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New start for UK fraud

The UK is set to embark on the most radical overhaul of its system for investigating and prosecuting white collar crime for a hundred years. The outcome of a consultation process, launched at the end of July, is likely to be the unification of a plethora of intelligence, investigatory and prosecuting bodies under the single roof of an Economic Crime Agency. The wider system of powers and processes in fraud cases is also being reviewed with a view to save the fraud-busting agencies time and expense.

The new agency will house the former Serious Fraud Office, the enforcement part of the Financial Services Authority and two divisions of the Crown Prosecution Service, namely the Fraud Prosecution Service (FPS) and the Revenue and Customs Division (RCD). Other agencies swept into the ECA will be fraud departments in the Department of Work and Pensions, the NHS Counter Fraud Services (NHS CFS), and the cartel unit in the Office of Fair Trading (OFT).

Jonathan Fisher, a barrister in the field, calls the present arrangement an institutional mess, and says, ' 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. As if this intricate web wasn't complicated enough, these agencies all operate under differing statutory frameworks, further exacerbating the problem.'

At the end of July, the British government announced that the bonfire of the agencies could go wider yet, and include the abolition of the Serious Organised Crime Agency, created in 2006, whose remit included asset recovery. The amounts reclaimed from criminals fell below government expectations and its powers are expected to be moved into the newly formed National Crime Agency.

The argument for merging the investigatory and prosecutory organisations under a single roof rests on the fact that the control of prosecutions could be improved. According to one lawyer, 'a multiplicity of skills are required to pursue a fraud investigation and prosecution and these are best harnessed by lawyers, police and investigators working together and unimpeded by turf watching and the jealousies.' Louise Delahunty, a partner at Simmons and Simmons, says that ' There is always an argument that you have tighter control when you have everything under one roof. '

Fisher comments, 'cases of serious fraud, corruption and financial market crime 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.'

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The shake-up has prompted some agency chiefs to express dismay. For example, the FSA's Hector Sants is known to be battling to ensure that the new ECA retains responsibility for insider trading, ahead of the Consumer Protection and Markets Authority. The head of SOCA, Sir Stephen Lander, is seeking to protect the autonomy of SOCA, now threatened by the latest government announcement. A battle is also brewing over the leadership of the ECA, with Margaret Cole, the head of enforcement at the FSA thought to be the leading contender, ahead of the SFO's Richard Alderman.

The unified structure proposed by Fisher mirrors that described by the famous Roskill Committee in 1985, says Monty Raphael, a consultant to the law firm, Peters and Peters, and a doyen in the field. Raphael says, 'we welcome the creation of the Economic Crime Agency if it means that there is a truly coherent approach to the prosecution and investigation of white collar crime.'

The Fraud Trials Committee Report chaired by the late Lord Roskill in 1985 highlighted the advantages of a unified agency responsible for the detection, investigation and prosecution of serious fraud cases. It argued that the professionals needed to work closely together and under a single roof, to investigate and prosecute complex cases. 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.'

A group of lawyers under the umbrella of the Fraud Advisory Panel, and led by Raphael, has produced a document entitled, *Roskill Revisited: Is there a case for a unified fraud prosecution office?'.* This confirms the view that the current system is flawed. 'T here remains a plethora of organisations in the UK with fraud prosecution responsibility and the risks identified by Roskill of frauds potentially slipping through the net, of overlapping resources and of restrictions on the disclosure of information continue. Developments such as the recent Revenue and Customs Prosecutions Office and CPS merger provide a sign that this fragmentation is being addressed.'

But the report says that the creation of a new unified agency, in itself, does not guarantee that the flaws will be dealt with. 'T he official reasons given for the merger are largely economic, to save public money and improve efficiency, as well as ending structural confusion and providing more focused prosecutions. These developments, as well as proposals for the disbanding of the SFO and the FSA, have occurred not as part of an overall, coherent anti-fraud strategy but on a piecemeal basis as a reaction to political pressures, perceived threats or financial exigencies.'

In fact Roskill's findings underpinned the creation of the Serious Fraud Office, which has a dedicated cohort of lawyers, accountants and policemen to tackle complex and large cases where the value at stake is over £1m. This argument for collegiate prosecution is exactly that proposed to the newly unified Economic Crimes Agency, however critics of the SFO claim that its record of successful prosecutions is low. A n analysis of the SFO's conviction rate in 2008 by Jessica De Grazia found that only 61% of defendants were convicted between 2003 and 2007. She said that this contrasted badly with the 72% conviction rate achieved by the CPS in 2007 and the 80% rate achieved by the FPS. 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.

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%. The criticism can be

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overdone, says Delahunty. 'Although the SFO is criticised when it doesn't get a victory, its conviction rate is pretty respectable. A lot of commentators would say it is doing all right. It is not a huge agency and its budget has already been cut.' Moreover, she notes that the Office has also been at the forefront of some legal developments which have added to the complexity of its cases and upset some vested interests.

She says that judges on two recent occasions have attacked SFO attempts at plea-bargaining. In the first, Robert Dougal, a company director, co-operated with the SFO in its investigation of bribes paid by his company to Greek doctors. The judge overthrew the SF's request for a suspended sentence and sentenced Dougal to a year in jail. The Court of Appeal subsequently came to the SFO's rescue and suspended the sentence. In the second case, a judge protested at having his hands tied by the prosecution about the sentence given to Innospec which was also found guilty of bribery. Delahunty says, 'The good thing the SFO has done is look at plea bargaining, and try to make self-reporting attractive for companies that want to do the right thing. By self-reporting they should get credit, and maybe people don't have to go to prison. That's been going well. Case like Innospec and Dougal have cast doubt on the doubt on the ability of the SFO to do a deal. The SFO can do a deal on what the plea will be and what charges they will plead to, but they haven't been given the power to instruct the court on sentencing. The SFO can't be the judge and the sentencer. The judge said "it's not up to you it's up to me what the sentence should be. Corruption is really serious, and it undermines governments in small countries. I wouldn't have given this deal, but my hands are tied. It shouldn't happen again."'

The introduction of Deferred Prosecution Agreements (DPAs) is under consideration as part of the current review of Britain's processes used to prosecute fraud. The DPA, a process that is established in the US, enables a company to avoid prosecution by pleading guilty before the case is completed, and paying a heavy fine. It also agrees to accept conditions required by the prosecution. This is likely to include a shake-up of its procedures and the acceptance of a court-appointed monitor, to oversee the company's processes. The monitor reports to the court on his observations and if the company's fails to complies with the initial agreement, it can be brought to court, tried, and because it has already pleaded guilty, faces an inevitable sentence. If the UK adopts the American model of the DPA, the prosecution will publish the terms of the agreement it has reached with the company. It will also law out the details of the criminality the company has admitted. Fisher believes the UK can learn from the US experience. '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.'

While the DPA is a useful means of saving court time and expense, courts have to watch that companies, especially large ones, do not find loopholes, says Fisher. ' 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

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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.'

New powers now under discussion are seen as tilting the balance in the direction of prosecutors. This leads many lawyers to question their fairness and acceptability to the British judicial system. Delahunty says, 'The US is very good at persuading corporations and individuals to plead guilty, because the weapons in their armoury include sending people to prison for 150 years, and very, very, tight sentencing guidelines. They basically say, if you don't put your hands up, things will be very bad for you. You don't have any choice in the US, there is the whole question of the administration of justice. Some would say they have gone the other way. If you have a grand jury investigation and a Federal trial, there is no point defending it, you should just do a deal because the alternative is so appalling. Although we have much more law that echoes US law - our money laundering law is extra-territorial, the new Bribery will be extra-territorial -- we don't send people to prison for 150 years. We are trying to get the balance right.'

While there is a measure of agreement over the proposals laid out by the government and now under discussion by the fraud prosecution community, many question whether funds are available to provide the training and resources for their successful implementation. Raphael says, 'The new measures will require more people trained in fraud investigation and more resources allocated to the agencies, if they are to work better and as intended.' Delahunty concurs,: 'What about the money? We have a government of austerity. These agencies have already had their budgets cut. You can't just tell an agency you have to get it right without making sure they have the resources and the money.'