IEA Discussion Paper No. 127

REPLACING THE SERIOUS FRAUD OFFICE

The case for a new approach to serious economic crime

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August 2024

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Economic Affairs

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Summary

- The Serious Fraud Office has experienced regular criticism and periodic scandals related to its operation, which have often led to calls for serious reform through to abolition.

- The Serious Fraud Office should be reformed into a Serious Economic Crime Office (SECO) with a wider remit covering prevention, the capacity to use more regulatory sanctions and the ability to build a stronger relationship with the private sector.

- SECO should embrace the holistic use of alternative justice mechanisms, using deferred prosecution agreements more widely, establishing a leniency programme, creating a register of serious economic crime offenders and using larger fines.

- SECO should undertake a much more significant role in the advancement of economic crime prevention through the development and promotion of good practices and, in the most extreme cases, 'Ethics orders', which can be targeted at corporations to implement ethics and compliance programmes.

- There is a gap in supporting SME victims of economic crime, and the resources and role in prevention of the new SECO should be utilised to provide support to this group in enhancing their resilience and resources in some cases to pursue relevant litigation.

- The new SECO should also work much more closely with private actors – who are already the most significant in tackling economic crime – to enhance its and the private sector's capabilities through accreditation and standards, staff exchanges and some contracting out of investigations through approved structures to maintain separation of powers.

Introduction

‘Prevention is better than cure’ is a commonly used quotation directed at not just healthcare but policing. It is far better to prevent a crime than to investigate and prosecute it after the harm is done. Yet, the prevention of serious economic crimes in the UK is hardly a model of success. The Serious Fraud Office’s contribution to ‘cure’ and its role in prevention are negligible, as are those of other law enforcement agencies in this field. This is why this paper argues for a reformed Serious Fraud Office (SFO) renamed the Serious Economic Crime Office (SECO) with a much greater role in prevention. Such a body should have the capabilities to ‘cure’ serious economic crime by utilising an extensive array of sanctions against both corporate offenders and individuals beyond criminal prosecution, and should draw more on the substantial expertise and resources of the private sector. Furthermore, the SECO should also better support SMEs, who are largely neglected when it comes to government and law enforcement with regards to economic crime. This paper will begin by briefly setting out some of the common problems that have beset the SFO. It will then examine past ideas for reforming the institution before setting out some of the potential new roles of the proposed SECO.

The Serious Fraud Office

It is not the purpose of this paper to revisit the history of the SFO's or the scandals, poor performance and criticisms that have so beset it. For those interested, James Forder's (2023) paper provides an excellent overview of its history and troubles. It would be useful, however, to illustrate the common problems the SFO has experienced.

Failures to secure a successful prosecution

There have been many notable cases where the SFO has failed to secure a successful prosecution, which have dented their reputation, for example, in the trials of the Maxwell brothers and the Tesco executives. Prosecution failures are too often a consequence of procedural failures. These have included the use of a fake letter from Sir David Steel in the Virani case, a flawed search warrant in the case against the Tchenguiz brothers, the inappropriate use of a contractor in the Victor Dahdaleh case, and several examples of disclosure failures. Jessica de Grazia focused on disclosure problems in her report for the SFO in 2008, yet it remains a recurring obstacle, contributing to the collapse of the case against Serco executives in 2021 as well as the successful appeals by Ziad Akle and Paul Bond in the Unaoil corruption scandal.

It must also be noted that the SFO has been, for a variety of reasons, repeatedly criticised for being susceptible to undue interest by the OECD Working Group on Bribery (WGB). For example, in the Phase 4 follow-up report in 2019, the WGB indicated that it 'regrets that no steps have been taken to address long-standing recommendations to ensure the independence of foreign bribery investigations and

prosecutions.' (OECD 2019: 4). At the end of 2021, the WGB considers its recommendations regarding the independence of investigation and prosecution only partially implemented (OECD 2021).

Ethical leadership as a systematic failing

The practices and behaviour of the SFO and its staff have been repeatedly questioned. Jessica de Grazia's review of the SFO identified a range of management and performance problems that stemmed from ineffective leadership that fostered a demoralising culture of lethargy, delay, risk aversion and unaccountability (de Grazia 2008). Bringing her American perspective and experience into the report, she recommended in 2008 that the then new director, Richard Alderman, should recruit 'innovators and implementers' to create a 'can do' culture. It is a positive sentiment, but vibrant can-do innovators are usually not suited to the leaden bureaucracy of the public sector.

Four years later, and subsequent to internal allegations of corruption, the end of Alderman's tenure was marked by a parliamentary inquiry and heavy criticism.[1] Consider the anger of Margaret Hodge MP, the Chair of the Public Accounts Committee, who was incandescent in her criticism of Mr Alderman for appointing 'an old friend' and former colleague at the HM Revenue & Customs (HMRC), Phillippa Williamson, to the position of Chief Executive, allowing her to work two days per week at home, 300 miles away from the office, paying £98,946 to cover her travel and hotel costs, and then in 2012 paying Ms Williamson and the Chief Operating Officer nearly £900,000 in unauthorised severance packages (Public Accounts Committee 2013):

> It is all indicative of a culture that you led, which does not …. give confidence that it was the sort of culture you require if you are trying to find fraud. …. It is shocking, just shocking. It is against every principle of how public service organisations should operate.

More recently, the SFO has been criticised for the inappropriate use of a contractor in the bribery case against Victor Dahdaleh. The Calvert-

1 L. Fortado. Former fraud chief Richard Alderman quits OECD bribery group. *Financial Times*, 6 May 2015 (https://www.ft.com/content/63d4a6a2-f31d-11e4-a979-00144feab7de)

Smith (2022) review was critical of the inappropriate contact between the former Director of the SFO, Lisa Osofsky, and a private investigator during the Ziad Akle investigation. However, using the Alderman and Osofsky incidents as evidence of a failing culture that warrants, in Forder's (2023) view, the disbandment of the SFO is a bit of a stretch. The two incidents are very different in nature and motivation. Whilst Mr Alderman blatantly abused his position by breaching civil service rules to the benefit of colleagues, Osofsky was trying to overcome the structural obstacles to get justice done. Furthermore, and more importantly, if ethical leadership is a systematic failing, then attention ought to be focused on the ethical recruitment practices of the Attorney General's Office and senior civil servants.

Inefficiency and sluggish pace thwart SFO's (and other authorities') capacity to take on more cases

In addition to the questionable ethics, the headline figures latched onto by critics are, at first sight, unfavourable to the SFO. According to its 2022–23 annual report, the SFO spent £76 million and employed 450 staff to complete just four successful prosecutions and secure eight convictions (SFO 2023). The ratios are alarmingly high: £19 million per prosecution, £9.5 million per conviction, 113 staff members for each prosecution and 56 for each conviction. With some obfuscation, the annual report claims cases took an average of four years from opening an investigation to obtaining the first outcome. The report does not reveal the average lead time from registering a complaint to obtaining the final outcome.

On the other hand, it obtained justice for over 10,000 victims in 2022–23, an average of 2,500 victims per prosecution, recovered £95 million against financial orders and collected a £280 million fine from Glencore Energy UK. By delivering justice to thousands of victims, disabling very serious offenders, covering its own costs and returning nearly £300 million in profit to the Treasury, its efforts were very worthwhile. Indeed, since 2015–16, it has secured £1.7 billion through the use of Deferred Prosecution Agreements (DPA) with errant corporations. Although boldly publicising the aggregate settlement income is somewhat unappetising, it does broadcast a strong signal that the SFO seeks and obtains serious penalties for corporate fraud, bribery and other economic crimes.

These figures suggest that the SFO is delivering societal benefit, but its inefficiency and sluggish pace thwart its capacity to take on more cases and thereby have a bigger impact on the economic crime problem. In this regard, it faces the same challenges as other government agencies and regulatory bodies, such as the Crown Prosecution Service (CPS), the Department for Work and Pensions (DWP), the HMRC, the Financial Conduct Authority (FCA) and the police, in that investigating complex economic crime is expensive, slow and hugely difficult to prosecute. However, there are two important differences between the SFO and the other agencies. Firstly, the SFO focuses on wealthy individuals and corporations who hire very expensive lawyers to find procedural faults. Secondly, the SFO is set up to be the apex agency in dealing with serious economic crimes and is, therefore, a totem to be torn down by its critics.

The criminal courts and the Criminal Procedure Rules are not fit for purpose in complex economic crime cases

A cursory analysis of the poor prosecution performance of the SFO, HMRC, DWP, FCA, CPS and the police suggests that there is a common factor: the criminal courts and the Criminal Procedure Rules are not fit for purpose in complex economic crime cases. The Roskill Report (Fraud Trials Committee 1986) recognised this fundamental problem nearly 40 years ago. Attempts to introduce trials without juries in complex fraud cases spiked after the Fraud (Trials without a Jury) Bill 2007 was blocked in the House of Lords. As well as calling for plea bargaining, which offends the sensibilities of British jurisprudence, the Attorney General's Fraud Review in 2006 criticised the disclosure laws as unfit for purpose in serious fraud cases (Attorney General 2006). Quoting a Senior Circuit Judge, the de Grazia Review (2008) describes the disclosure problem as so serious that it has created, in effect, two-stage trials:

> In Stage 1, the defence says, 'Let us see if we can get this prosecution stayed for abuse of process for whatever reason.' Stage 2, 'If we have to, let us defend the case before a jury.'

Jessica de Grazia's review of the SFO provided recommendations for streamlining the disclosure rules, but they were ignored (de Grazia, 2008). In his later review of disclosure practices in 'heavy' criminal proceedings, Lord Justice Gross (2011: 64, 75) noted:

> There are still too many examples of prosecution disclosure going wrong. … In our view, a defence refusal to engage in the disclosure process, coupled with persistent sniping at its suggested inadequacies, is unacceptable – and reflects a culture with which the system should not rest content.

The disclosure problems identified within L.J. Gross' analysis included weak management of disclosure issues by judges, uncooperative adversaries, late and uninformed defence statements, and inadequately trained disclosure officers within the police. The report recommended incremental improvements with more robust case management by judges, more common-sense cooperation, timely submissions and further training. In other words, it was a plea for all participants to do a better job. Unsurprisingly, little has changed: in the 12 months to March 2023, 1,650 Crown Prosecution Service cases collapsed due to disclosure failures (CPS 2023).

The jealous protectionism culturally embedded within the institution of law defends the UK's adversarial legal system as the 'Rolls Royce' of jurisprudence, resists fundamental changes and tolerates only incremental developments. The legal profession may sit very comfortably in the plush seats of the Roller, but they seem to be unaware that the spluttering, asthmatic engine of this vintage model is only capable of a walking pace, and they seem to be oblivious to the economic criminals whizzing by, whilst leaving an untold number of victims and societal harm scattered in their wake. Despite being by far the most common crime in the UK (ONS 2023), the number of fraud offenders convicted has continuously fallen from just 12,378 in 2012 to a tiny 3,455 in 2022 (MOJ 2023).

One might even say that the impenetrability of the courts is an increasing obstacle to justice because the legal profession and judiciary have over-lawyerised the law in favour of offenders to such an extent that a criminal prosecution of complex economic crime schemes is virtually impossible. As a result, the courts are presently a greater deterrent to prosecution than they are a deterrent to active or would-be economic crime offenders. It is a very uncivilised position wherein the institutions set up for delivering this core purpose of justice are unabashed in blocking it.

Endless reviews and criticisms of the SFO will lead nowhere until the government and the judiciary overcome their historic inertia to address

the elephant in the room and reform the criminal courts. Forder (2023) recommends that three areas of criminal law should be addressed:

- the disclosure rules
- the criteria for establishing corporate liability
- replacing citizen juries with expert juries, and creating a panel of judges with expertise in fraud cases.

These are very sensible suggestions. However, it is not clear that they would go far enough and, moreover, they would likely be resisted with sufficient vigour to kick them into the long grass.

Forder (2023) asks if the SFO is fit for purpose in prosecuting economic crime, finds that it is not due to cultural and competency failures, and proposes two options. One option offered is to fracture the SFO's integrated investigation and prosecution model and distribute the elements to other agencies. This option has merit and may be relatively straightforward to deliver: the investigation functions could be transferred to the City of London Police, the lead force for economic crime, and the prosecution functions could be transferred to the Crown Prosecution Service. The proposed alternative is to transfer the entire operation of the SFO into the Crown Prosecution Service, but this would likely disturb the cultural ethos of the agency as an independent prosecutor. Politicians might be attracted to Forder's ideas because they often view rebranding and moving chairs as solutions to problems, as getting things done. However, such reorganisations will not address the fundamental problem that all agencies contend with, the unfitness of the criminal courts and the Criminal Procedure Rules to handle complex economic crime cases.

Meanwhile, frustrated by the intransigent criminal justice system, the UK government has introduced innovations in order to avoid the criminal courts, such as Civil Recovery Orders under the Proceeds of Crime Act 2002, Unexplained Wealth Orders, and DPAs in fraud, bribery and other economic crime cases. This trend towards a regulatory style of justice is a hint that the government has given up on anything other than tinkering with criminal court reforms. At the same time, public policy has placed greater emphasis on preventing economic crime and engaging with the private sector in tackling money laundering, bribery and tax evasion.

The regulatory approach and the involvement of the private sector in policing economic crime suggest that the salient question is not whether the SFO is fit for its current purpose, but whether that purpose should be changed. It is time to reappraise what kind of justice is suitable for economic criminals, to consider what the SFO's role could be in delivering that justice, and to contemplate how the SFO could support the prevention policies. It is only by establishing an answer to these fundamental questions that we can then consider how to be policing serious economic crime more effectively.

Reforming the SFO: past discussions

Since the formation of the SFO in 1987, it has been the subject of a number of proposals for reform. The influential think tank Policy Exchange published a report in 2010, which argued for a 'Financial Crime Enforcement Agency' either built upon the SFO or a new body incorporating the functions of the SFO, the Financial Services Authority (now Financial Conduct Authority), the now defunct Office of Fair Trading, as well as some parts of HM Revenue and Customs (Fisher 2010). These proposals were supported by Ryder (2011: 261).

The 2010 Conservative Party manifesto also argued for such a Fisher/Ryder structure (Ryder 2011). This was never implemented and was missing from the 2015 manifesto, returning in 2017 with a less ambitious plan to merge the SFO with the National Crime Agency (Conservative and Unionist Party 2017: 44). The 2019 manifesto completely dropped the idea, and there was only reference to the creation of a 'new national cyber-crime force' (Conservative and Unionist Party 2019: 19) with very little detail about its composition.

The current remit of the SFO is a 'specialist prosecuting authority tackling the top level of serious or complex fraud, bribery and corruption' (Serious Fraud Office, n.d.). It focuses primarily on white-collar crime, fraud and bribery committed by businesses and their managers. Its methods, skills and experience are orientated towards investigating the corporate world and sophisticated investment scams. Merging it with the National Crime Agency, which focuses on the gangsters involved in serious organised crime, would be like mixing water with oil.

Although there is more logic in merging the SFO with elements of regulators such as the HMRC and FCA, there is a more productive and less controversial alternative. We propose that the SFO be reformed to become the 'Serious Economic Crime Office' (SECO) with the following powers and focus areas:

- continuing to investigate and prosecute complex economic crime cases while assuming a broader regulatory role with a range of powers to sanction offenders

- a significant preventative function, especially the prevention of fraud, bribery and corruption committed within and by organisations, their managers and associated persons

- utilising the substantial role of the private sector, which is already active in dealing with these problems, in a more formal and effective way

- a capacity-building role, helping the private sector build its resilience to economic crime. The Public Sector Fraud Authority has a similar role in helping to equip the different branches of government to better counter fraud.

The Serious Economic Crime Office (SECO)

This section will now set out in more depth some of the proposed reforms of the UK counter-serious economic crime policing system and consider the responsibilities of the SECO.

The holistic use of alternative justice mechanisms

The investigation and prosecution of serious economic crimes are very challenging. Offences are often complex and difficult to prove, and defendants are often protected by expensive lawyers. There are clearly cases where the facts of the case warrant the strongest possible response from the state: criminal prosecution. However, there are alternatives to criminal prosecution, which are sometimes more efficient and effective means of delivering justice.

The alternatives are essentially based on a regulatory approach that operates to the civil standard of proof and avoids the risks of imprisonment. From a deterrence perspective (given that deterrence is one means of prevention), the criminal and regulatory approaches should complement each other. By no means should this be understood as arguing for the 'decriminalisation' of vast swathes of economic 'crime' that have hitherto been regarded as 'serious'.

Instead, the UK needs to find the right balance between a) the punishment orientation and rigidity of traditional criminal law procedures and b) the reform orientation and effectiveness of alternative modes

of justice such as DPAs. One way to find such balance, at least in serious corporate economic crime cases, is to set up a more holistic approach. Such cases should be dealt with by a wide spectrum of traditional and alternative justice mechanisms, including DPAs, leniency programmes, rapid closed-door hearings, large fines, ethics and compliance programmes.

1. *Broader use of DPAs for specific deterrence*

DPAs and other forms of negotiated settlements have proved an effective means of bringing corporations to account for serious misconduct (Hock 2020). DPAs involve cooperation and agreement between enforcement authorities and alleged corporate offenders. While cooperative in its nature, the process of negotiating the terms of DPAs involves complex interactions and backdoor deals (Hock 2021). Hock and Dávid-Barrett (2022) show empirical evidence that such deals generally favour corporations and might be too lenient at times, though some legal academics argue that such practices undermine the rule of law by pushing corporations to settlements without due process. This somewhat contradictory criticism is linked to a more general struggle to determine what the role of DPAs in the UK criminal justice system should be.

Unlike in some other jurisdictions, plea bargaining lacks a more formal status and could be better and more actively utilised (Alge 2014). Given the known efficiencies associated with these mechanisms, they should be considered in complex economic crime cases in more formal and extensive ways. While there are differences when corporations and individual offenders are concerned, these alternative approaches should be available to both as a complement to traditional approaches.

2. *Broader use of leniency programmes*

The SECO should be inspired by some mechanisms currently present in regulating hard-core cartels. Whereas a corporate bribery scheme involves the corruption of specific contracts, hard-core price-fixing cartels distort the functioning of entire market sectors. International price-fixing schemes are amongst the most serious economic crimes. The average duration of these secret conspiracies is eight years, and they typically increase prices by 16%, such that the average overcharge ultimately borne by the consumer is $7 billion per cartel (Boyer & Kotchoni 2015; Button et al. 2020. They make corporate

bribery look amateurish. Yet, regulatory justice is the dominant form of justice in hard-core cartel cases in the UK, the USA and the EU. The European Commission's Directorate-General for Competition is the enforcement body for such offences. The respondents in the EU cases are corporations, not individuals, based in the EU and elsewhere. To combat the secrecy problem, the EC operates a leniency programme, similar to DPAs, which grants immunity to the first corporation that self-reports the conspiracy. Widening the use of the leniency model would assist in detecting and bringing to justice offenders involved in a broader spectrum of economic crime conspiracies.

3. *Rapid closed-door hearings*

What makes the policing of hard-core cartel cases so effective is the use of rapid closed-door hearings. In the EU context, hard-core cartel cases are investigated and judged by the DG Competition behind closed doors. Although these closed-door hearings challenge the fundamental principle of open justice, respondents have the right to request closed oral hearings and they can appeal to the EU General Court. A key feature of the oral hearings is that they are tightly managed so that they are completed within days. The enforcement outcomes of cases are the prohibition of infringing practices and fines. The largest suite of fines amounted to €3.7 billion against six truck manufacturers (European Commission 2023). The Competition and Markets Authority (CMA) is the agency responsible for enforcing cartel laws in the UK. Although the CMA has the power to launch criminal prosecutions, it very rarely does so. Its primary means of enforcement is very similar to the EC's model, the closed-door regulatory approach.

Applying the anti-cartel regulatory framework, including the leniency model and closed-door hearings, to other economic crimes is entirely logical for corporate cases and may be appropriate for cases involving real people.

4. *Large fines for general deterrence*

Financial penalties are currently widely used within the regulatory and criminal justice systems as practical and proportionate sanctions against both organisations and individuals. Indeed, when the defendant is a corporation, custodial sentences are impossible, so fines become the default punishment. But this raises a rather rhetorical key question: What is the purpose of launching a criminal prosecution against a corporation

when a regulatory approach at a lower standard of proof could deliver the same outcome? Similarly, we agree with the police, the CPS and the HMRC that prosecuting individuals has become increasingly impossible, so the regulatory approach has become a practical alternative even for individual offenders. After all, administrative methods are routine practice for the HMRC in tax fraud cases (HMRC 2024).

However, we also argue that fines should be both painful and considered alongside other regulatory-style sanctions, including Financial Reporting Orders, Serious Crime Prevention Orders, Unexplained Wealth Orders and Civil Recovery Orders, as well as 'ethics orders' and listings on a public offender register (see below).

5. *'Ethics orders' – expand the requirement to implement ethics and compliance programmes*

A valuable innovation associated with DPAs is the requirement for corporations to implement ethical and compliance programmes. The SFO is currently responsible for overseeing the programmes via independent monitors. They are practical pathways to rehabilitating offending corporations, and rehabilitation has to be a primary goal of civilised systems of justice. By unshackling ethics programmes from DPAs, SECO could be empowered to issue 'ethics orders' more widely in corporate economic crimes cases. They should include the power to appoint and retain an independent monitor when addressing deep-seated corporate cultural pathologies (Hess & Ford 2007).

6. *A register of serious economic crime offenders*

Another alternative to prosecution is for SECO to establish and maintain a public register of economic crime offenders. There is precedence for this approach. Using an internet-era version of the village stocks, the HMRC names and shames offenders by openly publishing lists of individual and company tax defaulters. The lists include the offenders' names, addresses, the value of the tax frauds and the value of the fines. The consequences of such public humiliation are highly disruptive, including damaged credit ratings, reduced opportunities and difficulties in accessing services.

Offenders could be placed on the register for a specified period of time. By cooperating with industry regulators (e.g. the FCA) and professional bodies (e.g. the Solicitors Regulation Authority), specific conditions

could be attached to the register, for example, prohibition from certain responsibilities (director of company, trustee), professional roles (such as accountant), or activities (selling financial products). It would be a coherent, efficient and practical alternative when criminal prosecution is not warranted whilst also informing the public about high-risk individuals and firms.

A listing on the register could also be offered to defendants as an alternative to prosecution.[2] The accused would then be faced with a choice of accepting the shame and conditions of being listed on the register versus the substantial disruption, expense and risks of a criminal prosecution. As convicted offenders would be automatically listed in the register, it would serve as an additional sanction alongside any other ancillary orders.

Such a register should be inspired by some features of the EU's Early Warning System (EWS). The EWS is an internal information tool that helps the European Commission identify third parties, both corporations and individuals, that pose financial and other risks. This tool includes a Central Exclusion Database including all organisations and natural persons that have been excluded from EU funding because they are, for example, convicted of serious professional misconduct or criminal offences against the EU's financial interests (EPDS n.d.).

To be clear, we do not suggest that all economic crime be dealt with under a framework akin to cartel regulation. The key point is that SECO should go beyond the traditional dichotomy, 'criminal' or 'regulatory', and utilise a more holistic approach to serious economic crime problems and the harms they cause. Considering that economic crime schemes share very similar characteristics of secrecy, conspiracy and corrupt commerce, it would make sense to combine the best of the regulatory features for hard-core cartels, bribery and other economic crime types, including a leniency programme, rapid closed-door hearings, DPAs for specific deterrence, large fines for general deterrence, 'ethics orders' for implementing ethical and compliance programmes, and public shaming on a register of offenders. Indeed, as all corporate economic crimes involve secret, corrupt conspiracies for financial gain, it would make

2 Research on white-collar offenders has noted the most serious consequences many offenders experience are the damage to reputation/bad publicity rather than the criminal justice sanctions (see Button et al. 2020 and Shepherd et al. 2019).

sense to bring fraud, money laundering, tax evasion, insider trading and so on within this more holistic regulatory framework.

Thus, the remit of the new SECO could be expanded to cover all types of serious economic crime. Empowered with a larger toolbox, it would be more agile and efficient in delivering regulatory justice alongside criminal justice, which would enable it to focus on fixing the problem rather than just punishing the problem. Given the range of tools at its disposal, SECO would need to develop clear policies and decision processes to ensure that the most appropriate options are selected in each case.

Preventing serious economic crime

1. *More sophisticated oversight of the requirement to implement ethics and compliance programmes*

Although UK businesses already have multiple obligations to implement adequate procedures, including in the area of bribery, money laundering, tax evasion, antitrust and fraud, there is a scope of the SECO to be more sophisticated in creating incentives for businesses to prevent economic crime.

The advent of DPAs and the associated supervision arrangements have led the SFO to oversee ethical and compliance programmes that reform the offending corporations and prevent future offending. Similarly, it is normal for the police to not only investigate crime but also engage in and encourage crime prevention. Various offences have already been created that effectively create minimum obligations on organisations to prevent economic crime, including:

Failure to prevent bribery: Bribery Act 2010

Failure to prevent the facilitation of tax evasion offences: Criminal Finances Act 2017

Failure to prevent fraud: Economic Crime and Corporate Transparency Act 2023

The Proceeds of Crime Act 2002 (POCA)

As the prevention of serious economic crime is a much more effective strategy than pursuing justice, the authors argue the SECO should assume a much more significant role in prevention. We are not arguing for a regulator of organisations like the Health and Safety Executive, but rather a body that sets and commissions standards and offers guidance on the prevention of serious economic crime. The recently formed Public Sector Fraud Authority has a wide remit across government agencies, which includes promoting stronger fraud prevention, building networks, setting standards and offering advice to the public sector. The SECO could assume this role by building and encouraging standards where there are gaps (there is already a recognised standard for bribery – ISO 37001 – Anti-Bribery Management System), producing more guidance, accrediting commercial providers of economic crime prevention services and products, and facilitating networks of professionals combatting economic crime.

2. *SMEs support – compliance and recovery*

SMEs are the backbone of the UK economy. They also experience regular incidents of economic crime, which can be terminal (Home Office 2023; Federation of Small Businesses 2023). Making the SECO the centre of economic crime prevention advice for organisations provides an opportunity for this role to embrace SMEs. The sounder long-term funding of this body and the expertise it would possess would provide an ideal location.

The SME section of the SECO could also possibly support SMEs in pursuing litigation where they do not have sufficient resources. The main concern of SME owners is recovering lost money, but access to civil justice is very expensive, and finding the right professionals to support

rapid action is challenging: freezing orders need to be obtained very quickly to ensure there are assets to enforce any judgments against. SECO could provide a rapid triage service that assesses the merits of cases and provides honest advice about the options. One option would be to engage pre-approved lawyers and other professionals on conditional fee agreements. CFAs are expensive, but they are a powerful test of a lawyer's real view of the merits and risks of a case.

Embracing private actors to improve SECO

The investigation of most serious cases of economic crime in corporations is largely private. Many cases that the current SFO deals with start their lives with significant private investigations (Shepherd 2021). This raises an important question of how this private capacity can be better utilised in combatting serious economic crime. It is also important, given the recent scandal of the private prosecution of postmasters by the Post Office, that this is done in a way to minimise the risk of such miscarriages of justice.

The majority of serious economic crime investigations where there is an organisational victim with substantial resources are dealt with predominantly by the following private actors:

- In-house investigative and legal staff
- For-hire investigators in large accountancy firms and private investigators
- Specialist lawyers.

The SFO has around 450 staff, but to put this into context, KPMG's forensic team is 3,500 strong globally (KPMG n.d.), EY's is 4,000 (EY n.d.), and Deloitte's is 1,400. One of the largest firms of corporate investigators, Kroll, has 6,500 staff worldwide (Kroll n.d.). These firms sell their global capacity because many investigations of serious economic crimes are international. It is clear, however, that the capacity of just these firms is far greater than of the SFO. Consider the textbox below, which illustrates how many serious economic crimes in organisations are dealt with.

Most economic crimes are investigated by both public and private sector actors outside of the criminal justice system. Within the public sector, government agencies and regulators focus on investigating only a small number of specific economic crime types:

- the HMRC deals with tax fraud
- the DWP focuses on welfare fraud
- the CMA is responsible for business cartels.

Cases of fraud and corruption in private companies are usually investigated by private actors, and the state only picks up these cases once private actors have made significant progress or, in some cases, completed the investigation. Consider the following example:

Company A is in a contract with Company B to supply services. Evidence comes to light of overcharging and corrupt relationships between staff in Company A and Company B.

- *If Company A has no significant evidence and were to contact the SFO or other relevant policing authority, they would be unlikely to secure their interest unless Company A finds sufficiently strong evidence of wrongdoing.*
- *For this, Company A would need to hire private investigators and lawyers. If these private actors find sufficient evidence, Company A may wish to simply sue Company B for damages in the civil court and deal with staff through internal disciplinary procedures. In some cases, Company A may also settle the case with Company B out of court.*
- *If Company A does want a criminal case, they would need to build a strong enough case to meet SFO standards. SFO may decline. If they are determined to bring a criminal prosecution, their final option would be to bring a private prosecution, turning to some of the specialist law firms operating in this area.*

As the private sector is dominant in the investigation of economic crime, cooperating more effectively with the private sector would help SECO better utilise its capacity and ability to combat the problem. The opportunities would be enabled by addressing the following:

Greater staff exchanges. Both SECO staff and private sector practitioners would benefit from more regular staff exchanges to get a better mutual understanding of practices, procedures, challenges and obstacles.

Setting clearer standards for the acceptance of cases. Unlike the SFO, SECO could articulate clearer and more inclusive standards for the acceptance of cases to enable victims to present 'oven-ready' cases. This would probably require an accreditation procedure linked to appropriate training and standards.

Accrediting lawyers, investigators and firms offering private investigation services. Linked to the above, SECO could accredit investigators and lawyers who demonstrate the competence and ability to bring forward cases that meet SECO's standards.

Contracting out part or complete investigations. Robust accreditation processes would enable the investigation of cases to be substantially or wholly contracted out, thus expanding capacity and increasing efficiency. This would not be a great leap, as specialists in forensic services and barristers are often drawn from the private sector.

Ensuring the separation of powers. A key problem with the Post Office scandal was that the alleged victim (the Post Office) managed the investigation and the private prosecution. The scandal illustrates the importance of robust gatekeeper processes that separate the victim, the investigation and the decisions to impose regulatory sanctions or pursue prosecution. Fortunately, as an investigator and a prosecutor, the SFO already has these structures and processes in place. Nevertheless, in making greater use of the private sector, SECO would have to ensure that the separation of powers is maintained.

Conclusion

Serious economic crime is the costliest crime confronting society. Combatting it is a vitally important function. This paper sets out how the current Serious Fraud Office could be reformed into a Serious Economic Crime Office (SECO) with a much greater orientation towards prevention and alternatives to criminal prosecution to better utilise substantial resources and the expertise of the private sector to tackle the problem of economic crime more effectively.

References

Alge, D. (2014) Plea bargaining in England and Wales: some comparisons with the USA. In: *Academy of Criminal Justice Sciences Annual Meeting*, 18-22 Feb 2014, Philadelphia, USA. (Unpublished)

Attorney General (2006) Fraud review, final report. https://webarchive.nationalarchives.gov.uk/20070222120000/http://www.lslo.gov.uk/pdf/FraudReview.pdf

Boyer, M. & Kotchoni, R. (2015) How much do cartel overcharge?. *Review of Industrial Organization*, 47: 119–53.

Button, M., Gough, D., Shepherd, D. & Blackbourn, D. (2020) White collar criminals' experience of imprisonment in England and Wales: revisiting the 'special sensitivity' debate. *Deviant Behavior*, 41(12): 1585–1600.

Calvert-Smith, D. (2022) Independent Review into the Serious Fraud Office's handling of the Unaoil Case – R v *Akle & Anor*. https://assets.publishing.service.gov.uk/media/62d91f1d8fa8f50c05012428/DCS_report_-__FINAL_-_21_July_08.31_.pdf

Conservative and Unionist Party (2017) Forward Together. http://ucrel.lancs.ac.uk/ wmatrix/ukmanifestos2017/localpdf/Conservatives.pdf

Conservative and Unionist Party (2019) Get Brexit Done Unleash Britain's Potential. https://assets-global.websitefiles.com/5da42e2cae7ebd3f8bde353c/5dda924905da5 87992a064ba_Conservative%202019%20Manifesto.pdf

CPS (2023) CPS data summary Quarter 4 2022-2023. https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2022-2023

de Grazia, J. (2008) Review of the Serious Fraud Office, Final Report. SFO.

Deloitte (n.d) Professional opportunities in Deloitte Forensic. https://www2.deloitte.com/uk/en/pages/careers/articles/professional-opportunities-in-deloitte-forensic.html

EPDS (n.d.) Blacklisting and early warning systems. https://www.edps.europa.eu/data-protection/data-protection/reference-library/blacklisting-and-early-warning-systems_en

European Commission (2023) Cartels cases and statistics. https://competition-policy.ec.europa.eu/antitrust-and-cartels/cartels-cases-and-statistics_en

EY (n.d.) Forensic & Integrity Service Offerings. https://www.ey.com/en_uk/assurance/foren -integrity-service-offerings

Federation of Small Businesses (2023) Cracking the Case. Uncovering the Cost of Small Business Crime. https://www.fsb.org.uk/resource-report/cracking-the-case-uncovering-the-cost-of-small-business-crime.html

Fisher, J. D. (2010) Fighting fraud and financial crime: a new architecture for the investigation and prosecution of serious fraud, corruption and financial market crimes. Policy Exchange.

Forder, J. (2023) Fraud Focus. Is the Serious Fraud Office Fit for Purpose? https://iea.org.uk/wp-content/uploads/2023/03/DP120_Fraud-focus_web-2.pdf

Fraud Trials Committee (1986) Roskill Report. HMSO. https://api.parliament.uk/historic-hansard/lords/1986/jan/14/the-roskill-report

Gross, L. J. (2011) Review of disclosure in criminal proceedings. Courts and Tribunals Judiciary.

Hess, D. & Ford, C. (2007) Corporate corruption and reform undertakings: a new approach to an old problem. *Cornell International Law Journal*, 41 (2): 307–46.

HMRC (2024) Current list of deliberate tax defaulters. https://www.gov.uk/government/publications/publishing-details-of-deliberate-tax-defaulters-pddd/current-list-of-deliberate-tax-defaulters

Hock, B. & Dávid-Barrett, E. (2022) The compliance game: legal endogeneity in anti-bribery settlement negotiations. *International Journal of Law, Crime and Justice* 71. https://doi.org/10.1016/j.ijlcj.2022.100560

Hock, B. (2020) *Extraterritoriality and International Bribery: A Collective Action Perspective. Routledge*.

Hock, B. (2021) Policing corporate bribery: negotiated settlements and bundling, *Policing and Society*, 31(8): 950–66, DOI: 10.1080/10439463.2020.1808650

Home Office (2023) Economic Crime Survey 2020. https://www.gov.uk/government/publications/economic-crime-survey-2020

KPMG (n.d.) Investigation and incident response. https://kpmg.com/uk/en/home/services/consulting/forensic-consulting/investigation-and-incident-response-solutions.html

Kroll (n.d.) About. https://www.linkedin.com/company/kroll/?originalSubdomain=uk

MOJ (2023) Criminal Justice System statistics quarterly: December 2022. https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2022

OECD (2019) PHASE 4 TWO-YEAR FOLLOW-UP REPORT: United Kingdom. https://www.oecd.org/daf/anti-bribery/United-Kingdom-phase-4-follow-up-report-ENG.pdf

OECD (2021) United Kingdom Phase 4 – Additional follow-up report. https://one.oecd.org/document/DAF/WGB(2021)84/FINAL/en/pdf

ONS (2023) Crime in England and Wales: year ending June 2023. https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingjune2023

Public Accounts Committee (2013) PAC report: Serious Fraud Office – redundancy and severance arrangements: HC 360. House of Commons.

http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/360/360.pdf

Ryder, N. (2011) The Fight against Illicit Finance: A Critical Review of the Labour Government's Policy. *Journal of Banking Regulation* 12(3): 252–75.

Serious Fraud Office (n.d.) About Us. https://www.sfo.gov.uk/about-us/

SFO (2023) Annual report 2022/23. https://www.sfo.gov.uk/2023/07/18/annual-report-accounts-2022-23/

Shepherd, D. (2021) DIY fraud investigation and access to justice: a case study. *Policing: A Journal of Policy and Practice* 15(4): 2165–77.

Shepherd, D., Beatty, E., Button, M. & Blackbourn, D. (2019) The media, personal digital criminal legacies and the experience of offenders convicted of occupational fraud and corruption. *Journal of Criminological Research, Policy and Practice* 6(1): 3–16.

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