



WHO SHOULD PROSECUTE FRAUD, CORRUPTION AND FINANCIAL MARKETS CRIME?

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In June this year, the Serious Fraud Office (“SFO”) instituted criminal charges against a former trader at UBS and Citigroup for conspiracy to defraud at common law by manipulating LIBOR (Tom Hayes, 18.6.13). Two more traders were charged a few weeks later (Terry Farr, James Gilmour, 14.7.13). Prior to the SFO’s involvement, the circumstances involving the rigging of LIBOR had been the subject of extensive investigations by the Financial Services Authority (“FSA”), resulting in disciplinary proceedings against a number of financial institutions to punish them by civil fine for their acquiescence in a relaxed regulatory regime (Barclays, 27.6.12; UBS 19.12.12; RBS 6.2.13; ICAP 25.9.13).

Meanwhile, a few weeks before the SFO initiated criminal proceedings against the former LIBOR traders, the FSA’s successor organisation, the Financial Conduct Authority (“FCA”) had been busy instituting criminal proceedings in relation to an entirely different matter, charging eight defendants with conspiracy to defraud at common law in relation to a land banking fraud (Operation Cotton, 17.4.13). The essence of a land banking fraud is the sale of a large number of small plots of land to unwitting investors, falsely representing that when planning permission for development is granted the value of the land will soar, when in reality there is little or no prospect of obtaining planning permission because the area is “green belt” or an area of natural beauty or historic interest.

These two cases provide perfect illustrations of the absurdity of the present arrangements for the investigation and prosecution of fraud and financial markets crime. Why is the SFO instituting criminal charges in a case which *par excellence* concerns the cleanliness of the financial markets? Surely the FCA is the more appropriate prosecuting authority, in the light of its specialist role as policeman of the financial markets.

And why is the FCA prosecuting a major investment fraud which has no connection with the financial markets when the SFO’s statutory remit is to investigate and prosecute cases involving serious or complex fraud?

It is a similar story with corruption cases. A few months ago, the SFO charged four men with corruption offences, allegedly committed in connection with an investigation into the promotion and selling of “bio fuel” investment products to UK investors (Sustainable AgroEnergy, 14.8.13). Meanwhile, four years earlier the FSA had placed a stake in the same ground when it fined a leading financial institution for failing to take reasonable care to maintain effective systems to counter the risks of bribery and corruption (Aon, 8.1.09). Responsibility for the investigation and prosecution of corruption cases has been further complicated by the establishment of the Economic Crime Command in the new National Crime Agency to “lead and coordinate work to investigate corruption in the UK” (Serious and Organised Crime Strategy, Cm 8715, October 2013, paragraph 1.26).

It is absurd there should be multiple Government agencies with overlapping responsibilities for the investigation and prosecution of serious fraud, financial markets crime and corruption in the UK. In addition to the obvious problems posed by the fact that no single Government agency has exclusive responsibility for investigating and prosecuting financial market crimes in the City of London, there is unnecessary duplication of manpower and specialist resources between the agencies. Moreover, as a result of their haphazard development the powers of each agency are different.

The SFO, for example, has a statutory obligation to investigate and prosecute cases involving serious or complex fraud with a current budget of around £3 million (Annual Report and Accounts 2012-13). The SFO has a total civil service staff of 300. Over 80 per cent are specialist caseworkers. 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 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.

As the SFO’s annual budget has gradually shrunk over the years, the FSA Enforcement Division’s budget has correspondingly increased. In 2010, the budget was thought to have reached £43.7 million following a substantial increase in its 2008-9 allocation of £37.9 million. The FSA Enforcement Division then employed 35 criminal law specialists including lawyers and other specialists. More recently published figures

demonstrate the exponential growth in the Enforcement Division budget. In the FSA's recently published Annual Report 2012-13, the enforcement costs for the year ending 31 March 2012 were put at £68.6 million (page 138) and £65.2 million for the year ending 31.3.13 (page 137).

At first blush, the financial dissonance between the FSA/ FCA and the SFO's budgets is surprising since, whereas the FCA is responsible for the regulation of the financial markets with the power to prosecute added by Parliament as an adjunct to its regulatory function, 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 FCA is encumbered by statutory limitations which inhibit its ability to perform as an effective mainstream prosecutor at the highest level. Unlike the SFO –

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

Running alongside the SFO and the FCA, the Central Fraud Division ("CFD") was consolidated within the Crown Prosecution Service ("CPS") in April 2010 to provide a specialist prosecution and advisory service for complex, sensitive and high value fraud cases throughout England and Wales and for all fiscal fraud and export control cases investigated by Her Majesty's Revenue and Customs ("HMRC"). According to the CPS website, members of the CFD are specialists in prosecuting a wide range of fraud and fraud-related crime, much of which is international, serious and highly specialist. The Division also prosecutes illegal arms brokering investigated by HMRC and cases in conjunction with the Financial Services Authority, the Department of Work and Pensions and others, as well as the police. Typically the cases will be sensitive, high profile or involve large sums of money in excess of £250,000. The CFD employs 50 prosecutors, 70 caseworkers and 30 support staff and it has its own guidance on policies for charging criminal offences, protecting victims, and restraint and confiscation of assets procedures.

At the time of the last election, it was recognised that the public interest was not best served by maintaining this fragmentary approach. When the Conservative Party and the Liberal Democrat Party came together in May 2010, the agreed Coalition Government programme contained the

following declaration of intent: "We take white-collar crime as seriously as other crime, so we will create a single agency to take on the work of tackling serious economic crime that is currently done by, among others, the Serious Fraud Office, Financial Services Authority and Office of Fair Trading" (page 9). The declaration of intent contained in the Coalition Government programme reflected Conservative party policy as set out by the now Chancellor of the Exchequer, George Osborne, on 23rd April 2010 when he announced far-reaching plans to deal with serious economic crime (Change for the Better in Financial Services, page 16 & 17).

The considerations which led the Conservative Party and subsequently the Coalition Government to adopt the policy are not merely extant. They have come into even sharper focus following the Parliamentary enquiry into the handling of the Barclays LIBOR case by the SFO and the FSA.

The Parliamentary inquiry was conducted by the House of Commons Treasury Committee and was published on the 18th August 2012 (HC 481-I). It was clear from the evidence that when it came to deciding whether to criminally investigate or prosecute in the LIBOR case, there was some confusion between the FSA and the SFO. Meetings took place in 2011 between the SFO and the FSA but the purpose and content of the discussions, when they took place or those present, was obscure. It was against this background the Treasury Committee expressed surprise that neither the FSA nor the SFO saw fit to initiate a criminal investigation until after the FSA had imposed a financial penalty on Barclays (paragraph 207). The Treasury Committee also noted that the evidence suggested that a formal and comprehensive framework needed to be put in place by the two authorities to ensure effective relations in the investigation of serious fraud in financial markets (paragraph 208). However, this is not a sufficient answer. The reality is that the failure to initiate a criminal investigation into LIBOR until July 2012 was attributable to the fact that alleged fraud in the financial markets fell down a large crack between the SFO's and FSA's respective jurisdictions. If a unified single authority to combat serious economic crime had been put in place, this would not have happened.

The Coalition Government has already demonstrated its willingness to tackle serious corporate crime with the addition of deferred prosecution agreements to the SFO's and the CPS's – but not (at present) the FCA's – armoury. As the Prime Minister and Deputy Prime Minister seek to identify legislative initiatives in the last quarter of this Parliament, the Coalition Government should implement this outstanding aspect of its agreement and establish an Economic Crime Agency. The SFO would then mutate into an enlarged new economic crime-busting agency, leaving the FCA to concentrate on the imposition of civil penalties for regulatory and compliance breaches which do not demand a criminal response.

The Law and Financial Markets Project is based in the LSE's Law Department. The project provides a framework for a research group of LSE faculty and associated participants from outside academia to explore the interactions of law, regulation, financial markets and financial institutions, principally within the EU and the UK.



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