



Investigating and prosecuting cases of serious and complex fraud

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Introduction

The future of fraud investigations and prosecutions in England and Wales has recently been in the spotlight again, following rumours (later scotched) that the Serious Fraud Office (SFO) was to be disbanded or rolled into an Economic Crime Agency (ECA). Under new proposals to create a National Crime Agency (NCA), incorporating an Economic Crime Command, the role of the fraud investigator, and hence that of the prosecutor too, may radically change.

In light of these developments the Fraud Advisory Panel convened a round table on 14 June 2011 to gauge the views of those with a particular interest in, and experience of, fraud investigations and prosecutions. This occasional paper summarises these proceedings.

Tackling serious fraud: an overview

Serious fraud has unique features that distinguish it from other forms of crime. Consequently it needs exceptional resources to tackle it.

The context of a major financial criminal case is often arcane and esoteric. The transactions involved are intricate and complex and the evidence to support the charges can be vast – millions of gigabytes, roomfuls of paper, and racks of lever arch files. The expertise needed to make sense of a case like this – to be able to analyse the evidence, to penetrate the morass of facts to find the core evidence to support the charges, and to present a prosecutable case to a jury – is not easily found. Those who are trained and experienced in the necessary skills are few and far between and their numbers are dwindling in the public sector.

At the same time fraud itself is on the increase. Recent studies have estimated the cost to the UK economy of financial crime to be in excess of £38 billion.¹ The diverse nature of fraud and fraud-related offences is infinite and constantly evolving. Fraudsters are highly creative, very well funded and have the know-how and the latest technology at their disposal. Fraud is commonly committed across national boundaries, and financial criminals skilfully exploit the weaknesses in cross-border cooperation. This presents new and massive challenges for law enforcement.

Yet the resources available to the public sector for law enforcement to tackle all forms of crime, let alone financial crime, are restricted and have recently been put under strict limits – even severely cut – in many instances.

- Police numbers within specialised economic crime departments around the country are being reduced from about 600 to fewer than 450.
- The budget of the SFO has been slashed and its staff, in the words of its Director are ‘haemorrhaging’.

¹ National Fraud Authority, 2011. *Annual Fraud Indicator*. London: NFA. Available at www.homeoffice.gov.uk/publications/agencies-public-bodies/nfa/annual-fraud-indicator/.

The recent uncertainty about the future of the SFO has also hindered attempts to recruit replacements for those experienced, and in some cases very senior, personnel who have left to take up alternative employment in the private sector leaving the SFO badly under-resourced in terms of manpower as well as money.

Effective law enforcement does not come cheap; the training and deployment of expert investigators costs a great deal of money. More than ever before, a truly holistic and joined-up approach to fraud fighting is required.

Roskill revisited

The Fraud Advisory Panel's 2010 paper *Roskill Revisited* examined the options now available for the prosecution of serious fraud since the Roskill Fraud Trials Committee's Report in 1986. It noted that:

'Roskill's rationale for a unified organisation was the need to match the breadth of a fraudster's activities with an efficient system of detection and trial. This is as true now as it was in 1986, although much has changed since then in terms both of the institutions responsible for the investigation and prosecution of fraud and the range of outcomes available to them, as well as the impact on the UK fraud landscape of the globalisation of the world economy. The increasing sophistication of fraudsters and their use of 21st-century technology, such as the internet, facilitate the commission of serious cross-border crime in the blink of an eye.'²

The current environment

The Home Office is responsible for setting policing priorities. It has not included economic or financial crime as a major policing priority for many years. This means that there is currently no central priority set for chief police officers to investigate fraud in their own areas. Accordingly, many chief police officers do not accord financial crime the importance it deserves and therefore the resources it needs to be tackled effectively. The City of London Police (CoLP) is a notable exception, and it acts as the national lead force for fraud. However, it too is necessarily limited in the amount of assistance it can provide to enquiries received from other forces.

The SFO was created by the Criminal Justice Act 1987 and is responsible for investigating and prosecuting serious or complex fraud and corruption in England, Wales and Northern Ireland. Today, it faces increasing demands to investigate cases of international and cross-border financial crime and corruption such as cases arising out of the Madoff scandal in the US, the Kaupthing cases in Iceland, and a large number of allegations of bribery committed overseas by bodies connected to UK-based undertakings.

² Fraud Advisory Panel, 2010. *Roskill revisited: is there a case for a unified fraud prosecution office?* London: FAP. Available at www.fraudadvisorypanel.org/publications, page 6.

In mid-2006 the Crown Prosecution Service (CPS) created a Fraud Prosecution Service (FPS) to prosecute a range of serious and complex cases referred by police forces throughout England and Wales. In 2010 the FPS was merged with the Revenue and Customs Prosecutions Office to become the Central Fraud Group (CFG). Therefore, the CPS, which in some areas is severely undermanned, has responsibility for a huge swathe of 'medium-range' financial crime cases, including fiscal fraud. It has also recently assumed responsibility for the prosecuting powers of a number of smaller departments. It has no investigative powers.

There are also a number of other investigative and prosecuting agencies whose remits cover investigations and prosecutions of serious and complex financial crime (see Table 1 below). Each of these bodies is severely stretched in terms of manpower and financial resources. Each is facing cuts in its services and personnel. But each, on the other hand, has a wealth of specialist expertise and experience at its disposal to tackle cases that fall within their special areas of concern.³

Table 1: Investigation and prosecution bodies⁴

Prosecuting body	Investigating body	Types of fraud
Department for Business, Innovation and Skills (including the Insolvency Service)	Insolvency Service including Companies Investigation Branch	Company fraud Disqualification of directors
Department for Work and Pensions (DWP)	DWP	Benefit fraud
Financial Services Authority (FSA)	FSA	Insider dealing Market abuse
Local Government	Local Government	Corruption Procurement
Trading Standards Departments	Trading Standards Departments	Consumer fraud Mass-market fraud
Ministry of Defence (MOD)	MOD	Corruption Procurement
Office of Fair Trading (OFT)	OFT	Cartels

³ These bodies can refer cases under investigation to the SFO when their unique powers and skills are required, and the SFO can decide to take them on, resources permitting.

⁴ Fraud Advisory Panel, 2010. *Roskill revisited: is there a case for a unified fraud prosecution office?* London: FAP. Available at www.fraudadvisorypanel.org/publications, page 14. Note: table has been modified.

Issues and problems

A number of issues have been identified which are hampering an effective response to financial crime:

- a lack of coordination amongst public law enforcement agencies, and between the public and private sectors;
- gateways to data-sharing still appear to be partly if not wholly closed off in some cases;
- limited proactive assessment of future fraud threats.

One of these – the lack of coordination of public law enforcement agencies – is being addressed in the latest government initiative in the form of the Economic Crime Command, which will become part of the NCA from 2013. Better tasking and targeting of resources in the public sector will also follow from this initiative.

However, there is still a perception that fraudsters are always one step ahead of the game, with law enforcement running behind. Reliance on the traditional reactive response to financial crime by law enforcement has helped to compound this. Technological resources could be used to greater effect to improve fraud forecasting.

The response to fraud is pragmatic and not 'joined-up' in the true sense, across government departments, and engaging the private sector. A number of joint initiatives involving industry and commerce (for example the Dedicated Cheque and Plastic Crime Unit (DCPCU) in the fight against plastic card crime) have been highly effective and illustrate what can be achieved from ring-fenced investment into dedicated fraud investigation units.

Although there have been some laudable attempts to publicise the dangers of fraud on several public sector websites (for example the Metropolitan Police 'Fraud Alert' site (www.met.police.uk/fraudalert) and the Financial Services Authority's (FSA) website (www.fsa.gov.uk)), very little has been done for those members of the public who do not have access to a computer or are not aware that the venture they are embarking on may be a scam and therefore do not make the necessary checks. Many elderly people live in blissful ignorance of common frauds and scams, such as cold-calling by unlicensed share-pushers or lottery fraudsters.

What 'value-added' does the SFO bring?

The SFO has built up an unrivalled and vital expertise over the 23 years that it has been in existence. It has valuable links with overseas partners and is able to secure the cooperation of other law enforcement agencies in the UK and abroad. Its structure is designed to ensure that only cases which are likely to succeed at trial progress through the investigation stages, and it is based on multidisciplinary working. Each case is under the direction of an experienced lawyer who maintains control of it from inception to final appeal.

Because it tackles only the most serious and complex of cases, the demands on the SFO's resources are immense and frequently (by the very nature of the cases themselves) result in problems, often unforeseen, at trial and in defendants being

acquitted. The blame for this is inevitably, and very often unfairly, laid by the press at the door of the SFO.

This is not to say that the SFO's approach to cases and the quality of its work could not be improved. Assigning forensic accountants or investigators to direct the conduct of investigations, as has happened of late, runs counter to the principle that was established at the outset by the SFO: that investigations should be under the guidance of an experienced fraud prosecution lawyer. In any event it would be helpful to appoint a senior lawyer who is detached from the investigation process to:

- review the evidence in each case periodically throughout the life of the investigation;
- assess its strength; and
- abort its progress (if necessary).

The criticisms of the SFO made three years ago by former Manhattan prosecutor Jessica de Grazia⁵ were justified in many instances and it is right to say that the SFO's cases could be done better, faster and reach the courts more quickly. For years, the argument that every avenue must be explored to comply with the requirements of the Criminal Procedure and Investigations Act 1996 (CPIA),⁶ or to demonstrate the 'total criminality' of the case, has led to lengthier and more unwieldy cases, with less chance of a speedy trial, let alone of a successful conviction. These cases need better focus, fewer charges and a more streamlined approach to evidence – all factors that would help to achieve the three-month time limit on trials of serious offences set by the Lord Chief Justice's protocol.⁷

Disclosure of evidence

At present the onus is on the prosecution to identify and disclose material in its possession, including unused material which could assist the defence or undermine the prosecution's case. The suspects in a fraud case will often be best placed themselves to identify evidence that will support their pleas. Indeed, it is not uncommon in such cases for a series of different frauds to have taken place within the same company. Relying on investigators to find evidence on the defendant's behalf is unnecessary and distracts them from their fundamental task. An investigating authority should be permitted to select a confined and discrete area for investigation, subject to approval from a Crown Court judge. A suspect or defendant should in turn be given the right to apply for an order requiring the investigating authority to explore a line of enquiry, or to obtain and/or disclose unused material.

Under this arrangement the prosecuting authority would also present the judge with a schedule of unused material and seek a ruling on whether it is relevant to the issues likely to arise in the case. It should be for the defence to satisfy the court that further disclosure should be made; it is much better placed than the prosecuting authority to know whether any unused material is relevant.

⁵ de Grazia., 2008. *Review of the Serious Fraud Office: final report*. London: Serious Fraud Office. Available from <http://www.sfo.gov.uk/about-us/our-policies-and-publications.aspx>.

⁶ *Criminal Procedure and Investigations Act 1996*. London: HMSO. Available at www.legislation.gov.uk.

⁷ Lord Chief Justice of England and Wales, 2005. *Control and management of heavy fraud and other complex criminal cases* (Protocol). London: Ministry of Justice. Available at www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/pd-protocol/protocols.htm.

Plea and charge bargains

There is presently a lack of clarity in the SFO's policy of encouraging corporate entities to self-refer cases of fraud and corruption. The Office of Fair Trading (OFT) has a clear, published policy that those who 'come through the door' first in cases of suspected competition infringements and offences receive lenient treatment of up to 100% in some cases (ie that they will not be prosecuted or civil or regulatory action will not be taken against them). In contrast, companies who self-refer to the SFO are walking into the dark and take the risk that their admissions will be seized on as the basis of a prosecution of the corporation and its officers. There is still a feeling of distaste in some quarters that wealthy corporations who commit infringements, particularly in the area of corruption, can 'buy their way' out of a prosecution, while those at the other end of the socio-economic scale, such as benefit cheats, will be pursued relentlessly.

Improving SFO outcomes

There are several legislative changes that could assist the SFO in its goal to bring cases to a satisfactory outcome more effectively and speedily.

- Repeal the disclosure of evidence provisions of the CPIA and its Code of Practice, insofar as they relate to cases of serious and complex fraud.
- Give powers to prosecuting authorities, including the SFO and the CPS's Central Fraud Group, to negotiate proper plea and charge bargains.
- Give powers to pursue, restrain and confiscate criminal assets and the proceeds of crime salted overseas.
- Abandon the practice of incentivisation whereby law enforcement agencies are given a 'cut' of any funds recovered in financial crime cases. This is perceived as a thoroughly unwelcome and unethical development that could undermine public trust in police or other agencies seen to be 'bounty hunting'.

Bringing to book

The Fraud Advisory Panel's 2006 paper *Bringing to Book* made a number of recommendations to tackle the crisis in the investigation and prosecution of serious fraud.⁸ Many of these hold true today.

- Introduce plea bargaining.
- Reform investigation and disclosure rules.
- Appoint specialist judges.
- Maximise resources and safeguard standards.

⁸ Fraud Advisory Panel, 2006. *Bringing to book: tackling the crisis in the investigation and prosecution of serious fraud*. London: FAP. Available at www.fraudadvisorypanel.org/publications. Also see Fraud Advisory Panel, 2006. *Improving the investigation and prosecution of serious fraud*. London: FAP. Available at www.fraudadvisorypanel.org/publications.

The future

A national agency

In June 2011 the Government put forward a plan for the establishment of an NCA to replace a number of existing bodies, most notably the Serious Organised Crime Agency (SOCA).⁹ The principal remit of the new body will be to disrupt and investigate serious organised crime, including serious financial crime under an Economic Crime Command or ECC. It will be responsible for coordinating the efforts of other agencies, including police forces around the country, and become the tasking agency for financial crime. This is an encouraging move. Coordinating the efforts of disparate agencies all tasked to tackle fraud will put an end to the free choice of such agencies to take their own separate actions to investigate whatever they feel appropriate at the time.

The original plan to set up an Economic Crime Agency that would embrace the SFO, the CPS CFG and possibly other anti-fraud agencies such as the National Fraud Authority and the OFT appears to have been shelved for the moment.

However, there is a danger that in creating an overarching, coordinating authority with no operational duties of its own in relation to financial crime, the resources at the coalface for the investigation of actual crimes will be further diminished and the chain of command will be taken away from local senior officers and blurred. There is a further risk that in bundling economic crime into a large comprehensive organised crime-coordinating agency, fraud itself will receive less emphasis and the performance of units currently dedicated to fraud investigation such as the DCPCU could be adversely affected.

The future of the SFO

The uncertainty that surrounded the SFO during the spring of 2011, with conflicting media reports and unfounded rumours,¹⁰ must be ended and its future as a joint investigating and prosecuting body for serious and complex fraud with specialist expertise must be secured. Government commitment to the SFO should be shown in practical terms with the injection of adequate resources to enable the SFO to replace the expertise and experienced staff it has lost.

With the implementation of the Bribery Act on 1 July 2011¹¹ there has been a flurry of activity and interest in overseas corruption offences, to the possible exclusion of resources being devoted to mainstream fraud. While there is political and prosecutorial will to tackle bribery cases which hitherto have been impossible to bring to court, the danger is that many serious cases which do not involve allegations of bribery will be left unprosecuted as the allocation of resources will be unevenly distributed.

⁹ Home Office, 2010. *The National Crime Agency: A plan for the creation of a national crime-fighting capability* (CM8097). London: The Stationery Office Limited. Available from www.homeoffice.gov.uk.

¹⁰ Gibb, Frances, 2011. Serious Fraud Office given 12 months to save itself. *The Times*, 8 June, page 5; Binham, Caroline, 2011. May drops proposal to split SFO. *Financial Times*, 9 June, page 2; Atkinson, Dan, 2011. SFO boss 'talks of quitting' in row over new agency. *Daily Mail*, 8 May, page 72; Farrell, Sean, 2011. How a political row hit the fight against fraud. *The Independent*, 14 June, pages 36–37. Spence, Alex, 2011. White-collar crime fighters have another battle on their hands. *The Independent*. 27 April, page 35.

¹¹ *Bribery Act 2010*. London: The Stationery Office Limited. Available from www.legislation.gov.uk. Also see Ministry of Justice 2011. *Bribery Act comes into force* (01 July 2011). Available at: <http://www.justice.gov.uk/news/features/feature010711a.htm>.

Fraud sanctions

Financial crime is a global and transnational issue and yet it tends to be confronted on a sovereign state basis. On the continent, good working relationships have been developed between investigators and prosecutors and a joined-up approach is the norm whereby civil and criminal remedies are used simultaneously, where appropriate. At the moment, sentencing for fraud offences in England and Wales does not follow this approach, with little or no coordination between criminal, civil and regulatory penalties. This is exacerbated by the fact that those engaged in criminal prosecution often have limited experience or knowledge of civil procedure.

The needs of victims

The needs of fraud victims have to be better understood and addressed. Victims have their own priorities in fraud cases. While they are keen to see justice done, their money back, and the criminal who robbed them prevented from defrauding anyone else, they often have little interest in long prison sentences being imposed on those who have defrauded them.

It seems likely that victims of financial crime would appreciate a similar approach in the UK to that of adopted elsewhere in Europe, in which their own claims could be dealt with at the same time as criminal penalties are handed down and, as in some jurisdictions such as Switzerland, they can have access to the prosecution case file.

Investigator training

There are reports that the National Policing Improvement Agency (NPIA) will be disbanded. While this is strictly outside the remit of the Fraud Advisory Panel, as far as the investigation of financial crime is concerned, there is a need for a professional qualification for both police officers and the wider counter-fraud community that is recognisable in both the public and private sectors to encourage common understanding.

Conclusion

The stringent limits on public resources to tackle financial crime and the plethora of often conflicting and then abandoned initiatives put forward to tackle it have resulted in confusion and lack of confidence in policymakers. The only persons set to gain are the fraudsters, who will inevitably seize opportunities to commit bigger and risk-free crimes. They will see a floundering and under-resourced anti-fraud capacity in the UK, where before there was a determination and the skills and expertise, supported by adequate funding, to fight financial crime with vigour.

It is true that better coordination in the fight against fraud can reap rewards; but it will be valueless unless the actions that are coordinated are being taken by the right people – and enough of them – properly trained and led by those with experience and commitment. When the numbers of police officers in dedicated economic crime units are being cut by a quarter, the SFO's budget is trimmed to the bone and the plea goes out to the private sector to underwrite the costs of policing financial crime, we are in dire straits indeed, and any number of newly created coordinating agencies is not going to solve the problem.

Useful links

Fraud Advisory Panel
www.fraudadvisorypanel.org

City of London Police
www.cityoflondon.police.uk

Crown Prosecution Service
www.cps.gov.uk

Home Office
www.homeoffice.gov.uk

Ministry of Justice
www.justice.gov.uk

Serious Fraud Office
www.sfo.gov.uk

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