

## UK Lawyers Warn Nixing Fraud Squad Will Hurt Enforcement

By **Mark Taylor**

*Law360, London (May 18, 2017, 8:35 PM BST)* -- Theresa May's promise to abolish the Serious Fraud Office if re-elected prime minister as expected next month has been roundly condemned in the legal community, with City lawyers saying the move could diminish Britain's standing as a leading anti-corruption light on the world stage.

May's Conservative Party election manifesto published Thursday included plans to fold the enforcer into the National Crime Agency, a move that top white collar crime attorneys worry will kill off the U.K.'s only specialist fraud squad.

"This is a dreadful decision," said Stephen Parkinson, head of criminal litigation at Kingsley Napley LLP. "The NCA does not have the capability or the expertise to investigate complex, serious fraud nor, I suspect, the desire. This is a real step back from the U.K.'s commitment to tackle serious economic crime."

The SFO has endured a fractious relationship with the government in recent years, with several reviews of its usefulness and economic value ongoing. But a string of high-profile successes in the last year led many to believe it had turned a corner, carving out a role for itself as an aggressive and powerful enforcer.

"Whatever criticisms may be made of the SFO, there is no doubt that the U.K.'s reputation as a bastion of the rule of law will be seriously harmed by the demise of its only dedicated serious fraud investigator and prosecutor," said David McCluskey, partner in the corporate crime and fraud group at Taylor Wessing LLP.

May had sought to break up the SFO in her previous role as home secretary, wanting to send its investigators and prosecutors to the U.K.'s general criminal authorities. This forced director David Green QC to address the issue in late 2014, saying "any thoughts of putting the SFO into the NCA are just not sensible."

In one step, May will destroy the momentum the SFO has built with its increasingly muscular approach and successful use of deferred prosecution agreements, according to Robert Amaee, white collar partner at Quinn Emanuel Urquhart & Sullivan LLP.

"The disbanding of the SFO has been a longstanding goal of Theresa May, and it seems that now, with the outcome of the U.K.'s general election seemingly a foregone conclusion, she has grabbed her

opportunity with both hands,” he said. “This move will split apart specialist investigators and prosecutors, something that was the cornerstone of Lord Roskill’s model which set up the SFO, and hand their workload to the already overburdened NCA and Crown Prosecution Service.”

The NCA itself has complained of being understaffed and overloaded with suspicious activity reports, and lawyers say the additional bureaucracy surrounding such a merger could negatively affect cases currently in progress.

“Both the SFO and NCA have had difficulties regarding resource and budget,” said Michael Ruck, financial services attorney at Pinsent Masons. “Combining the two will not remedy these difficulties without a substantial increase in the new agency’s funding, and any merger is inevitably likely to result in delay in current projects or investigations.”

Pushing the white collar-focused SFO into a stretched agency, which already has a broad remit covering human trafficking, drug and sex offenses and organized crime, may also throttle the life out of fraud investigators.

“The work that the SFO is currently undertaking will, under these plans, end up having to compete for resource and priority with other incredibly important work at the NCA, including the combating of terrorism, narcotics trafficking, human tracking and sexual exploitation,” Amaee said.

The new makeup of the body will make for fervent discussion as some believe it could in a best-case scenario resemble a U.K. version of the feared U.S. Federal Bureau of Investigations.

“It is difficult to say with any certainty what a reformed NCA would look like,” said Alison Geary, of counsel at WilmerHale. “However, at least in the short term, one would assume the SFO would sit in its current form under the umbrella of the NCA.”

If the intention is simply to move the SFO to the NCA as a division within it, then the move might have some benefits, such as better intelligence sharing, according to Guy Wilkes, white collar partner at Mayer Brown International LLP.

“However, I suspect that is unlikely to happen,” Wilkes told Law360. “If instead SFO staff are merged into a structure within the NCA, then the benefits of specialization within the SFO are likely to be lost.”

A worst-case scenario has the government seeing the merger of the pair as an opportunity to cut funding, he added.

“Serious fraud investigation and prosecution is already underfunded, and any further reduction would not be welcome,” Wilkes said.

Ultimately, the Conservatives must come clean on their manifesto reasoning, added Marcus Thompson, a partner at Ropes & Gray LLP in London.

“The government has made this announcement without making the case for why or how a merger would improve the prosecution of serious fraud,” Thompson said. “All prosecutors know that trying to make a case without the evidence does not always end well.”

The SFO's Green took over the stuttering fraud squad in 2012, with a career spanning 25 years

prosecuting and defending at the Criminal Bar. The maligned SFO had suffered reputational damage under previous director Richard Alderman, with ministerial figures critical of the relationship it held with many financial services figures it should have been investigating.

In 2014, the introduction of Deferred Prosecution Agreements as part of the Crime and Courts Act gave the agency a remit to become more aggressive, and securing more DPAs became a key policy under Green. The same year, the SFO published its DPA Code of Practice, stating it would measure a company's cooperation by its willingness to waive privilege and disclose witness accounts and other documents developed during an internal investigation.

Although slow to bear fruit, with just two DPAs during its first two years, it then resulted in two DPAs in a matter of months at the start of 2017. A £500 million agreement was met with Rolls Royce PLC in January for a variety of alleged offenses, including conspiracy to corrupt and a failure to prevent bribery at the British manufacturing giant's arms business, following a four-year probe. Then in March, a \$161 million DPA was cut with Britain's largest supermarket retailer, Tesco PLC, for skewing the prices of its shares and bonds with false accounting.

The four DPAs thus far have netted the U.K. fines and disgorgement in excess of £650 million, with others waiting in the wings.

All this was achieved with a shrinking budget, having seen funding slashed over the past 10 years from £52 million (\$65.4 million) in 2008 to £34 million last year. It had to go cap-in-hand to the government to beg for "blockbuster funding," ring-fenced emergency cash for costly cases, such as its investigation into Barclays PLC's 2008 fundraising from Qatar.

Meanwhile, the NCA is granted about £435 million annually in a budget controlled by May's former colleagues at the Home Office.

With pressure mounting, a small lifeline appeared in March when international think-tank the Organization for Economic Cooperation and Development said the SFO should be given more independence and greater funding to tackle foreign corruption cases. The OECD said it would be a wrong move to wrap the body into the NCA, which is responsible for handling suspicious activity reports filed by banks and handing them over to the SFO.

This chimed with an October interview with Green, in which he told Law360 he believed complex prosecutions such as those into Libor couldn't have been done as well without fraud specialists, a view shared by many in the City.

"The investigation and prosecution of serious fraud requires significant expertise, and it is less than clear that the NCA will have that capability," said Jeremy Summers, head of business crime at Osborne Clarke LLP. "At a time when the SFO is establishing a track record of success, this can only be seen as a retrograde step."

The SFO won a much-needed victory in June, securing prison sentences for four former Barclays traders who attempted to rig the London Interbank Offered Rate linked to the dollar, which helps set prices for trillions of dollars' worth of loans around the world. But this came after the acquittal of six brokers in January on the same conspiracy to commit fraud charge.

It is this rollercoaster of success and failure that Green has tried to tame since he took over the reins,

and again signs of recovery were evident in different manner earlier in May, when London's High Court granted Green's fraud squad officers access to confidential documents drawn up by a firm under criminal investigation.

Eurasian Natural Resources Corporation Ltd. had claimed that papers drawn up by lawyers and forensic accountants during an internal investigation should be protected under so-called litigation privilege. However, the U.K. court rejected privilege claims, vindicating Green's vocal stance against what he called baseless privilege, but some lawyers claimed this ruling could tarnish the guarded client-attorney relationships.

Ultimately, the victories may have come too late to save the agency, said Jonathan Peddie, dispute resolution partner at Baker McKenzie and former managing director of litigation, investigations and enforcement at Barclays Bank PLC.

"The SFO struggles to progress cases in a commercially and politically effective timescale," he told Law360.

Echoing calls for a singular FBI-style crime-fighting organization, Peddie said the proposal reflects a move toward intelligence-driven, holistic law enforcement, which has developed apace since the Crime and Courts Act 2013. He said placing fraud, bribery, DPA jurisdiction, money laundering, serious organized crime and terrorist finance strategies all under one roof recognizes the need for a single strategy for an interwoven set of threats.

"Combining that with increased levels of information flow between the security services and law enforcement in the U.K. and with their counterparts overseas, and between the regulated sector and the NCA under the Criminal Finances Act 2017, amounts to a big leap forward."

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