
**Roskill Revisited: Is there a case for a unified fraud
prosecution office?**

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Executive summary

Paragraphs

The present crisis in fraud prosecution in the UK is due to the absence of a coherent high-level strategy, a plethora of bodies with responsibility for the prosecution of fraud, problems inherent in the system of prosecution itself and the emergence of alternative sanctions applied inconsistently across the criminal justice system.

1 to 7

40 to 44

94 to 98

At the same time, the extent and breadth of fraudulent activity is at its highest and most prominent. Whilst the accurate and comprehensive measurement of levels of fraud in the UK is in its infancy, it is clear that only a fraction of fraud committed ends up in court.

25 to 35

This state of affairs warrants consideration of a new approach to fraud prosecution. This study revisits two recommendations of the 1986 Fraud Trials Committee headed by Lord Roskill: that consideration be given to the creation of a unified fraud investigation and prosecution office and the creation of an independent monitoring body for studying the efficiency with which fraud cases are conducted.

8 to 24

Since 1986, the fraud prosecution landscape in the UK has, if anything, become more fragmented, as well as demanding more of the nation's resources, although there are signs that the need for coherence has been recognised, for example, through the creation of the National Fraud Authority ('NFA').

36 to 56

The efficacy and the future of two of the UK's principal prosecuting and regulatory bodies, the Serious Fraud Office ('SFO') and the Financial Services Authority ('FSA'), are in doubt, although smaller prosecuting authorities such as the Fraud Prosecution Division ('FPD') (formerly the Fraud Prosecution Service), and the Revenue and Customs Division ('RCD') (formerly the Revenue and Customs Prosecution Office), of the Crown Prosecution Service ('CPS'), have fared better, albeit with a lower profile. Both the SFO and the FSA are undergoing changes in their approach to fraud: the former emphasising alternative sanctions and the latter placing greater emphasis on criminal prosecutions.

57 to 93

We pose a series of six questions in order to stimulate a debate on the extent to which a Unified Fraud Prosecution Office (a 'UFPO') might facilitate the development of a coherent anti-fraud strategy and strong agencies to implement it, improve socially acceptable outcomes and the certainty of such outcomes and provide adequate resources and value for money. This study is intended to encourage suggestions for improvement in the way that fraud prosecutions are currently organised and conducted.

99 to 100

Question 1: Which bodies might be incorporated in a Unified Fraud Prosecution Office (a UFPO)? 101 to 115

If a UFPO is to include the prosecution function of the SFO, with its investigative function relocated elsewhere, the FPD, some case-work of the RCD, and the fraud-related work that would currently fall to the enforcement division of the FSA, might this give rise to other problems: for example, the lack of adequate available investigative resources to replace those of the SFO? The inclusion of other fraud-related offences, such as the criminal cartel work of the Office of Fair Trading ('OFT'), may not prove as complex a problem.

Question 2: What should be the remit of a UFPO in terms of the types of cases to be taken on and thresholds? 116 to 128

We note that there is considerable overlap between the current case acceptance criteria of the bodies we consider might be incorporated into a UFPO. What should the criteria be for acceptance of cases to be taken on? Should these criteria incorporate not only monetary amounts but also the perceived degree of harm caused by the fraud?

Question 3: What operational efficiencies and other benefits might a UFPO provide? 129 to 135

It is beyond the scope of this report to quantify the current cost of fraud prosecution in the UK, except to recognise that it is significant. Equally, it is beyond our remit at this stage to assess any financial savings that might result from creation of a UFPO. However, were a UFPO to contribute even marginally to the reduction of fraud in the UK, the overall financial benefits to private and public sector alike would be considerable.

Question 4: How would a UFPO fit in with the NFA and the National Fraud Strategy? 136 to 138

The NFA, in devising a National Fraud Strategy, has not so far turned its attention to the delivery of a coherent, centrally developed fraud prosecution policy through a unified and centralised prosecuting body. The arguments put forward in this paper for such a body should be given serious consideration by the NFA.

Question 5: What sanctions should be available to a UFPO? 139 to 142

The use of non-forensic and non-criminal sanctions by fraud prosecutors is not standardised. Should a range of civil, regulatory and criminal sanctions be available to those prosecuting and regulating the full range of financial and commercial fraud cases, or should the use of non-criminal sanctions be limited to specific types or magnitudes of case? We welcome academic research into the effectiveness and economic benefits accruing from criminal and non-forensic sanctions.

Question 6: Is there a need for an oversight body with or without a UFPO? How might an oversight body be constituted and where might it sit? 143 to 146

All agencies involved in the regulation and prosecution of fraud should be clearly accountable for their actions and performance judged against their objectives and targets. We invite suggestions as to how this can be best achieved through regular independent review. Would the most appropriate body be HM Crown Prosecution Service Inspectorate, or should a new body be created for this purpose?

As we say above, our primary objective in undertaking this work is to stimulate discussion on the subject, and we look forward to the Fraud Advisory Panel taking it forward in the form of a public debate, or even a small-scale commission of enquiry, involving all stakeholders. 147 to 148

Part 1: Introduction

1. When the special project group first set out on this task, we approached it from a quasi-academic perspective, tinged, perhaps, with some nostalgia for the lost innocence of a less complex and less regulated world. Certainly we laid no claim to prescience in starting a discussion on a Unified Fraud Prosecution Office (a 'UFPO'). Yet no sooner had we embarked on our work than the topic, or at least aspects of it, began to feature in the pronouncements of prosecutors, academics and, most poignantly of all, in the speeches of politicians.
2. Possibly the most recent factor in focusing the public gaze on fraud was the exposure of Bernard Madoff, coming as it did shortly before the near-collapse of the global financial system. Breathtaking risks had been taken with depositors' and investors' funds, billions would be lost and giant financial institutions laid low. Where did recklessness and dishonesty merge, and who were to be held to account and how? Regulation had been preferred to penalisation, and regulation had been found 'too light'. Regulation and prosecution sat side by side but didn't appear to hold hands. Who in future should be prosecuted and by whom? Should it be the Serious Fraud Office ('SFO'), the Fraud Prosecution Division ('FPD') (formerly the Fraud Prosecution Service) and the Revenue and Customs Division ('RCD') (formerly the Revenue and Customs Prosecution Office until 1 January 2010) of the CPS, the Financial Services Authority ('FSA'), the Department for Business, Innovation and Skills ('BIS'), or the Office of Fair Trading ('OFT'), or some or all of these as appropriate?
3. As so often happens, there was an absence of coherence in the pronouncements of critics of a "failed" system. In addition to questions as to the locus of prosecution and regulatory bodies were issues or questions as to the whole process of prosecution itself. The investigation and prosecution of fraud calls for expensively trained staff and very many of them. Trials are difficult to mount. How is one to explain to a jury the arcane mysteries of the financial markets, international trade finance, and ever more complex tax arrangements? Even more demanding is the political patience and nerve to persevere over a period of years.
4. On the other hand, in defence of the existing system, it was said that the implementation of the recommendations of the Government's 2006 Fraud Review (which itself did not reflect on unifying the fraud prosecution landscape) had yet to mature and show results; the SFO had a new Director and with him a new direction; the FSA had begun a programme of muscular

enforcement, known as its “credible deterrence strategy”, only to learn that a change of Government could also mean its possible disbandment.

5. The special project group was careful to avoid the hubris of advocating a solution to all that has been found wanting in the prosecution of serious fraud in the preceding 25 years. Rather, we wished to reflect upon – and indeed invite those with the power to change policy to reflect upon – the possible advantages of creating a more coherent response to the challenge facing a sophisticated economy under attack from all manner and type of dishonesty on a truly grand and global scale.
6. Roskill was chosen as a starting point because his was the first attempt to confront the challenge and examine how well the UK organised its defences and how it might do better. It also served to illustrate the limited way in which finite resources may be applied to radical proposals, with not always the best possible outcomes.
7. We firstly set out a summary of Roskill’s recommendations as to the establishment of a unified fraud office (which we refer to as a UFPO, although we accept that a more terrestrial name would be advisable) and an oversight body which the Committee termed a Fraud Commission. We then set out a summary of the fraud landscape in the UK and highlight key changes since 1986, before going on to raise a series of questions.

Part 2: Roskill's recommendations

Introduction

8. The Roskill Committee on Fraud Trials published its Report in 1986. This wide-ranging review, prompted by the collapse of a series of major fraud trials, is best known for its recommendations leading to the establishment of the SFO. What is often overlooked is that Roskill also recommended that the case for the establishment of a unified organisation responsible for the investigation and prosecution of serious fraud be further examined, a recommendation that was not fully taken forward. The establishment of an oversight body, referred to as a Fraud Commission, responsible for studying the efficiency with which fraud cases are conducted, was also suggested, but again failed to find favour.
9. 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.
10. In this section we summarise these recommendations.

Roskill's Recommendation 1

11. Roskill's first recommendation was:

*"The need for a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud cases should be examined forthwith."*¹

12. Although the Roskill Committee did not go as far as to recommend the establishment of a unified organisation, and indeed it was beyond its remit to undertake a thorough examination of the issue, the Committee felt compelled to at least raise it as a possibility, because it was

¹ *Fraud Trials Committee*, 1986. (Roskill Report) London: HM Stationery Office. See paras 2.48 and 11.1.1.

considered inextricably linked with its actual remit: “to consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved...”²

13. The Committee noted that the operations of the modern fraudster extended over a wide range of illegal activities and that if these operations were to be curtailed they needed to be matched by an efficient system of detection and trial. The Committee considered that this was hindered by the diversity of different powers and processes extending over a whole range of different organisations.³

14. To counter this, the Committee thought that a unified organisation would have a number of advantages:
 - fewer serious frauds would be allowed to escape prosecution by slipping through the net of a series of organisations working in this field;
 - overlapping resources could be avoided;
 - it would enable the investigation process to lead to more effective prosecution;
 - there would be scope for greater efficiency and the reduction of delays; and
 - unhelpful restrictions on the disclosure of information from one organisation to another would be avoided.⁴

15. At the time, there was insufficient political will to take this recommendation forward, for fear perhaps of the perceived additional effort and costs involved. This was despite the Committee’s view that, in countries where a unified approach had been adopted – for example, in the former West Germany, where economic crime was handled by the police and specialised prosecution units comprising prosecutors, accountants and “business administration experts” – it had met with apparent success.⁵

² Ibid. See para 1.1.

³ Ibid. See para 2.44.

⁴ Ibid. See para 2.46.

⁵ Ibid. See para 2.46 and Appendix E.

16. It seems to us that the Committee's observation about the need to confront the fraudster's operations with at least the prospect of an efficient system of investigation and prosecution is as true now as it was in 1986, if not more so.
17. There have of course been extensive developments in the UK's fraud investigation and prosecution regime since 1986. In this paper we aim to examine whether these developments have successfully addressed the problem identified by Roskill arising from the diversity of powers and processes across the system and whether any of these developments have delivered any of the advantages that Roskill saw as accruing from a unified organisation.

Roskill's Recommendation 2

18. Roskill's second recommendation was:

*"An independent monitoring body (the "Fraud Commission") should be responsible for studying the efficiency with which fraud cases are conducted and should make an annual report..."*⁶

19. The Committee's view was that the fragmented nature of the (then) system made essential the establishment of an independent monitoring body with responsibility for studying and advising on the efficiency with which fraud cases were conducted.⁷
20. It was recommended that the Fraud Commission would have the following objectives:
 - to watch the system in operation for the detection and pursuit of fraud cases until the final verdict, including the time which elapses at the various stages, including the time between the discovery of fraud and its reporting to the prosecuting authority;
 - to inquire into major variations or breakdowns in the system; and
 - to assess the possibility of improvements by changes of policy and procedure or the introduction of more efficient techniques.⁸

⁶ Ibid. See paras 2.49 and 11.1.2.

⁷ Ibid. See para 2.49.

⁸ Ibid. See para 2.49.

21. The Committee went on to express the view that a Fraud Commission should work closely with bodies to whom reports of fraud were made and bodies concerned with self-regulation, with a view to encouraging the early detection of fraud.⁹
22. The view was also expressed that it would be preferable for a Fraud Commission to be carried out by a body within the existing machinery of Government but with an independent element.¹⁰
23. According to Dr Michael Levi, Professor of Criminology at Cardiff University, Roskill's proposal for a Fraud Commission "*reflected the Committee's scepticism about the sustained energy of government and of the legal profession in zealously keeping watch*".¹¹
24. This suspicion of scepticism is perhaps confirmed by the fact that the proposal was not taken forward and by the continued low priority accorded to financial crime within UK police forces. The Fraud Review has changed the language of the authorities' approach to fraud in the UK, but the institutions set up in its wake, including the National Fraud Authority ('NFA'), are as yet fledglings. We discuss further below the possible place of a Fraud Commission or similar oversight body in the UK's fraud prosecution hierarchy.

⁹ Ibid. See para 2.51.

¹⁰ Ibid. See para 2.50.

¹¹ Levi, M., 2003. The Roskill fraud commission revisited: an assessment. *Journal of Financial Crime*, 11(1), pp. 38-44.

Part 3: The fraud landscape in the UK and developments post-Roskill

Introduction

25. In this section we summarise key elements of the fraud landscape in the UK at the time of Roskill and how these have developed subsequently.
26. We go on to examine the role of the NFA and elements of its recently published first National Fraud Strategy and then comment on the perceived and actual efficacy of the UK's principal fraud prosecution agencies.

Levels of fraud in the UK

27. The comprehensive and accurate measurement of levels of fraud in the UK is in its infancy.
28. Roskill noted that there were then no reliable national statistics available to indicate the total value of money or property lost or at risk of being lost through fraud each year. This was partly due to the fact that published figures included only those made available by the Metropolitan Police and the City Police Company Fraud Department.¹² In 1984, the most recent figures available to Roskill, the total "money at risk" was put at £617 million.¹³ However, it was reported in *The Times* on 9 December 1985 that "*company fraud is costing British business nearly £3 billion a year*".¹⁴
29. In January 2010 the NFA published the first Annual Fraud Indicator, which estimates that in 2008 fraud cost the UK £30 billion, referred to as a "*staggering figure which gives the UK its first comprehensive picture of the devastating consequences fraud has on the UK economy*".¹⁵ The public sector was the biggest fraud victim, at £17.6 billion, followed by the private sector at £9.3 billion (including £3.8 billion from the financial services sector alone) and the individual and charity sector at £3.5 billion.

¹² *Fraud Trials Committee*, 1986 (Roskill Report) London: HM Stationery Office. See Appendix K, para 4.

¹³ *Ibid.* See Appendix K, Table B.

¹⁴ *Ibid.* See Appendix K, para 4, note 1.

¹⁵ National Fraud Authority, 2010. *Annual fraud indicator*. London: NFA. See page 4.

30. This total of £30 billion greatly exceeds previous estimates, such as the £13.9 billion figure reported in February 2007 by the Association of Chief Police Officers¹⁶ although, given the wide range of definitions and methodologies adopted within the NFA's measurements and the continuing risk of under-reporting (particularly in the private sector), the NFA warns that caution should be taken when using its estimates and notes that there is much to be done in improving fraud reporting and measurement mechanisms and methodologies.¹⁷
31. A more concrete measure of serious fraud cases actually prosecuted can be obtained from the KPMG Fraud Barometer. In January 2010, KPMG reported that 2009 saw record levels of fraud cases valued in excess of £100,000 coming to court, with 271 cases valued at over £1.3 billion¹⁸ (compared with 239 cases valued at over £1.1 billion in 2008¹⁹). This also compares with under £200 million in 1987, the Barometer's first year.²⁰
32. 2009 saw record levels of serious fraud by managers and employees (123 cases valued at £568 million). The biggest victims were the Government and public sector organisations who suffered frauds to a value of £476 million followed by the financial services sector (£396 million). KPMG report that 101 cases valued at some £719 million (over 37% of the total by volume and almost 55% by value) were committed by organised crime.²¹
33. Prior to 2009, the biggest monetary loss to fraud recorded by the KPMG Fraud Barometer was in 1995, seen as a legacy of the preceding years of recession.²²
34. Whilst certain high-profile cases have already emerged from the recent financial crisis, such as the record-breaking Ponzi scheme operated by Bernard Madoff, itself believed to have had its roots in the recession of the early 1990s, and the alleged fraud operated by Alan Stanford in the Caribbean, in KPMG's view "2010 is likely to see a continuation of recent fraud highs".²³

¹⁶ Levi, M. Burrows, J. Fleming, M.H. & Hopkins, M. with the assistance of Mathews, K., 2007. *The nature, extent and economic impact of fraud in the UK*. ACPO.

¹⁷ National Fraud Authority, 2010. *Annual fraud indicator*. London: NFA.

¹⁸ KPMG, 2010. *Record fraud in 2009 closes out the 'naughty Noughties'* [press release, 25 January]. Available at www.kpmg.co.uk.

¹⁹ KPMG, 2009. *Fraud nears record levels in 2008 – and worse to come, says KPMG* [press release, 02 February]. Available at www.kpmg.co.uk.

²⁰ KPMG, 2007. *KPMG fraud barometer: twenty years of fraud: 1987–2006* [presentation].

²¹ KPMG, 2010. *Record fraud in 2009 closes out the 'naughty Noughties'* [press release, 25 January]. Available at www.kpmg.co.uk.

²² KPMG, 2007. *KPMG fraud barometer: twenty years of fraud: 1987–2006* [presentation].

²³ KPMG, 2009. *Fraud highs set to continue in 2010* [press release, 31 December]. Available at www.kpmg.co.uk.

35. It is notable that there is an enormous gap in the estimated levels of fraud committed and those coming to court. How the UK's already resource-stretched fraud investigation and prosecution services will respond to the challenges of increasing levels of fraud is another matter.

Developments in the UK's fraud regulatory framework

36. At the date of Roskill, the bodies with the primary responsibility for investigating and prosecuting fraud were the 43 independent police forces, the (then) Department of Trade and Industry ('DTI') (which was renamed the Department for Business, Enterprise and Regulatory Reform ('BERR') and more recently renamed again as BIS), the Fraud Investigation Group ('FIG') operating under the Director of Public Prosecutions ('DPP'), the Inland Revenue ('IR') and Customs and Excise ('C&E').

37. Legislation for tackling fraud was primarily restricted to Theft Act offences, forgery and conspiracy to defraud.

38. From 1986 onwards, major developments in the UK's fraud and financial legislative landscape have included:

Year	Developments
1986	This was a momentous year in financial regulation, marking as it did the 'Big Bang' and the dismantling of barriers within the financial services industry. Whilst these developments arguably provided a springboard for the emergence of London as a global financial centre, they also provided new opportunities for fraud. This year also saw the passing of the Financial Services Act 1986 and the formation of the Securities and Investments Board ('SIB') and associated self-regulating bodies.
1987	The UK's first Criminal Justice Act was enacted, establishing the SFO. Further Criminal Justice Acts followed in 1988, 1991, 1993 and 2003.
1990s	A decade of major frauds, including Barlow Clowes (uncovered in 1988), Polly Peck, Maxwell and BCCI. These frauds justified the creation of the SFO and, although its prosecution success was mixed, highlighted weaknesses in the existing regulatory regimes for banking, investments and pensions.

Year	Developments
2000	Owing to weaknesses in the regulatory system brought in by the Financial Services Act 1986, the Financial Services and Markets Act 2000 ('FSMA') was enacted and the FSA brought into being, replacing the SIB and its second-tier regulators, of which at least some were regarded as ineffective. Unlike the SIB, the FSA was granted criminal prosecution powers in relation to insider dealing and market abuse.
2002	The Proceeds of Crime Act 2002 was enacted, bringing with it a raft of new offences in relation to money-laundering. The Enterprise Act 2002 created a new cartel offence.
2005	The IR and C&E merged to form HM Revenue and Customs ('HMRC'). The Revenue and Customs Prosecution Office ('RCPO') was created, to prosecute independently cases investigated by HMRC. The Serious Organised Crime Agency ('SOCA') was formed. SOCA brought together in a single organisation the responsibilities of the former NCS, NCIS and other intelligence and investigation functions.
2006	The Fraud Prosecution Service ('FPS') was formed as a stand-alone division of the CPS. The final report of the Fraud Review was published, which recommended, inter alia, the development of: <ul style="list-style-type: none"> • a national fraud strategy, to be devised by a newly created authority (the NFA) with an emphasis on fraud prevention; • a National Fraud Reporting Centre ('NFRC') in order to tackle the gap in fraud reporting and facilitate the analysis of trends; • the City of London Police force as a national lead police force, together with the strengthening of fraud as a priority within police plans and fraud squads. The Fraud Act 2006 was passed, bringing into being new fraud offences relating to, inter alia, false representations and failures to disclose and representing an " <i>entirely new way of investigating the many methods by which fraud can be perpetrated</i> ," where it is " <i>no longer necessary to prove that a victim was deceived</i> ". ²⁴
2010	The RCPO was merged into the CPS as a separate but ring-fenced division ('RCD') with effect from 1 January and the FPS became a division of the CPS with effect from the same date ('FCD'). Speculation intensified as to the future of the SFO and the enforcement division of the FSA.

39. Thus, new bodies have been created and new legislation enacted to tackle fraud and financial crime, particularly since 2005.

²⁴ HM Treasury, 2007. *Fraud report 2006–07: an analysis of reported fraud in Government departments*. London: HM Treasury. Available at www.hm-treasury.gov.uk.

40. As of today, the bodies with primary or some responsibility for the prosecution and investigation of fraud include the following (in alphabetical order):

Prosecuting body	Investigating body	Types of fraud
BIS (including the Insolvency Service/Treasury Solicitor)	Insolvency Service Companies Investigation Branch	Company fraud Disqualification of directors
Department of Work and Pensions ('DWP')	DWP	Benefit fraud
FSA	FSA	Insider dealing Market abuse
FPD of CPS	Police forces SOCA	Complex, sensitive or high value fraud
RCD of CPS	HMRC SOCA	Tax evasion Evasion of duty MTIC fraud
Local Government	Local Government	Corruption Procurement
Trading Standards Departments	Trading Standards Departments	Consumer fraud Mass-market fraud
Ministry of Defence ('MOD')	MOD	Corruption Procurement
OFT	OFT	Cartels
SFO	SFO and Police forces	Serious or complex fraud

41. Thus there 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.
42. Developments such as the recent RCPO and CPS merger provide a sign that this fragmentation is being addressed. However, the 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.²⁵

43. But, as we see it, 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.
44. In saying that, we recognise that the advent of the NFA and the other measures emanating from the Fraud Review evidence a new focus on fraud, but it is too early as yet to make any judgements on their effect on the prosecution of fraud.
45. In the following section we briefly examine the objectives of the NFA and the National Fraud Strategy.

The NFA and the National Fraud Strategy

Introduction

46. In this section we consider the objectives of the NFA and the recently published National Fraud Strategy, particularly as regards the prosecution of fraud, and what has been achieved in its first year of operation.

Objectives of the NFA

47. The NFA came into being in October 2008 and, in March 2009, published its first National Fraud Strategy document (the 'NFS'). In May 2009, the NFS was followed by the NFA's business plan for 2009–2010.
48. The NFA's principal function is "*to develop a comprehensive counter-fraud strategy based on agreed national priorities*", delivered through, inter alia, coordination, gap analysis, dispute resolution, and the elimination of duplication.²⁶ The overall vision of the NFA is of a UK "safe

²⁵ Attorney General's Office, 2009. *Statement on changes to the organisation of the Revenue & Customs Prosecutions Office and Crown Prosecution Service* [press release, 3 April]. Available at www.attorneygeneral.gov.uk.

²⁶ National Fraud Authority, 2009. *Business Plan 2009-2010*. London: NFA. Available at www.attorneygeneral.gov.uk. See page 8.

from the harm caused by fraud'.²⁷ Realisation of this vision is dependent upon progress in five key areas, with other agencies responsible for the delivery of some of these:

- tackling the key threats that pose the greatest harm to the UK;
- pursuing fraudsters and holding them to account and supporting victims;
- reducing the UK's exposure to fraud by building capability to prevent it;
- targeting fraud more effectively by building on and sharing knowledge; and
- protecting the UK through international collaboration.²⁸

49. The Executive Summary to the NFA's 2009–2010 business plan describes the current year as one in which the NFA will be "*clear in its focus and committed to a year of substantial delivery and challenge*", for which its annual budget is £4.3 million.²⁹ It goes on to note that the headcount of the NFA will be expanded in order to reflect its ambitious programme of work and that it will be relocated with the SFO in new and larger Central London premises.
50. The Executive Summary then identifies 14 key priorities for the NFA, arising out of the NFS, which have clearly defined outcomes and deliverables. These 14 items include a number of measurement, information-sharing, and education and victim support initiatives. Specific fraud types or 'enablers' to be addressed are: ID fraud, mass-marketing fraud, share sale fraud and mortgage fraud. In addition, the priority areas include the development of the National Fraud Intelligence Bureau ('NFIB'), the National Fraud Reporting Centre ('NFRC', now renamed 'Action Fraud') and the National Lead Force for Fraud.
51. The fourteenth item on the list is headed "Justice and Enforcement" and is described as: "*Consideration of how to deal with fraudsters, the sanctions that can be imposed, how fraudsters are brought to justice and how this may reflect on fraud victims. It will also involve overseeing*

²⁷ Ibid. See page 10.

²⁸ Ibid.

²⁹ Ibid. See pages 3 and 5.

and recommending legislative changes that will disrupt and sanction individuals and businesses that commit fraud".³⁰

52. In this regard, it refers to two measures to increase the effectiveness of fraud prosecutions already being progressed by the government: the plea-bargaining framework; and the increased powers to be granted to Crown Courts (in respect of matters such as company winding-up, professional disciplinary actions and compensation to victims). It also refers to the planned "*announcement of options for more flexible powers to punish fraudsters and meet future fraud challenges*" in October 2009.³¹
53. A further plank of the NFA's work in this area is a fraud enforcement landscape project under which the NFA, working in partnership with SFO, has developed a programme to strengthen multi-agency collaboration on the detection, disruption, investigation and punishment of fraud. The NFA will start the collection, analysis and reporting on management information on fraud enforcement by November 2009 in order to examine enforcement performance from a strategic perspective and with the aims of providing:
- a settled strategic and operational structure to oversee and manage fraud enforcement;
 - the implementation of the performance management framework to provide an evidence base for strategic decisions on fraud enforcement; and
 - linkages between fraud enforcement and reformed structures for tackling organised crime.³²

What has been achieved?

54. In a section of the 2009–2010 business plan entitled "What has been achieved?" the NFA lists a number of benefits that have accrued to date. These largely comprise the development of partnerships and frameworks on which the NFA's future work will depend. The business plan also refers to four areas where government action has assisted in bringing fraudsters to justice:

³⁰ Ibid. See page 4.

³¹ Ibid. See page 34.

³² National Fraud Authority, 2009. *6 month report: April–September 2009*. London: NFA. Available at www.attorneygeneral.gov.uk.

namely, the formation of the FPS, which has achieved an 85% success rate; the review and changes under way at the SFO; the Fraud Act 2006 and the confiscation of £82 million from criminals; and a 91% conviction rate at the RCPO.³³

55. The NFA has yet to make any significant pronouncements or policy in the fraud prosecution arena that are independent of initiatives already under way from the Attorney General's Office, although activities such as the fraud enforcement landscape project are encouraging. Whilst we recognise that it is early days in the NFA's history, we would welcome an enhanced role for the NFA in ensuring coherence in the UK's approach to fraud prosecution.
56. In Question 5 of Section 4 below, we look further at how a UFPO might fit in with the NFA and the NFS. We first examine the efficacy of the UK's primary fraud prosecution agencies.

The efficacy of the UK's fraud prosecution agencies

Introduction

57. First, we would stress that one cannot monitor or judge the performance of a fraud prosecution regime based on individual statistics such as conviction rates alone.
58. In our view, a broad range of qualitative indicators must also be applied, including the existence of:
- a coherent anti-fraud policy that provides 'sustained energy' in the fight against fraud and is immune to the frequent vagaries of political will;
 - a platform of well-respected agencies that are appropriately resourced and provide value for money;
 - agencies that are proactive in tackling threats where possible and can react quickly to new threats that emerge;
 - certainty of outcomes for both victims and perpetrators;

³³ National Fraud Authority, 2009. *Business Plan 2009-2010*. London: NFA. Available at www.attorneygeneral.gov.uk.

- outcomes that provide a deterrent effect and appropriate sanctions; the ability to identify the nature and incidence of fraud and common denominators across the fraud spectrum; and
- the effective dissemination of anti-fraud knowledge through training and information programmes.

59. In the following paragraphs we firstly look at symptoms of a crisis in fraud prosecution identified by the Fraud Advisory Panel's earlier work, before going on to look at the profiles of some of the UK's principal fraud prosecuting agencies and emerging trends in the outcomes from the current fraud prosecution regime.

A crisis in fraud prosecution?

60. A previous report by the Fraud Advisory Panel in May 2006, entitled 'Bringing to Book: Tackling the crisis in the investigation and prosecution of serious fraud', provided the following statistics of the symptoms of that crisis:

- lengthy investigations, the average SFO case in 2002–2005 taking 33 months between acceptance and transfer to Crown Court;
- burdensome trials, with 30 trials taking an average 67 working days and having 6 defendants and 114 witnesses;
- low conviction rates, with only 66% of defendants found guilty; and
- soaring costs, with 2003–2004 fraud trials consuming £100 million of legal aid alone.³⁴

61. Generally, it does not appear to us that much if any progress has been made on these fronts between 2006 and the present (the costs and delays in fraud trials are as much in the news as

³⁴ 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.

ever), although there is a new emphasis on non-prosecutorial sanctions (see *infra* the section ‘Emerging trends in outcomes’).

62. As regards conviction rates, the following table sets out the caseloads and conviction rates of the SFO, the RCPO, the FPS and the enforcement division of the FSA:

Agency	Cases worked on	Criminal cases completed	Case success* %	Defendants in completed cases	Defendant conviction rate %
SFO ³⁵	83 ³⁶	18	94%	60	60%
<i>SFO excluding the Holbein case</i>	-	-	100%	46 ³⁷	78%
RCPO ³⁸	-	940	84%	1268	84% ³⁹
FPS ⁴⁰	250	-	-	-	85%
FSA – Enforcement division ⁴¹	502	1 ⁴²	100%	2	100%

* At least one defendant convicted.

63. These data indicate that the former RCPO was the organisation with by far the heaviest caseload and the highest conviction rate, on both a by trial and a by defendant basis.
64. As regards the SFO, the defendant conviction rate for 2008–2009 (excluding the Holbein case, the only wholly unsuccessful case during the year) has marginally improved compared with recent years, but lags behind the other bodies, a fact echoed in the recent review of the SFO by Jessica de Grazia,⁴³ which compared the SFO’s conviction rates and prosecutorial efficiency in extremely adverse terms with those achieved by state and Federal prosecutors in New York. On

³⁵ Serious Fraud Office, 2009. *Annual report 2008–09*. London: SFO. Available at www.sfo.gov.uk.

³⁶ Excluding restraint and confiscation proceedings on completed cases.

³⁷ Of these 46 defendants, 27 pleaded guilty, 9 were convicted by jury and 10 were acquitted.

³⁸ Revenue and Customs Prosecutions Office, 2009. *Annual report and resource accounts 2008–09*. London: The Stationery Office. Crown Court cases only.

³⁹ 54% of defendants pleaded guilty.

⁴⁰ HM Crown Prosecution Service Inspectorate, 2008. *Review of the Fraud Prosecution Service*. London: HMCPSP. Figures for first two years of operation to 31 March 2008.

⁴¹ Financial Services Authority, 2009. *Annual report 2008–09*. London: FSA.

⁴² During 2008–09 the FSA’s enforcement division as a whole closed 302 cases and levied 55 fines for a total of £27.34 million. These included 9 cases of market abuse (penalties of some £740,000) and the AON case, with its penalty of £5.25 million, classified under ‘Systems and controls’.

⁴³ De Grazia, J., 2008. *Review of the Serious Fraud Office: final report*. London: SFO. Available at www.sfo.gov.uk.

the basis of a by trial conviction rate, the SFO's success rate of 94% for 2008–2009 is, however, comparable with other organisations.

Profiles of the UK's primary fraud prosecuting agencies

SFO

65. The SFO is one of the few bodies to have both investigating and prosecuting powers, which, though one of its significant *raison d'être*, runs contrary to the prevailing preference for the independence of investigation and prosecution functions.⁴⁴
66. Cases accepted for investigation by the SFO will generally fulfil one or more of the following criteria:
- the sum at risk is at least £1 million;
 - the case is likely to give rise to national publicity and widespread public concern, e.g. involving government departments, public bodies, overseas governments, as well as commercial cases of public interest;
 - the investigation requires a highly specialist knowledge of, for example, financial markets and their practices;
 - a significant international dimension;
 - the need for legal, accountancy and investigative skills;
 - the suspected fraud appears to be complex and one in which the use of section 2 Criminal Justice Act 1987 ('CJA 1987') powers might be appropriate.⁴⁵

⁴⁴ Gower-Hammond report of December 2000. Also see Butterfield, Honourable Justice, (2003). *Review of criminal investigations and prosecutions by HM Customs and Excise* (Butterfield Review). London: HM Treasury. Available at www.hm-treasury.gov.uk.

⁴⁵ Serious Fraud Office, 2010. *Serious fraud office (SFO) criteria* [online]. Available at www.sfo.gov.uk.

67. According to its 2007–2008 Annual Report, the SFO’s aims were:

- to reduce fraud and the cost of fraud;
- to deliver justice and the rule of law; and
- to maintain confidence in the UK’s businesses and financial services.⁴⁶

68. In its 2008–2009 Annual Report, the SFO presents a reworded ‘vision’ which refers to “one” SFO with a common purpose and consistent processes, which are:

- supportive (trusted to protect society from serious, complex, fraud and corruption);
- relevant (up to date on current and potential fraud and corruption issues);
- proactive, focused and collaborative.⁴⁷

69. This revised vision reflects the appointment in 2008 of a new Director and the ‘transformation’ programme instituted by him. The SFO was previously structured into five geographically based divisions, plus a restraint and confiscation unit. The transformed SFO has been organised into three sector specialisms, or “domains”: corruption, financial services and general corporate. There have also been significant changes to case management procedures: for example, the ‘case controller’ role has been renamed a ‘case manager’ and the post is no longer limited to qualified lawyers (as was envisaged by Roskill).

70. Along with the organisational transformation is the emphasis on reducing the length of investigations by means of matters such as plea-bargaining and the use of alternative civil remedies such as fines (as seen in the recent cases involving Balfour Beatty, Mabey & Johnson and AMEC). Opinions are divided as to the efficacy of this emphasis in terms of acting as a deterrent, and we return to the subject in the section on outcomes below.

⁴⁶ Serious Fraud Office, 2008. *Annual report 2007–08*. London: SFO. Available at www.sfo.gov.uk.

⁴⁷ Serious Fraud Office, 2009. *Annual report 2008–09*. London: SFO. Available at www.sfo.gov.uk.

71. A programme has been instituted to encourage whistleblowing by city insiders, lawyers and accountants and to expand the SFO's role in public anti-fraud initiatives.
72. It goes without saying that the SFO has a blemished public profile arising from perceived high-profile failures (e.g. Maxwell, Levitt and Walker in the 1990s) and, more recently, the controversial decision to close down the Saudi aspects of the BAE investigation and the Holbein NHS price-fixing case (which was taken on in 2002 and pre-dates the Enterprise Act 2002). The public perception of the SFO as a failing or accident-prone organisation is not, however, a fair reflection, given its successful prosecutions in other high-profile cases and its overall conviction rates, particularly on a 'by trial' basis.
73. The de Grazia report was highly critical of the SFO's performance for a variety of reasons in addition to its conviction rates. Some criticisms related to legal process (disclosure and lack of plea-bargaining) and others to its internal workings (for example, poor case ownership and management, inadequate training, over-dependence on external Counsel and other consultants).
74. It is too early to assess the longer-term impact of the transformed SFO on its performance and reputation.

RCD

75. The former RCPO stated its aim as "*to be an effective, independent and specialist prosecuting authority that commands public confidence*".⁴⁸
76. Before its merger into the CPS, the RCPO was organised into five casework divisions plus the Asset Forfeiture Division. The casework divisions were:
 - A – direct tax and tax credit fraud;
 - B – VAT including MTIC;
 - C – border offences and drugs;

⁴⁸ Revenue and Customs Prosecutions Office, 2009. *Annual report and resource accounts 2008–09*. London: The Stationery Office. Available at www.cps.gov.uk. See page 62.

D – tax, duty and excise fraud and non-SOCA money laundering in the North of England;

E – SOCA work, drugs and money laundering.

77. In its four years of operation, the RCPO had not developed a high public profile such as that of the SFO. Anecdotally, the RCPO benefited from the formidable reputation of HMRC investigators, particularly those formerly with Customs and Excise.
78. It is fair to say that the RCPO took a little time to settle down as an organisation, no doubt due to the teething problems which attend the establishment of a brand new entity. Four years on, the organisation had a generally good reputation amongst fraud practitioners and, in particular, appeared to have been the appropriate solution to the criticisms contained in the Butterfield Report which recommended its creation.
79. Recent fraud-related areas of focus in RCPO had been on MTIC fraud and tax evasion through offshore bank accounts. Generally, the RCPO had been proactive in publicising its successes, particularly with MTIC fraud, although the majority of cases identified by HMRC were dealt with civilly through the tribunal system, with only the most serious and flagrant examples being referred to the RCPO. In relation to offshore tax evasion, there had been criticism that RCPO had insufficient experienced staff in order to secure the sort of high-profile criminal prosecution necessary to act as a deterrent.
80. The aim of the new Revenue and Customs Division ('RCD') of the CPS is to provide an effective and efficient prosecution service and establish itself as a centre of excellence for fiscal fraud. As such, the RCD handles cases involving:
- all types of direct and indirect tax fraud;
 - evasion of the duty on tobacco, alcohol and oils;
 - illegal arms trafficking, export controls and sanctions violations; and
 - related money laundering.⁴⁹

⁴⁹ Crown Prosecution Service, 2010. *Revenue and Customs Division* [online]. Available at www.cps.gov.uk.

FPD

81. The FPS is now a division of the CPS and has been renamed the Fraud Prosecution Division ('FCD'). It aims to provide "*a specialist prosecution and advisory service for complex, sensitive and high value fraud cases*".⁵⁰ It was brought into being partly as a result of the failure of the Jubilee Line case.
82. It has a fairly low public profile but, in general, handles cases which may involve:
- difficult corruption cases, especially concerning public bodies and officials;
 - cases where it is necessary to maintain public confidence in the impartiality of the reviewer;
 - substantial and significant frauds on Government departments;
 - cases in which, because of widespread public concern, the Fraud Prosecution Division may be expected to perform a coordinating and standard-setting role;
 - difficult cases requiring specialist knowledge involving, for example, Stock Exchange practices, complex banking issues etc; and
 - significant and complex cases of money laundering in connection with fraudulent activity.⁵¹
83. The FPD criterion for acceptance is now a minimum value of £1 million.⁵² In late 2008 Jonathan Djanogly MP asked the Solicitor General how many frauds over £1 million were undertaken by the then FPS⁵³, but was told that this information was not routinely recorded and it was not in the public interest for it to be prepared for him. He was advised that no cases had been referred by

⁵⁰ Crown Prosecution Service, 2010. *Prosecuting fraud – Fraud Prosecution Division* [online]. Available at www.cps.gov.uk.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Djanogly, J., 2008. *Written questions to ministers* [online]. Available at www.jonathandjanogly.com.

the FPS to the Joint Vetting Committee (whose purpose is to decide which is the most appropriate body to investigate a suspected fraud) since September 2006.

84. In October 2008, Her Majesty's Crown Prosecution Service Inspectorate ('HMCPsi') reported on the FPS's first two years of operation and found good results in terms of "*successful outcomes (convictions), which stood at a creditable 85% of the defendants proceeded against in 2007–08; underlying casework quality, which is characterised by strong legal decision-making and active case progression; and the development of management systems and leadership profile*".⁵⁴ As well as identifying 9 areas of strength, the HMCPsi also made 11 recommendations and identified a further 11 areas for improvement. Key recommendations were largely in respect of developing and improving procedures: for example, in relation to unused material and restraint and confiscation orders, together with certain management and operation issues.

FSA

85. According to its 2008–2009 Annual Report, the FSA's objectives are:
- market confidence: maintaining confidence in the financial system;
 - public awareness: promoting public understanding of the financial system;
 - consumer protection: securing the appropriate degree of protection for consumers; and
 - the reduction of financial crime: reducing the extent to which it is possible for a business to be used for a purpose connected with financial crime.⁵⁵
86. Clearly there has been much criticism of the FSA of late for its 'light touch' approach to regulation on matters related to the current financial crisis. That issue is beyond the scope of this report. However, what seems certain is that, in addition to domestic pressures, the emphasis of the G20 on bolstering the global system of financial regulation will have an impact on the FSA by forcing it to step up the pressure.

⁵⁴ HM Crown Prosecution Service Inspectorate, 2008. *Review of the Fraud Prosecution Service*. London: HMCPsi. Available at www.hmcp.si.gov.uk. See page 5.

⁵⁵ Financial Services Authority, 2009. *Annual report 2008–09*. London: FSA. Available at www.fsa.gov.uk.

87. Indeed, the FSA recognises that civil remedies against market abuse have not been a success, but stresses that it will take a case-by-case approach (guided by the Code for Crown Prosecutors in relation to the available evidence and public interest considerations) and is not bound to prosecute. Recent speeches and activity by the FSA, such as the substantial expansion of its criminal legal team, indicate that it is placing greater emphasis on criminal prosecutions, a departure from previous practice but one of the planks within the FSA's concept of credible deterrence.⁵⁶
88. The FSA's powers are derived from the FSMA and allow administrative, civil and criminal tools to achieve these objectives. Powers relating to insolvency, settlements and fines extend beyond those which the SFO, RCPO and FPS have historically had.
89. In terms of criminal prosecutions, the FSMA grants the FSA the power to bring prosecutions in limited areas, chiefly insider trading (s402) and market manipulation (s397). However, it has recently been established in the Court of Appeal that the FSA can bring private prosecutions in other areas, such as money-laundering offences under POCA, where the offences arise from the same criminal conduct (R v Rollins [2009] EWCA). How far this may allow the FSA to go in bringing wider prosecutions remains to be seen.
90. In addition, the FSA works with other investigating and prosecuting bodies, for example, Operation Archway, a joint operation into boiler-room fraud between the FSA, the City of London Police, SOCA and the SFO.
91. In relation to insider trading, to date the FSA has instigated only a handful of criminal prosecutions.
92. Its first criminal insider dealing trial was successfully concluded in March 2009 with the conviction of two individuals: a former employee of a company who tipped off his father about an impending takeover of the company and shared in the father's profits realised from a purchase and sale of shares in the company. This has been followed by another successful insider dealing prosecution at the end of 2009.

⁵⁶ Cole, M., 2009. Setting out the FSA's strategy and approach to fighting fraud. Fraud Advisory Panel, *Annual general meeting* (10 September 2009). Available at www.fsa.gov.uk.

93. These cases, however, fall far short of a concerted stand against organised financial crime in the City, and the FSA has been criticised for failing to pursue criminal sanctions in more cases rather than relying on civil remedies. For example, the recent regulatory action against Richard Ralph was, according to some, a prime candidate for criminal prosecution, as he had confessed and the matter was of public interest, given his profile as a former ambassador.

Emerging trends in outcomes

94. As referred to above, an emerging trend from the recent practice of the SFO and the former RCPO is their increased emphasis on non-criminal outcomes. The FSA has historically favoured regulatory outcomes, and its claim to be focusing more on criminal sanctions is yet to be demonstrated to any significant extent, despite rhetoric to the contrary. The OFT is similar to FSA, in that it has made little use to date of criminal powers to prosecute cartel activity under the Enterprise Act 2002 (the first case being brought in 2008, when three were imprisoned for up to three years in a bid-rigging case), but increasing criminal prosecutions is one of the OFT's stated objectives.

95. We believe that the choice of non-forensic outcomes over criminal sanctions in dealing with criminal fraud enquiries is a worrying trend for a number of reasons, including:

- loss of certainty for victims and perpetrators about the consequences of certain actions;
- loss of “*moral opprobrium*”⁵⁷ and the deterrent effect that comes with individual criminal penalties (in a 2007 report by Deloitte, ‘The deterrent effect of competition enforcement by the OFT’, one of the main findings from a survey of companies and lawyers was that criminal penalties were the highest ranking deterrent.⁵⁸ We would presume that these conclusions can be generally applied);
- the risk that cases may not be fully investigated and the extent of wrongdoing may remain hidden;

⁵⁷ Kilcommins, S., 2009. Think tank: lock up corporate cheats. *Times Online* [online] 7 June. Available at www.timesonline.co.uk.

⁵⁸ Deloitte & Touche LLP, 2007. *The deterrent effect of competition enforcement by the OFT*. London: OFT. Available at www.of.gov.uk.

- the development of a two-tier criminal justice system where minor ‘working-class’ crimes are punishable by custodial sentences whereas ‘white-collar’ criminals face only monetary penalties (as is allegedly the case in the Republic of Ireland).⁵⁹

96. A further danger is perhaps the spectre of “regulator shopping” that might emerge where more than one agency has jurisdiction over the same area but may take a different approach to a case. We refer here to the recent AON enquiry in relation to potential corruption or money laundering, which was settled by the FSA on the basis of procedural failure without apparently ever being referred to the SFO for criminal consideration. In a climate where wrongdoers are being enticed to confess to a regulator or prosecutor in order to gain lenient treatment, it is obvious that they will choose the regulator or prosecutor whom they consider will mete out the least onerous sanction.

97. Whilst we appreciate that there will be cases where a non-forensic or non-criminal outcome is the proper exercise of discretion, we believe that significant changes can be made to the criminal justice regime which will reduce the barriers to criminal action being taken: for example, legal obstacles related to the CPIA and disclosure rules and resource pressures, without compromising the fairness of the process from the point of view of the defendant.

98. As we see it, a UFPO could facilitate the promotion of coherence and consistency on this subject, and we examine this and other questions in the following section.

⁵⁹ Kilcommins, S., 2009. Think tank: lock up corporate cheats. *Times Online* [online] 7 June. Available at www.timesonline.co.uk.

Part 4: A UFPO and an oversight body – questions for discussion

Introduction

99. In this section we address questions in relation to the composition and remit of a UFPO and an oversight body, and their potential advantages and disadvantages, drawing on international comparisons where appropriate. As stated above, the aim of this report is to stimulate discussion with a view to addressing at least some of the issues identified in earlier sections of this report and elsewhere, in particular:

- facilitating the development of a coherent anti-fraud strategy and strong agencies to implement it;
- improving socially acceptable outcomes and the certainty of such outcomes;
- providing adequate resources and value for money.

100. The questions we address are:

- **Question 1:** Which bodies might be incorporated into a UFPO? We also refer to the separation of the SFO's prosecution and investigative functions and where investigative function should be located.
- **Question 2:** What might be the remit of a UFPO in terms of the types of cases to be taken on and thresholds?
- **Question 3:** What operational efficiencies and other benefits might a UFPO provide?
- **Question 4:** How would a UFPO fit in with the NFA and the National Fraud Strategy?
- **Question 5:** What sanctions should be available to a UFPO?
- **Question 6:** Is there a need for an oversight body with or without a UFPO? How might an oversight body be constituted and where might it sit?

Question 1: Which bodies might be incorporated into a UFPO?

101. Our first question is to identify the existing agencies which might be incorporated into a UFPO. On one level this was a simple task, as under section 4 of the CJA 1987 the FPD, RCD and the SFO all have a remit to prosecute serious or complex fraud.
102. Whilst section 4 of the CJA 1987 is a good starting point, it is not sufficient, because, as we have seen, there is a multitude of prosecuting authorities with a remit to prosecute fraud of varying degrees of seriousness.
103. We have taken the view that the criminal fraud prosecution elements of BIS, the DWP, Local Government (including Trading Standards departments) and the MOD should not be incorporated into a UFPO because the frauds which are prosecuted would in most cases be of a relatively modest level and/or it would be difficult, inappropriate or politically inexpedient to strip out the fraud prosecuting functions from their existing prosecuting/legal departments. Cases within the remit of these bodies but also within the remit of a UFPO could continue to be referred upwards.
104. The two other agencies we have considered as possibly falling within the remit are the FSA and the OFT.

FSA

105. With regard to the FSA, the reduction of financial crime is one of its four statutory objectives. As we have noted above, anecdotal evidence is that, historically, the FSA has been reluctant to prosecute and has been content to refer criminal cases to the SFO. It has now significantly strengthened its enforcement division and criminal prosecutions are now being actively pursued.
106. However, the strong connection between financial crime and serious fraud, and the need to present a coherent policy across both, suggests to us that the prosecution work of the FSA should go into a UFPO.
107. However, we can see counter-arguments to this, for example that the FSA generally holds specialist knowledge about increasingly esoteric financial transactions that is essential to

bringing about a successful prosecution. But, although the FSA may now cooperate with other agencies, this cooperation cannot be as effective as policy-making and action taking place under one roof. Public confidence might also be enhanced if funding for enforcement no longer relied, as it does now, on the financial services industry.

OFT

108. The OFT has the power to prosecute cartel activity by virtue of section 188 of the Enterprise Act 2002. This power is shared with the SFO which, when the law was enacted, was envisaged to be the primary prosecutor in those cases where the alleged activity constituted a serious or complex fraud. In fact there have been no SFO prosecutions under the 2002 Act, though it did mount an unsuccessful prosecution of a number of drug companies for conspiracy to defraud. As with the FSA, the OFT's preference to date has been to pursue civil penalties, although it too has signalled an intention to increase the prevalence of criminal actions.
109. We are of the view that the criminal cartel work of the OFT would fall within the remit of a UFPO, but in insufficient numbers to justify its incorporation, at least initially.
110. An option to safeguard consistency of approach with other agencies would be the contemporaneous review of the OFT's prosecuting decisions by a UFPO or by an oversight body.

Implications of the SFO's incorporation into a UFPO

111. The incorporation of the SFO into a UFPO raises the obvious question about what would happen to the SFO's current investigative function. As we have noted above, one of the reasons identified by Roskill as a hurdle to the investigation and prosecution of serious or complex fraud was the plethora of investigating and prosecuting bodies. For this reason the Report recommended the establishment of an organisation staffed by lawyers, accountants and investigation officers, in other words individuals trained in all the skills appropriate to the complexities of fraud investigation.⁶⁰

⁶⁰ *Fraud Trials Committee*, 1986. (Roskill Report) London: HM Stationery Office. See para 2.46.

112. Roskill's recommendation was enacted by section 1(3) of the Criminal Justice Act 1987, which provides that the Director may "investigate" any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud. The current multi-disciplinary organisation we see today is the embodiment of Roskill's recommendation, and a key criterion for the SFO to take on a case has been that the suspected fraud is such "*that the direction of the investigation should be in the hands of those who will be responsible for the prosecution*".⁶¹
113. It is important not to lose sight of the fact that the SFO model is looked upon favourably by similar organisations outside the UK. The New Zealand SFO has a similar structure and OLAF, the EU's anti-fraud office, has consciously emulated the SFO's way of working (although it has no prosecuting function). Nevertheless, were a UFPO to be established, we consider that it would be incongruous for the "Serious Fraud Division" of the UFPO to retain its own dedicated investigative capability, given that no other "division" of the Office would have a similar resource.
114. We are of the view, therefore, that the investigation capability of the SFO should be hived off into a separate organisation. The logical home for it would be SOCA. The work undertaken by the fraud investigators within SOCA would then be referred to the UFPO in the same way that HMRC currently refers cases to the RCD and SOCA's organised crime work is referred to the Organised Crime Division of the CPS. This assumes that sufficient investigative resources would be made available within SOCA to cope with the inevitable increase in cases of serious and complex fraud. Police forces alone could not cope; the existing police investigatory capability in the specialist area of fraud work is already overstretched. Devolving SFO-type investigations, of course, risks losing expertise and experience built up over years in the areas of financial and forensic IT investigation. The unique collaborative style of working, with investigators and lawyers working alongside each other on a single case, would also be lost if the investigatory capability of the SFO were to be separated out.
115. An additional argument against hiving off the SFO's investigative capability is that this risks diluting the input and the direction of the case manager, whom Roskill identified as being essential to the whole process of fraud investigation and prosecution.⁶² We are not unsympathetic to such a view, but do not see this as an insurmountable problem and suggest that if the SFO's investigative and prosecution functions were to be split then measures could be put in place to ensure the continued pre-eminent role in a UFPO of the case manager.

⁶¹ Serious Fraud Office, 2008. *Annual report 2007–08*. London: SFO. Available at www.sfo.gov.uk. See page 4.

⁶² *Fraud Trials Committee*, 1986. (Roskill Report) London: HM Stationery Office. See para 2.65.

Question 2: What might be the remit of a UFPO in terms of the types of cases to be taken on and thresholds?

116. If a UFPO is to be established then consideration must be given to its remit. In so doing, regard must be had to the current remit and acceptance criteria of each of all the organisations which we regard as suitable for inclusion. As a starting point, it is convenient to look at the acceptance criteria of the SFO and the FPD.
117. The factors which need to be taken into account in deciding whether a case is suitable for acceptance by the SFO have been set out at paragraph 66 above.
118. The FPD was established to provide a specialist prosecution and advisory service for complex, sensitive and high-value fraud cases in both London and throughout England and Wales. For Greater London and elsewhere, the new FPD accepts those cases previously submitted to the Serious Casework Division Sector of the CPS London or Headquarters Casework Directorate by the Metropolitan Police Specialist Crime Directorate and the City of London Police.
119. The types of cases handled by the FPD have been set out at paragraph 82 above.
120. It will be appreciated that there is a significant overlap between the SFO acceptance criteria and those of the FPD. Taking the “sum at risk” criterion, there is no difference between them. The SFO accepts that its £1 million benchmark is simply an objective and recognised signpost of seriousness, rather than the main indicator of suitability. We take the view that, by taking a purely monetary criterion as a benchmark, there is a real risk that substantial frauds which fall far short of this target could well fail to be investigated or prosecuted altogether. Taking this into account, we suggest that an assessment of the degree of perceived “harm” to the victim or victims should also be a decisive factor in taking on a case.
121. The RCD of the CPS conducts a range of fraud work in the tax arena, including direct and indirect tax fraud, evasion of duty and money laundering.
122. Given the recent merger of the RCPO into the CPS, our task has been made somewhat easier. Were a UFPO to be established, we would recommend that the work currently undertaken as

regards tax and commercial casework (including MTIC fraud) be incorporated into it. The rest of the work undertaken by the RCD would therefore remain with the CPS.

123. Finally, let us look at the acceptance criteria of the FSA. FSMA provides that the FSA must, so far as reasonably possible, act in a way compatible with four regulatory objectives, which are:

- market confidence: maintaining confidence in the financial system;
- public awareness: promoting public understanding of the financial system;
- consumer protection: securing the appropriate degree of protection for consumers; and
- the reduction of financial crime: reducing the extent to which it is possible for a business to be used for a purpose connected with financial crime.⁶³

124. Obviously we are concerned with this final objective and the extent to which it is interpreted and implemented. For the purposes of FSMA, “financial crime” is defined as any offence involving fraud or dishonesty; misconduct in, or misuse of information relating to, a financial market; or, handling the proceeds of crime.⁶⁴

125. Effectively, the FSA is empowered to prosecute any offence created by FSMA, as well as offences of insider trading and money laundering. As noted above, it has recently been established in the Court of Appeal that the FSA can bring private prosecutions in other areas, but how far this may allow the FSA to go in bringing wider prosecutions, for example, corruption, remains to be seen.

126. Interestingly, however, the FSA has effectively widened its remit to cover corruption, following the £5.25 million fines levied against AON for its failure to mitigate the risks of dealing with overseas third parties.

127. A number of criteria are considered when deciding whether to refer a case to the Enforcement Division for investigation:

⁶³ Financial Services and Markets Act 2000. (s.2) London: HMSO.

⁶⁴ Financial Services and Markets Act 2000. London: HMSO. See s6.

- Has there been actual or potential consumer loss/detriment?
- Is there evidence of financial crime or risk of financial crime?
- Are there actions or potential breaches that could undermine public confidence in the orderliness of financial markets?
- Are there issues which indicate a widespread problem or weakness at the firm/issuer?
- Is there evidence that the firm/issuer/individual has profited from the action or potential breaches?
- Has the firm/issuer/individual failed to bring the actions or potential breaches to the attention of the FSA?
- Is the issue to be referred relevant to an FSA strategic priority?
- If the issue does not fall within an FSA strategic priority, does the conduct in question make the conduct particularly egregious and presenting a serious risk to one of the FSA's objectives.
- What was the reaction of the firm/issuer/individual to the breach?
- Overall, is the use of the enforcement tool likely to further the FSA's aims and objectives?
- Does the suspected misconduct involve an overseas jurisdiction? If so, would enforcement action materially further investor protection or market confidence in that jurisdiction?⁶⁵

128. Looking at these factors as a whole, it is clear that once again there is much synergy with the criteria of the SFO and FPD and it would be a relatively simple task to incorporate these into the acceptance criteria of a UFPO.

⁶⁵ Financial Services Authority, 2010. *Enforcement referral criteria* [online]. Available at www.fsa.gov.uk.

Question 3: What operational efficiencies and other benefits might a UFPO provide?

129. Clearly, in view of the current strictures on government spending and the decision to merge the RCPO into the CPS generally on economic grounds (said to be savings of 1.5% of their combined budgets), any recommendation that will result in budgetary savings should receive favourable attention.
130. It is beyond the scope of this exercise to even attempt to quantify any cost savings that might arise from the merging of bodies such as the SFO, RCD, FPD and the Enforcement Division of the FSA into one prosecution body (and housing the SFO's current investigation function in another existing body).
131. We can attempt to establish the current resources and costs of these prosecution functions as follows (based on available data for 2008–2009):

	Total costs £m	Total full-time employee equivalents	Prosecution costs £m	Prosecution employees	Estimated prosecution cost per defendant £'000
SFO ⁶⁶	53.9	305	11.8	87	200
RCPO ⁶⁷	-	-	34.0	359	25
FPS ⁶⁸	-	-	3.0	37	-
FSA ⁶⁹	35.8	229	-	-	-

132. The SFO has the largest total budget of the bodies under consideration for a UFPO prosecution cost, although less than 25% of this is ascribed to prosecution (based on estimates rather than a detailed allocation of the investigation and prosecution work performed).
133. Additional information would be required in order to allocate the RCPO figure to cases that might be taken forward into a UFPO. If this were 50% of the RCPO budget, then the combined fraud-

⁶⁶ Serious Fraud Office, 2009. *Resource accounts 2008–09* (HC 481) London: The Stationery Office.

⁶⁷ Revenue and Customs Prosecutions Office, 2009. *Annual report and resource accounts 2008–09* (HC 658) London: The Stationery Office.

⁶⁸ Costs are estimated, based on ratio of FPS employees to total CPS employees, but are likely to be higher.

⁶⁹ Financial Services Authority, 2009. *Annual report 2008–09*. London: FSA. Statistics provided for enforcement division only.

related prosecution cost of the SFO, RCD and FPD might be in the region of £35 million with a staff of up to 300. Marginal cost-efficiency savings from the creation of a UFPO, if along the lines of those to be achieved from the merger of RCPO into the CPS of 1.5%, are not therefore going to have a significant impact on the public purse.

134. However, the benefits of a unified organisation would arguably go beyond immediate cost savings. One interesting question is the deterrent effect of an empowered and coherent prosecutor on the volume of fraud committed. We have seen the billions of pounds that fraud costs the UK economy each year. A reduction of even 1% in current levels of fraud would produce significant benefits to the UK economy and the public revenue.
135. There is also the question of the ability of a unified organisation to bring about long-term improvements in case management procedures and fraud conviction rates which might arise from a coherent prosecution policy, a broader skill base and improved cooperation and disclosure or sharing of information.

Question 4: Would a UFPO fit in with the NFA and the NFS?

136. The aims, objectives and powers of the SFO, FPD, RCD and the FSA include the prevention, detection, investigation and prosecution of fraud and essentially fit well into the vision of the NFA and the NFS, although, as we have indicated above, the NFA to date has perhaps focused less on fraud prosecution than other areas of its vision.
137. In other respects objectives of coordination, data sharing, the elimination of duplication and public awareness would all be served by a UFPO.
138. Generally, then, we can see only advantages from a strategic perspective of a coherent, centrally developed fraud prosecution policy being delivered through a unified and centralised prosecuting body. The type of sanctions to be pursued against fraudsters are, in our view, a prime example of an area where coherence is required, and we turn to this in Question 5 below.

Question 5: What sanctions should be available to a UFPO?

139. We have mentioned above our concerns about the increasing prevalence of non-forensic or non-criminal outcomes in fraud cases and what we perceive in some quarters at least to be

reluctance or even fear of criminal prosecutions, given the perceived risks and burdens upon scarce resources of launching criminal proceedings.

140. It is difficult to argue against a prosecutor or regulator having a wide range of tools at their disposal in order to best fit the individual circumstance of a case and obtain optimum public-interest outcomes.
141. However, we might also argue that, in the absence of a coherent and transparent national policy framework, the ability of a prosecutor or regulator to select from a range of outcomes is detrimental to the delivery of justice in the long term and across all sectors of society.
142. One of our primary concerns about the increased use of non-forensic or non-criminal outcomes is the reduced deterrent effect believed to accrue. We reiterate our belief that the fraud prevention effects of an effective prosecution regime may give rise to significant economic benefits. We would welcome more academic research on this and other issues raised in this report.

Question 6: Is there a need for an oversight body with or without a UFPO?

143. In our view, all agencies involved in the regulation and prosecution of fraud should be clearly accountable for their actions and performance against their objectives and targets. This is best achieved through regular independent review.
144. One option for this would be to bring a UFPO, or remaining prosecution bodies other than the CPS (including the FPD and the RCD) in the absence of a UFPO, within the remit of HMCPSI (which was formed in 1995, first as an internal unit of the CPS and becoming independent in 2000).
145. HMCPSI's website states that "*The purpose of HMCPSI is to enhance the quality of justice through independent inspection and assessment of prosecution services, and in so doing improve their effectiveness and efficiency. To the best of our knowledge HMCPSI is the first independent quality assurance body for a prosecuting authority in the world*".⁷⁰

⁷⁰ HM Crown Prosecution Service Inspectorate, 2010. *Homepage* [online]. Available at www.hmcpsi.gov.uk.

146. Another option, which is not mutually exclusive with the idea of involving HMCPSI, is for academic research to be regularly commissioned, perhaps by the NFA, to inform fraud prosecution policy-making. There is a dearth of evidence-based policy-making in the criminal justice arena, which such research could seek to rectify.

Part 5: Concluding remarks

147. Since Roskill, levels of fraud have spiralled upwards, with the state as the main victim (as with MTIC/carousel frauds). The conventional response of the criminal justice system has been clearly inadequate, and yet fraud requires to be – if not overcome – at least discouraged and punished. Any agency, unified or otherwise, now has to employ not only penal measures but compulsory disgorgement of criminal proceeds and the long-term disqualification and debarment of malefactors. Civil and administrative measures are alternatives to, or complement, the more conventional fines and imprisonment. Overall, there is the unattractive choice of prioritisation coupled with the need to mark fraud out as the subversive crime it is; profoundly injurious to state and citizen alike.
148. We hope that the Fraud Advisory Panel will take this work forward in the future in the form of a public debate, or even a small-scale commission of inquiry, involving all stakeholders when we know whether the SFO is to survive in its present form and how it will complement other agencies, renamed, reformed or merged.

Appendix A: Professional biographies of Special Project Group members

Monty Raphael (Special Project Group Chairman) is special counsel at Peters and Peters, specialising in domestic and international business crime and regulation.

John Benstead is a partner at McGrigors LLP, specialising in business crime and commercial fraud.

Emma Porter is a Director (partner) of Aver Chartered Accountants, a company specialising in forensic and corporate recovery services.

Ros Stow is a partner in Financial Forensics LLP, an independent firm of forensic accountants and financial investigators specialising in fraud and regulatory investigations.