for victimised home-buyers and to pay the balance of monies not used to compensate home-buyers into the national restitution fund, which would then be divided between the DOJ and US Department of Housing and Urban Development.[88]

Public sector health service fraud: On 5th May 2009 WellCare Health Plans Inc agreed to pay a financial penalty of $80 million after accepting that it had defrauded Florida's Medicaid agency by submitting fraudulently inflated expenditure information through Florida's Agency for Health Care Administration in annual filings required under its contracts with the agency. One of the primary methods WellCare used to defraud was the creation of a wholly-owned corporate entity to conceal and falsely inflate the actual expenses it incurred in providing medical services to Florida's residents.[89]

Bribery and corruption: On 6th February 2007 Vetco International (a UK based company) agreed to pay a financial penalty of $26 million after admitting that it had violated corruption laws contrary to the US Foreign Corrupt Practices Act. In an effort to receive preferential treatment during the customs process, the company, acting through its subsidiaries, had made approximately 378 payments totaling $2.1 million to Nigerian customs officials over a two-year period. Invoices had been prepared for the illegal payments describing the items as "express courier payments," "interventions" and "evacuations".[90]

Financial markets fraud: On 15th May 2006 Bristol-Myers Squibb (a global bio-pharmaceutical company) agreed to pay a financial penalty of $300 million in restitution to compensate existing and former shareholders after admitting that it had committed securities fraud. Throughout 2000 and 2001 Bristol Myers Squibb concealed from the investing public its persistent use of an earnings management technique commonly known as "channel stuffing." This consisted of enticing its wholesalers, through the use of financial incentives, to buy and hold greater quantities of prescription drugs than was warranted by the demand for those products. As part of the DPA, Bristol-Myers Squibb also agreed to endow a chair at Seton Hall University School of Law dedicated to the teaching of business ethics and corporate governance.[91]

Revenue fraud: On 25th August 2005 KPMG agreed to pay financial penalties of $456 million for criminal violations of US tax laws. The fraud generated $11 billion dollars in artificial tax losses which cost the United States at least $2.5 billion dollars in evaded taxes. KPMG partners had concocted tax shelter transactions, together with false and fraudulent factual scenarios to support them, and targeted them at wealthy individuals who needed a minimum of $10 or $20 million in tax losses. Hence they would pay fees that were a percentage of the desired tax loss to KPMG, certain law firms, and others instead of paying billions of dollars in taxes owed to the government. To further the scheme, KPMG and the taxpayers filed false tax returns that claimed non-existent tax losses.[92]

In contrast to the position in England and Wales, where the SFO has been able to make financial settlements behind closed doors, in most States US law requires a DPA to be made in writing and approved by the Court in a Federal case. There is no legal requirement for the agreement to be published but in almost all cases the agreement is posted on the DOJ's website. The agreements tend to be lengthy and recite full details of the criminality which is admitted, the financial penalty which has been agreed, to whom the penalty is to be paid and for what purpose, and other remedial steps to be undertaken by the company such as the institution of new procedures to prevent recurrence of the criminality and the company's agreement for external monitoring to take place in the future at regular intervals.

Learning lessons from the US

Certainly the UK can learn from the US experience and when introducing reforms the UK could avoid some of the problems the Americans have encountered. Careful consideration needs to be given to the handling of corporate investigations so as to ensure that companies do not tempt investigating authorities to accept payment of a large financial penalty in place of immediate prosecution by unfairly offloading blame onto senior employees, and guidance from the Attorney General would need to be developed to ensure that any decision by a new unified agency to proceed with a DPA was made fairly and transparently, on the application of published criteria. It is not without significance that there is presently a Bill before Congress requiring the US Attorney General to issue guidelines delineating when to enter into DPAs. The factors for consideration identified by the Bill include:

- The potential harm of entering into a deferred prosecution agreement to employees, shareholders and other stakeholders
- The degree of cooperation by a company with investigators including the company's willingness to provide documents and make available for questioning employees, officers and directors
- The remedial action taken by the company in response to wrongdoing such as internal investigation, dismissal of employees, acknowledgment of wrongdoing, payment or restitution and other structural, management and policy changes
- The availability of criminal charges against specific employees who may have engaged in illegal acts relative to the corporate wrongdoing
- The availability of sufficient alternative punishments or remedial actions pursuant to a deferred prosecution agreement

The proposed US legislation would also require a Court to review the terms of a deferred prosecution agreement "to ensure that the agreement comports with public interest …. before authorizing the … agreement to be entered into by the parties".[93]

Directors as scapegoats?

Individual company directors or senior employees who caused a company to act unlawfully are frequently not afforded the benefit of a DPA. More often than not, directors or senior employees are prosecuted in a criminal court and following conviction it is not unusual for lengthy sentences of imprisonment to be imposed. An objection frequently raised against the use of DPAs is that companies become tempted to ditch their former directors and employees in a scramble to avoid immediate prosecution. There are concerns that the DPA procedure encourages prosecutors to bring unfair pressure to bear upon companies. There are also worries about double standards where a large corporation fends off immediate prosecution by paying an enormous fine, in circumstances where a smaller company would be prosecuted without any offer of deferment.

Certainly these are genuine concerns,[94] and it is for this reason that those responsible for investigating and prosecuting serious fraud, corruption and financial market crimes should not fear the prospect of judicial scrutiny of their actions.[95] On the contrary, the stamp of judicial approbation should be welcomed since it would ensure that the enforcement agency acted fairly in all cases and would operate to shield the agency from criticism in the media. In addition, it would also limit the ability of any interested parties, such as victims or NGO pressure groups, to challenge the decision not to prosecute. Since a DPA is a species of criminal enforcement, supervisory jurisdiction should be accorded to the Crown Court.

Recommendations

- Legislation needs to be enacted to enable a unified “Financial Crimes Enforcement Agency” to make DPAs
- The new legislation must include a requirement that:
  - The Attorney General issues guidance as to how the agency’s power to make DPAs will be exercised, subject to the approval of the Attorney-General
  - Full details of a DPA made will be published
  - A DPA cannot be made without obtaining the approval of the Crown Court as to its terms and conditions

Changes to the criminal law

It is trite to observe that few companies will agree to enter into a DPA in circumstances where, if a unified enforcement agency were to institute criminal proceedings, the chances of acquittal would be high. Yet as the law currently stands, this is precisely the position. For this reason, when the SFO recently offered companies an opportunity to confess to foreign corruption and accept a civil recovery settlement in place of prosecution, there was not a long queue.

The law's deficiency lies in the need for the prosecution to prove in serious fraud, corruption and financial market crimes cases that specific acts of culpable behaviour were committed by an identifiable director before a company can be held liable in criminal law. So, for example, in a case where a bribe had been paid, it would not be possible for the company to be held criminally liable for a corruption offence unless the prosecution could show that one or more of the directors was involved personally with the making of the bribe.

This approach was valid in the nineteenth century when a company's affairs were conducted by its directors but one hundred years later the application of the principle is hopelessly unrealistic. The number and size of companies has expanded rapidly, companies frequently operate internationally and in reality directors spend their time giving direction to the company rather than managing it or conducting its business affairs.

A solution to the problem is not difficult to find. There are four alternatives for reform of corporate criminal law.

Collective blame

The first option for reform would require recognition that the activities of different senior individuals within a company – directors and senior executives – could be aggregated or combined to reflect collectively a sufficiently blameworthy state of mind on the part of the company. The courts in the US embraced this notion of aggregation in the mid 1980's when an appeal court upheld a trial judge's instruction to the jury that, in a case involving violations of currency transaction reporting requirements, the bank had to be viewed as an institution, with its knowledge deemed to be "the sum of all of the employees". The appeal court noted that "since the bank had the compartmentalised structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary".[96]

If the same facts had arisen in England, the bank would not have been convicted. The position is neatly expressed in the American Model Penal Code which provides that a company will be held criminally liable for all offences which were "authorised, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his or her employment".[97]

Duties of organisational structure

A second option for change in the law's approach to corporate criminal liability could build upon the approach taken by Parliament when enacting the Corporate Manslaughter and Corporate Homicide Act

2007. Under this Act corporate criminal liability is imposed when a company (in actual fact, an "organisation" which is a broader concept than a company) breaches a duty imposed on it by law as a result of the way its activities are managed or organised. Clause 5 of the Bribery Bill presently before Parliament adopts a similar approach, proposing to penalise a company where "a responsible person, or a number of such persons taken together, was negligent in failing to prevent the bribe".

Culpable corporate culture

A third option would involve a change in the law by adopting a broader approach to corporate criminal liability by amending the law to recognise that legal responsibility can be found in the corporation's structure itself.[98] There is a precedent for this approach in the Australian Capital Territory in New South Wales where the statutory equivalent of the corporate manslaughter offence turns on proof of a culpable corporate culture which is defined as an "attitude, policy, rule, course of conduct or practice existing within the corporation generally or in that part of the corporation where the relevant conduct happens".[99]

Vicarious liability

A fourth option involves imposing criminal liability on companies by strictly applying principles of vicarious liability. Again, the law in the US approximates to this position. The most recently published Principles of Federal Prosecution of Business Organisations issued by the DOJ indicates that a company will be guilty of committing a criminal offence where the government can establish that an employee's actions were within the scope of his duties and were intended, at least in part, to benefit the corporation.[100] This is the simplest and most expedient option to adopt.

The Law Commission is currently working on a project which has as its primary focus the use of the criminal law as a way of promoting regulatory objectives or public interest goals and examines, in particular, the way that businesses are treated by the criminal law. The project has evolved from an earlier project on other aspects of corporate criminal liability. The Law Commission has indicated its intention to publish a consultation paper in the summer and following responses it proposes to formulate its recommendations for reform.[101] The intention is laudable, but it was negligent of the Government to have left the general principles of corporate criminal liability untouched in the last twelve years.

Recommendations

- The law on responsibility of a company for its criminal conduct must be changed, so that a company can be held vicariously liable for acts of its employees where the commission of serious fraud, corruption and financial market crimes are involved

Criminal procedure

In addition to changing the law of corporate criminality liability, important aspects of criminal procedure need to be reformed in serious fraud, corruption and financial market crimes cases.

The Government believes that abolition of trial by jury in serious fraud cases is the way forward. In June 2005 Lord Goldsmith QC, then Attorney General, informed the House of Lords of the Government's intention to abolish trial by jury in serious fraud cases "to ensure that people accused of serious frauds do not escape justice".[102] The proposal has been blocked consistently by the Opposition parties who recognise that jury trial is not part of the problem. Indeed, research suggests most non-specialist jurors are able to understand and deal with the information relevant to their verdicts in serious and complex fraud cases.[103] Rather, as De Grazia realised when she analysed the reasons for the SFO's under-performance, the procedural impediment to successful investigation and prosecution of serious or complex fraud cases lay in the slavish application of Part II of the Criminal Procedure and Investigation Act 1996 (CPIA).[104]

Burdensome practical requirements

The first problem focuses on the requirement set out in the CPIA Code of Practice (issued under Part II of the Act)[105] which requires an investigating authority to "pursue all reasonable lines of inquiry, whether these point towards or away from the suspect".[106] The Code adds that "what is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide which material on the computer it is reasonable to inquire into, and in what manner". The Fraud Advisory Panel first drew attention to the practical implications of this requirement when it reported that this compelled the SFO to widen the scope of an investigation considerably beyond what is necessary to establish the guilt of a suspect[107] and the Government in its Fraud Review made plain that it "has some sympathy with this conclusion bearing in mind the finite resources available to those investigating and prosecuting such cases".[108]

The second problem relates to the obligation imposed by section 3(1) of the CPIA requiring a prosecutor to disclose to the accused any documents or information which might undermine the prosecution case. These documents or information are referred to as "unused material" because they are not used as evidence in the trial but nonetheless the enforcement agency retains the documents or information in its possession, usually having obtained the material during the course of searches or from witnesses when taking their statements.

Although a vital safeguard for an accused the performance of this obligation has become unduly burdensome in serious or complex fraud cases where an enormous volume of electronic material has been seized. The CPIA Code of Practice stipulates that the investigating authority must list each item of material separately on a schedule, making clear the nature of the item. Although in some instances material may be listed in a block, the investigating authority must ensure that any items among that material which might satisfy the test for prosecution disclosure are listed and described individually".[109]

The discharge of these requirements in practice wreaks havoc with the ability of the SFO to prosecute a serious or complex fraud case. An investigating authority may find it necessary to seize over 100 computers from the head office of a large commercial enterprise, and if the totality of the material were printed out its height would rival the Eiffel Tower. The Government Fraud Review recorded that there had been occasions where entire investigation branches at HMRC had been closed down for a period of time so that investigators could give their full attention to disclosure on a given case. On occasions up to 80% of investigators' and prosecutors' time was spent on dealing with unused material in serious fraud cases. Moreover, the Government Fraud Review warned that "the increase in the amount of material stored in a digital form will exacerbate this problem and pose a significant challenge to the effective investigation and effective management of complex fraud trials".[110]

Case Study: Rastogi, Jain and Majumdar

In June 2008 three defendants (Rastogi, Jain and Majumdar) were sentenced to lengthy periods of imprisonment for conspiracy to defraud.

- The defendants obtained around $700 million from a number of different banks by falsely representing that they had approximately 300 customers based in the US, Hong Kong, Singapore, Dubai, India, France and Italy, who were trading with them
- Whilst the banks thought they were financing a profitable metal trading firm, in actual fact they were advancing money to a company propped up by dishonesty[111]
- Although the outcome of the case was highly successful for the SFO, the investigation was labour intensive and the financial cost enormous. According to information given to the De Grazia Review, disclosure of unused material took two years to complete and involved, at different times, a team of five lawyers (the case controller, a QC and three junior barristers), two investigators, and 13 paralegals
- "The aggregate lawyer time spent on disclosure amounted to 18.42 months; the aggregate paralegal time amounted to 148 months; and the aggregate investigator time was two months"[112]

There are a number of possible solutions to these problems:

Keys to the warehouse

One option involving elimination of the current scheduling requirement for serious fraud, corruption and financial market crimes offers a swift resolution, with defendants afforded access to all the unused material obtained from the time of charge without restriction. This approach is often referred to as the "keys to the warehouse" approach.

Pleading documents

Alternatively, the CPIA could be amended so that in serious fraud, corruption and financial market crimes cases there is a requirement on the defence to provide a defence case statement, or a pleading document, once the prosecution case has been served; and that only when that has been done would the prosecution be under a duty to consider initial disclosure of unused material. Such an approach would ensure that the defence case statement would be based on the response to the prosecution case rather than what happens to emerge from the unused material in the case.

Different classes of material

Another option would involve the introduction of a system under which the investigating authority would appear before a judge with a particular class or classes of material that has not yet been analysed where there is nothing at that point to suggest relevance to the case. The authority would seek a ruling to support that assessment and, if successful, the burden would shift to the defence to show a sound basis for any request for disclosure of that material. In serious fraud, corruption and financial market crimes cases the accused is often in a better position than the investigators to know whether certain material is relevant.

These options were put forward for consideration in the Government's Fraud Review and it is surprising that the Government has taken no action in this regard.[113]

Recommendations

- The law on criminal procedure needs to be changed so that in cases of serious fraud, corruption and financial market crimes, in the absence of a direction from the Court an investigating agency is not required to:
    - Investigate matters falling outside the areas it intends to prosecute
    - Individually describe or review every document or computer file held as unused material
- The Crown Court should be empowered to make an order requiring the prosecution to give the defence "the keys to the warehouse" where a defendant satisfies the Court that this is necessary in the interests of justice to ensure a fair trial

New Court powers

In order to confer all necessary powers on the criminal courts to deal with the problems posed in serious fraud, corruption and financial market crimes cases, the Government's new legislation involving the imposition of serious crime prevention orders and confiscation of assets needs to be refined in important respects.

A serious crime prevention order is a form of civil injunction granted by the High Court which imposes stipulations requiring an individual or company to behave in a particular way as regards their financial, property or business dealings, the types of agreements they can make and the premises to which they have access. A confiscation of assets order is an order made by the Crown Court following conviction which requires the defendant to disgorge the benefit he or she obtained from involvement in criminal conduct.

Increased Crown Court powers

To begin with, there is a strong case for increasing the powers of the Crown Court to enable it to make orders which would ensure that a company institutes appropriate policies and procedures so as to prevent any repetition of the criminal conduct in respect of which a prosecution has been commenced or deferred. As the Government's Fraud Review rightly observed, "an ounce of prevention is worth a pound of cure".[114] The reform can be achieved relatively easily, by conferring upon the Crown Court the same powers as the High Court to impose prohibitions, restrictions or requirements on a company or an individual such as a director as it considers necessary to prevent repetition of any criminal activity following conviction or as part of a deferred prosecution agreement.[115]

For example, in an appropriate case the new single enforcement agency could invite the Crown Court to impose an order – perhaps with the agreement of the company as part of a DPA – to prevent the company from conducting a certain type of business or from obtaining certain types of contracts, such as, for example, government contracts in a corruption case. In some cases, depending upon the particular circumstances, an order might also be sought requiring a company to use its resources to finance a suitable community project in order to add a social welfare component to a company's punishment. There may be other instances where compulsory management intervention is required, perhaps to compel anti-fraud, anti-corruption or anti-money laundering training and enhanced financial reporting or audit monitoring requirements.

Instances may also be envisaged where the commission of criminal activity is confined to one area of corporate activity or it is only a subsidiary company which has become involved. At the invitation of the new enforcement agency and/or with the agreement of the company the Crown Court might usefully order that certain directors are to be removed from office, with replacement directors appointed, and on occasions it might be helpful to appoint a receiver to take control of certain company functions or assets, either to ensure that the function is performed lawfully or where the asset represents the proceeds of crime or has been used for the purposes of crime, to take control of the asset for the purposes of disgorgement under the criminal confiscation regime.

Confiscation of assets

Finally, there are two matters relating to confiscation of assets following conviction in the Crown Court which require amendment.

First, if the criminal confiscation regime is to work effectively, the Crown Court needs to be empowered to make orders adjusting property rights in appropriate cases, at the restraint stage of proceedings if necessary. At the present time, where third parties have an interest in realisable property held by a defendant, the Crown Court is unable to determine the respective property interests and the matter has to be resolved by the High Court at the enforcement stage of the proceedings.[116]

This is a cumbersome process, and if an adept defendant shields property from the prosecution authorities as well as creditors generally, the dichotomy between the criminal and the civil jurisdictions affords him plenty of scope. In certain instances where it is not possible to lift the corporate veil or look through a trust arrangement at an early stage in the investigation, it will not be possible to obtain a restraint order over the assets pending trial and subsequent confiscation proceedings.

Split jurisdiction

The difficulties of split jurisdiction were recently highlighted in SFO v Lexi Holdings[117] where variation of a restraint order made at the Old Bailey was sought. In the Court of Appeal Lord Justice Keene remarked that issues concerning beneficial interests, equitable charges and tracing were not part of the daily work of most Crown Court judges. "In other cases the sums involved may not warrant any unusual steps. But there may be other times when the complexities are such that it may not be wise for the Crown Court judge to embark on seeking to decide those issues. In such a case where a relaxation of a restraint order is sought, consideration should be given to adjourning those variation proceedings to enable the issues to be determined in proceedings before a specialist Chancery Circuit judge or High Court judge of the Chancery Division".

It is unhelpful for jurisdiction to be divided in this way and the Crown Court's jurisdiction needs to be enlarged to deal holistically with the cases which arise. Many judges appointed to the Crown Court circuit bench gained experience in civil and property cases during their professional lives and there is no reason why these Judges should not be deployed to adjudicate in these cases.[118]

“Designer divorces”, where a defendant ensures his wife initiates ancillary relief proceedings seeking transfer of property rights before the institution of criminal proceedings, is a particularly successful ploy utilised by organised criminals in the evasion of any confiscation order which is subsequently made.[119] Again, the scope for a defendant to take advantage of this device would be significantly reduced if the Crown Court was afforded the right to adjust property rights at an early stage in the criminal process.

Secondly, the law regarding the making of a confiscation order against a company needs to be re-visited. At the present time there is no reason why a confiscation order cannot be imposed on a company[120] but there is no enforcement mechanism for imposing a sentence of imprisonment in default. A simple solution could be achieved if the law was amended to include a provision that a default sentence would have to be served by the directors in the event that the company went into liquidation, with discretion given to the Crown Court to re-consider the position on the application of the directors in the event that the company is wound-up.

Recommendations

- The Crown Court needs to be given power to make:
  - A serious crime prevention order
  - An order adjusting property rights
  - An order for confiscation of assets against a limited company, with a mechanism for the imposition of a default sentence of imprisonment against the directors

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