# The Investigation of White Collar Crime in England & Wales and France: A Comparative Study

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## Abstract

The investigation of white collar crime in England & Wales has traditionally been conducted by the police. As the need for specialisation has increased the police forces have responded with the formation of fraud squads. These departments comprise of detective officers who have been trained to gather evidence where the criminal offender is operating within the financial and business sectors. Ten years ago the UK government supported the introduction of the Serious Fraud Office who are authorised to investigate and prosecute the most serious cases of white collar crime. The power vested in the SFO has caused considerable concern over the years and cases have been brought before the European Court of Human Rights where the authority to demand answers to questions has been challenged as an abrogation of the fundamental principal that a person cannot be forced to incriminate themselves. In France white collar crimes are investigated by a professional judge. The role of this magistrate has been criticised as they have a considerable power to control the contents of the file of evidence and also, they are allowed to decide on the liberty of the suspect before trial. To many commentators this power is in direct conflict with the ability of the magistrate to remain impartial. White collar criminals have identified an emerging financial market within the European Community and they are aware of the differences that exist in methods and procedures in England & Wales and France. These differences provide fertile territory within which the fraudster can gain. This thesis investigates the differences that exist in respect of the investigation and prosecution of white collar crime in both countries, it then discusses the future role that investigators and regulators will have to perform, if they are to effectively deter and prevent greater criminal activity within individual and cross border jurisdictions.

## Contents

## Introduction

The general movement towards a single European market has resulted in the removal of national trade barriers as well as the complete or partial removal of physical barriers. The gradual abolition of checks at common borders, formalised under the Schengen Agreement[1], is an example of coordination between national authorities. The opening of the Channel Tunnel is another example. All this activity has stimulated the publication of various comparative criminological studies for example; Heidenson and Farrell, *Crime in Europe* is a compilation of essays written by a number of leading authorities. The work on fraud by Levi for the Royal Commission compared the accusatorial process with the inquisitorial process and from France Delmas-Marty was requested to conduct a study on behalf of the French government to evaluate the Common Law system in the light of proposed changes to the French criminal code and the role and function of investigating magistrates. A common theme established in these works has been the recognition that the removal of obstructions to promote effective trade between European nation states will inevitably lead to greater cross border criminal activity also.

Fraud is one of the many criminal activities that have continued to flourish with the easing of controls on the establishment and movement of business within Europe. Criminal cases involving fraud are occurring with greater frequency and seriousness in both England & Wales and France. While fraud has become a truly international activity, the response of law enforcement has not kept up with the increasing globalisation of serious crime. The nation states of Europe have continued to develop national rather than transnational solutions to these problems.

The criminal justice systems of England & Wales and France provide, what appears at face value, to be a stark contrast in mode of responses. The systems, definitions of criminality and penal policies are notably different. The investigation of white collar crime, which invariably includes serious fraud, commences in each

jurisdiction with a police response and at this entry level it is possible to identify the vast differences that exist in, not only the recruitment and training of police officers but also the concept of what policing is and under what authority the police forces of each jurisdiction operate. Considerable efforts are being made at local and government level to harmonise procedures and facilitate greater co-operation in the investigation and prosecution of offenders who transcend national boundaries.

The purpose of this thesis is to illustrate contemporary responses to the investigation of white collar crimes in both jurisdictions through a comparative study. 'There are clearly many points of similarity and overlap between the sociology of law and comparative law. In view of its general aims, comparative law needs legal sociology as much as legal history and legal ethnology. Both legal sociology and comparative law are engaged in charting the extent to which law influences and determines man's behaviour and the role played by law in the social scheme of things. One fundamental difference between the two is that sociology covers a much wider field than comparative law...comparative law concerns itself with the question of 'how the law ought to be' by studying the rules and institutions of law in relation to each other.'[2]

This thesis is a comparative study of alternative criminal justice systems. This involves an examination of the investigation and prosecution of a particular class of criminal offending, white collar crime. Before dealing with the specific law enforcement responses to white collar crime it is necessary to establish what the term means. Having evaluated a working definition of white collar crime I shall proceed to examine general points of divergence in policing before addressing the specific issues that relate to this special class of offence. To compare the enforcement response to white collar crime within each jurisdiction without first discussing the legitimacy, structure and function of the police in England & Wales and France could be misleading and could create an incomplete picture. As '...one touch is misleading, two better, and a multitude of tactile experience from as many

varying angles as possible is necessary if one is to get any clear impression of the nature of the object! Taking the analogy further, we might add that sight and smell (but perhaps not taste) are also essential if we are to gain an overall impression which has any validity. The wider the approach to the subject and the more elements it incorporates, the more complete the picture we get.' [3]

The comparative study of white collar crime is circumscribed by limitations and restrictions that would not apply to other property or physical violence offences. This is due to the fact that the methods of recording white collar crimes are opaque. In England & Wales and France there is no specific breakdown of this category of offence in national statistics. Furthermore, this thesis shows a range of criminal actors, in England & Wales, France and an example from Banco Ambrosiano in Italy, who did not consider their acts to be criminal. The first problem to overcome in a comparative analysis is the selection of material from which comparisons can be made. Traditional materials; crime statistics and victim surveys, are not particularly useful as the range of offending dealt with in this thesis is not recorded as white collar crime. Research studies such as the Royal Commission Report on Serious Fraud Trials and the Delmas-Marty report are useful in work of this nature as they provide a reliable source of information. The research project, 'Corpus Juris' written by Delmas-Marty has also been utilised.

In view of the scant amount of reliable statistical data, expert interviews were adopted as a data collection methodology. As a former police officer I am acutely aware of the 'official response' syndrome. By this I am referring to the required and agreed response that police officers, government lawyers and court officials may give to questions posed by researchers. There is, however, a further barrier to effective data collection, when the researcher is a former police officer, as a number of serving police officers regard their former colleagues with suspicion and many are extremely reluctant to divulge information to those who are no longer 'in the job'. For this reason all interviews were conducted informally and were semi-structured. Even so, it

became clear during this work that responses to questions that were interpreted as delicate or potentially sensitive would be freely discussed in an informal setting when no notes were being taken, respondents were not prepared to be recorded otherwise.

There is necessarily an element of personal interpretation in the methodology which I believe is thoroughly justifiable and explicable given the nature of the subject material and the rank held by some of the respondents, whose anonymity has been respected.

In addition to interviews, I have used a wide range of primary and secondary legal materials from both jurisdictions, including reported cases from both jurisdictions, cross-national comparisons between operational policing, and legislation adopted for judicial co-operation and mutual assistance in legal matters.

The central theme for this research is a comparison of the national agencies that are charged with the criminal investigation of white collar crimes. However, the investigation of white collar crime is not limited to police responses and criminal prosecutions. Frequently regulatory violations form the basis of investigations and case disposal. In chapter six the interface between civil and criminal responses and interview sources are used again in conjunction with documentary material to complete the picture of responses to the control of white collar offending intra and inter jurisdiction.

There is little evidence that the current trend of developing the remit of international investigation and information collation agencies, such as Europol, will extend to the investigation of serious white collar offending. The Europeanisation of policing is however, now high on the political agenda and to effectively police a unified Europe there must be legislation that is applicable across national boundaries. This thesis addresses the issues that prevent and also support the development of a European criminal code. The political will to adopt such a code is apparently lacking in England[4]. This is not resolved in this thesis. It is an issue that warrants further detailed investigation outside the scope of this work.

**Methodology**

To achieve the goals of this research, data has been collected from direct authoritative sources: primary sources; applicable legislation; reported cases which are referred to throughout the text and specifically in chapters four and five; Treaties, particularly those which address judicial co-operation and mutual assistance, and are discussed in chapters five and six, and official publications. Also, secondary sources, have been used. These include: articles in periodicals, practitioner textbooks and monographs as well as electronic legal databases such as the Legal Journals Index, Lexis, Nexis and a range of Internet sites. Interviews were conducted with individuals who have practical experience of dealing with major fraud investigations that have affected more than one jurisdiction. In total nine individuals were targeted for unstructured interviews. Five are English and four French. Seven were either current or former law enforcement officials whose careers have been directly involved either in the investigation of serious frauds and white collar criminality and/or policing issues which transcend national borders. The eighth interview, with a lawyer, was conducted because of the unique nature of the interviewee's perspective and situation in the former department of a prosecution agency. The ninth interview subject had been employed in a higher management role in a French telecommunications company. Subsequent to his employment the company was subject to a criminal investigation which resulted in the prosecution and conviction of a number of the company's officials. The trial forms the basis of one of the case studies.

The problems posed for bi-jurisdictional policing created by the opening of the Channel tunnel have been a new challenge for the law enforcement agencies of England and France. Whereas France has recent and relevant experience of cross-border policing strategies developed under the Schengen Agreement, it has not previously had to embrace the legal concepts of common law. For England, an issue such as allowing police officers, who are authorised to carry firearms in their own

country, to enter this jurisdiction whilst armed, is one of the many challenges that greater collaboration over policing the tunnel has stimulated. In view of the complexity of issues generated by the physical linking of England and France and the developments for mutual co-operation and understanding that have followed, it was felt necessary to include in the interviews a member of the police force who had been actively involved in developing the strategy for the policing of the Channel tunnel. The result is that a Chief Inspector from the British Transport Police was interviewed first. This was followed by a number of meetings with a Detective Inspector who was on secondment to the Home Office and directly involved in the development of the plans for implementation of a National Crime Squad, NCS, for England & Wales, a squad whose remit includes the investigation of serious crime which has subsequently and operationally been seen to include the investigation of serious white collar offending. A Detective Constable from Company Fraud Investigations was interviewed and also a senior lawyer from the Special Cases Division of the Crown Prosecution Service. In France an *Inspecteur* of the Police Nationale who had spent many years as the liaison officer at the National Criminal Intelligence Service, was interviewed. In addition I interviewed a Divisional Commissaire, who had previously worked in international liaison and anti-terrorism and a Commander and former director of a white collar crimes investigation unit from a Paris suburb was interviewed. Due to the nature of the work that these officials conduct and since the opinions expressed were personal and did not necessarily reflect the policy of their respective organisations, absolute confidentiality was guaranteed.

The number of individuals interviewed was not restricted to nine arbitrarily or deliberately. A number of requests for interviews were sent out to agencies in France and England and finally it became both practical and manageable to conduct the nine interviews over a time period that most suited the participant interviewees whilst taking cognisance of their collective expertise and practical knowledge. I selected to interview the senior officer from the British Transport Police first to gain an overview

of the real difficulties in developing a policing strategy which involves the use of personnel from different countries, with different legal systems and laws and languages. My own limited experience in requesting assistance from the authorities in France had been rather negative and my overarching impression was that by the standards of a provincial UK force, the response from France was slow and revealed little of evidential value. At the conclusion of my first interview I asked the interviewee who he thought would be the best people, in the field, to contact. This research strategy, sometimes referred to as 'scaffolding' was referred to constantly throughout the data collection process.

The interviews were unstructured in nature and contained open-ended questions. Where necessary, to confirm or clarify the initial notes, further consultation with the interviewee was completed. All interviewees agreed fully to the interview process and, when requested, a full copy of the relevant chapter containing interview information was forwarded to the Crown Prosecution Service.

Semi-structured interviews provide the basis for a very flexible method of data collection. This was felt highly appropriate given that it was personal opinion sought from interviewees. Semi-structured interviews facilitate the gathering of information about circumstances as well as opinion based on experience. They encourage the exploration of issues through utilisation of the interviewees' experiences and in doing so, they set the framework for a meaningful dialogue that can be developed through non confrontational conversation.[5]

Data collection also included brief semi-structured telephone interviews with police officers in England engaged in the development and delivery of white collar crime investigation training courses, and, in one instance, a regulator who had worked for Bank Paribas in Paris and was now employed by Lloyds of London. These telephone interviews were conducted towards the end of the data collection process and were used to confirm my opinions and findings. I visited the Detective Training Unit of the Metropolitan Police at Hendon, London and discussed their

current training procedures with them. Guidance manuals were made available to me to read and take notes from. In France, one of the interviewees, a serving senior police officer facilitated access to the Police Nationale training materials.

In chapter four, cases from England and France are studied to compare and contrast the processes and outcomes of the investigation methods. Case studies are valuable in research as they stimulate analysis of the information contained in the case and lead to the question, 'Why did things go wrong?' This in turn leads on to proposals for preventing a reoccurrence of that event. In the context of comparative studies this is particularly useful as experience from alternative jurisdictions is evaluated and contrasted in order that the advantages and disadvantages of each sample case can be synthesized.

In addition to the methods outlined above the author attended the trial of three executives from the French Telecommunications corporation Alcatel, conducted in Evry, France during March 1997. Court observation in France completed the theoretical picture that the research had formulated and contextualized the entire French, white collar prosecution process.

**Chapter 1.** This chapter deals with definitional issues. In England & Wales white collar criminals are treated differently from 'street criminals'. The law singles out the suspects and conducts investigations into their alleged offences in a manner which may compromise civil liberties. Yet identifying what is precisely meant by fraud and white collar crime, within this jurisdiction, remains unclear. There is no definition of fraud under the law of England & Wales, however, the Serious Fraud Office is empowered to investigate and prosecute serious fraud offenders. The legislation that created this office is the same that created some of the questionable powers to demand answers to questions even if the supplier of the information may incriminate himself.

The term white collar crime is frequently used as a generic term to encompass a wide range of criminal acts committed by participants in the business world. At times, this is also extended to cover corporate crime, economic crime and even the acts of the business professional in organised crime. Fraud, bribery, corruption and the exploitation of consumers have all been labeled white collar crime. The recent 'scandals' involving the former president of France, François Mitterand, are a further example of white collar crime as crimes committed by the powerful. In 1949 Edwin Sutherland defined white collar crime as, '...a crime committed by a person of respectability and high social status in the course of his [her] occupation'. It could be argued that this would now be classified as occupational crime. What is clear is that white collar crime may encompass a wide range of criminal activities. A constant is that the offender is legitimately at the scene and the offences are carried out in private. This concealment makes detection arduous. It can be seen that defining such activities presents complex problems. White collar crime, *crime en col blanc,* is used as a general term by the public, the investigators, the prosecutors and the offenders. Having traced the history of the development of a range of criminal offending that encompasses the term white collar crime this chapter concludes with a definition, constructed by the author, that is applied throughout the thesis, 'White collar crime incorporates those acts committed by a fraud or theft by members of the business community who have used their position of trust or responsibility to achieve the criminal objective'.

**Chapter 2.** Criminal trials at common law are conducted under the accusatorial model. With the notable exception of the Serious Fraud Office and the Financial Services Authority, the investigating agencies are distinctly separate from the prosecuting authorities. Under the Civil Law of France and the other states of Continental Europe the pre-trial and trial stages are inquisitorial. The investigating magistrate, *juge d'instruction,* is charged with determining the truth by questioning of

prosecution and defence witnesses. On conclusion of this investigation a decision is made as to whether or not the suspect will answer to a court.

The first part of this chapter deals with policing white collar crime in England. This is then compared and contrasted in the second section, which evaluates the role of the French police in investigating crimes committed by members of the business community. In the first section it is noted that the original model for policing in England was designed to be specifically different from the French model, particularly since the formation of a police force for the capital followed so closely behind the end of the Napoleonic wars. Of all police models, that least attractive to the government of England was anything French. The legacy this leaves behind is a police force that, by continental European standards, has wide discretionary powers. Chapter 2 follows the origins of policing in England & Wales and then investigates the recruitment, training and powers given to all recruits.

The rights of suspects are discussed as these have implications for the investigation of all criminal offences, especially those into white collar crime. Comparing and contrasting the powers that all suspects are subjected to highlights the development of specialist rules applicable only to one class of criminal, the white collar offender. The first section of chapter 2 sets the scene for an analysis of the development and application of the law in England & Wales relating to fraud and also the basis on which to compare and contrast the approach taken to curb such criminal activity in France.

In order to compare the roles and functions of the police in each jurisdiction it was necessary to interview police personnel in both countries. In the compilation of evidence to support my findings in chapter 2, interviews were conducted with a police officer from the Company Fraud Department of the Metropolitan Police. This interview gave me an insight into the current work and remit of police officers who are investigating specialist white collar offences. Before conducting this interview the training unit for all detectives was visited at Hendon in North London and materials

relevant to general as well as specialist courses was discussed and viewed. The result of these visits and materials has been included in the chapter as well as being specifically referred to in the endnotes.

In the conclusion to chapter two the reader is directed to the considerable authority that is vested in the office of police constable in one jurisdiction, England, compared with the police in France. The power to continue or dispose of a white collar investigation rests solely, in many instances, with a police officer from the lowest ranks. The police in England & Wales can effectively control the progression of investigations from the outset, this chapter clearly focuses on the fact that this is not the case in France. The police are the primary investigatory agency in England & Wales, but, during the 1980s, concerns over the rising level of fraud being conducting within the financial institutions in London caused the government to create a body of investigators that was a combination of police officers, lawyers and accountants. All of the most serious and complex fraud investigations are now conducted by this body, the Serious Fraud Office. The work of this agency and the Crown Prosecution Service is compared and contrasted with that of the *juge d'instruction* in France in chapter three.

**Chapter 3**. In response to concerns over the effectiveness and control of white collar crime through legislative measures, The Royal Commission on Criminal Justice researched the investigation and prosecution of serious frauds within England & Wales. The Commission concluded, 'Serious fraud cases have been at the cutting edge of jurisprudence and the powers of the State...what some suspects and lawyers appear to be advocating is an inquisitorial system of investigation...'.(p.205). The findings of the Delmas-Marty report in France voiced similar concerns and pressure from some quarters towards the adoption of the accusatorial model. Implicit in the comments from both jurisdictions is that white collar fraud offences are high profile

and they provoke diverse reactions over the viability and validity of current investigative provisions.

The division between investigator and prosecutor in England and Wales is clear and apparent in the majority of criminal investigations. Under English law most frauds are legally defined as either theft or deception and these would ordinarily be investigated by the police and prosecuted by the Crown Prosecution Service. In the case of serious frauds the legislature felt it necessary to formulate a specialist office comprising of barristers, accountants and police officers, the Serious Fraud Office. If a fraud is neither particularly complex nor involves a sum of loss in excess of £5 million pounds then the crime may be investigated by the local police or with the assistance of the Metropolitan Police Fraud Squad. The Crown Prosecution Service also has Special Case Officers to assist in complex fraud prosecutions and a separate headquarters based Fraud Investigation Group.

The prosecution agencies in England are frequently faced with a dilemma - one that is not a problem for their counterparts in France. The decision to prosecute in England & Wales is vested in the Crown Prosecution Service and the SFO. Whereas the police may decide to charge a suspect, the professional lawyers in these agencies will evaluate the evidence and permit or discontinue a prosecution. The decision is based on a number of factors including the prospect of a conviction balanced against the public interest and the amount of loss caused by the offender. These potentially conflicting interests do not occur for the investigating magistrate in France for, as the second section to this chapter shows, the role of the specialist investigating judge, whilst powerful, does not extend to authorising the prosecution of a suspect.

In France investigations into serious frauds are controlled by a professional judge. This investigating magistrate, *juge d'instruction*, directs the police to conduct inquiries and has authority to issue judicial orders and most contentiously, remand a suspect into custody. Under the civil law inquisitorial system the function and role of

the investigating agencies are fundamentally different from those at Common Law . As the preceding chapters demonstrate, the police forces of France and England, recruit, train and vest authority from differing perspectives and this has implications for the investigation of all alleged criminal offences. The delegated powers of the French police are one feature which can influence the investigation of serious frauds. A second influence, discussed in greater detail in chapter four, is politics. Many white collar crime cases have, over the recent past, involved public figures. Where investigations have been conducted into suspects who either hold public or have been associates of those who hold public office the police are compromised due to the centralized structure of the police forces. The police of France are not public servants but rather: physically in the case of the G*endarmerie*, and legislatively in the case of both of France's police forces, servants of the state. The lack of discretionary power and local accountability makes the role of the police in France, in serious fraud investigations, of significantly lesser importance than the *juge d'instruction.*

Having identified the role and powers of the office of investigating magistrate and drawn comparisons with the Crown Prosecution Service and the SFO, chapter three then analyses the criticisms that have been directed at the office of examining magistrate. These criticisms include; slowness, inefficiency and too great a concentration of power within one office, where the investigating magistrate has authority to investigate and arbitrate. Advocates of reform propose a division of the existing functions. Supporters of the present regime believe that traditions promote uniformity and eroding the powers of the *juge d'instruction* would only further de-stabilise the French judicial process.

The first three chapters of this research have shown that the investigation of white collar crimes has resulted in extensive powers being granted to investigators in both contrasted jurisdictions. Chapter three draws together the arguments in favour and against the continuation of the office of investigating magistrate in France and also, compared and where appropriate, contrasted the role of the investigating and

prosecuting agencies in this country. It is not the purpose of this thesis to support or defend either system. However the French system does not differentiate against the white collar offender, all defendants are subjected to archaic and oppressive techniques, whereas in England they are, at present, reserved for the serious white collar offender.

**Chapter 4** In this chapter the criticisms leveled at the investigatory and prosecutory agencies, in England & Wales and France, will be considered in greater detail. By taking a sample of the more high profile cases that the SFO and J.I.'s have considered to be successes, a comparison is drawn between the interpretation of success held by investigators and the investigated. The investigation and prosecution of high profile white collar crimes has caught the attention of the press and public on two distinct fronts. Public outcry when the offender has allegedly been living a life of luxury at the expense of investors, which was highlighted in such cases as those against the sons of Robert Maxwell and also against Peter Clowes. And public outrage against lenient sentences, where after an expensive investigation and trial the offender is found guilty and receives what the press determine to be a derisory custodial sentence which is served at an open prison. This does not reflect a true and accurate picture of the procedures in England and the criticisms leveled at the various agencies is frequently misplaced.

When George Staple, the third Director of the SFO, retired he stated that, 'If I have a regret about my time here, it is that our respectable record of hard work and dedication has not been more widely recognised'.[6] This chapter refers to 10 cases of which 3 are discussed in detail; Blue Arrow, Guinness and Polly Peck. The opinion of the SFO and the press is very different and as this chapter develops it becomes clear that there is a vastly different perspective held by those who bring about prosecutions and those who are subjected to prosecution.

At the time of writing this thesis the European Convention on Human Rights is not applicable law in England & Wales, this is soon to change, and the current government plan to introduce legislation to this effect for the year 2000. The case against Ernest Saunders was considered a success by the SFO, he was prosecuted and convicted of the alleged criminal offences. Saunders took his case before the European Court of Human Rights as he alleged that the prosecution was an effrontery to his rights to privacy and a fair trial. The Court at Strasbourg found in Saunders' favour that as a general principle the right not to incriminate oneself should apply to all types of criminal offences without distinction. Effectively white collar crimes should be treated in the same way as all other criminal investigations. It is outside the scope of this work to investigate the likely implications of incorporation of the ECHR into the legislative procedures in England, nevertheless it would be wrong to think that because France has the ECHR enshrined into its legal order that white collar investigations are devoid of abuses against a defendants fundamental human rights. As chapter three has demonstrated the role of the investigating magistrate in France continues to be a potential threat to fundamental human rights for all persons subject to criminal investigations irrespective of the class of crime they are alleged to have committed.

Earlier in this introduction reference was made to Higgins[7] who evaluated the process of comparative analysis with the essential features of establishing what was an elephant if blind. 'One touch is misleading, two better, and a multitude of tactile experience from as many varying angles as possible [is] necessary if one is to get any clear impression of the nature of the object'.[8] France has prosecuted a number of high profile white collar cases recently and many of these cases have, at some point in the process, again thrown into question the role of the *juge d'instruction,* J.I. There is no direct equivalent with the SFO in France and the closest analogy that can be drawn is with the J.I. In this section on France a number of high profile cases, all investigated by a J.I. are evaluated and commented on. This includes commentary

and analysis of a case observed by the author, the trial of the financial director of Alcatel Alsthom in France during 1997.

Evaluating cases in France raises the same problems that have been identified in chapters two and three, that is, what is being evaluated? The police in France and England base successful detection figures on a suspect being charged. This takes no account of subsequent case disposal. If success is based on prosecution rates then this does not take into account acquittals. In England the agencies concerned would, perhaps rightly, argue that they are not responsible for jury verdicts and therefore should not be held to account for case outcomes. This is justifiable in respect of perverse decisions and misdirections by the judiciary. It does not account for defence applications of 'no case to answer' and where wrong charges have been brought. In France the investigating magistrate plays a far more visible role and evaluating a successful prosecution in white collar cases, which are not tried before a jury, is different but as complex as in England.

A number of the cases referred to in this section are still under investigation. It is the process of bringing a matter to trial that is the subject of comparison, not any subsequent case disposal and it is from this perspective that the analogies can best be drawn from France, as it is during this process that the recent criticisms and scrutiny have been directed. As this introduction has indicated comparative studies should not be confined to similarities, this is confirmed again throughout this chapter where similarities and differences are examined.

The greatest source of criticism leveled at the entire French legal system is that of the role of the investigating magistrate. The holder of this office, particularly when investigating white collar offences, has the power to bring about political scandal and financial ruin. It is a position that should not be underestimated and one that understandably attracts the greatest media attention and proposals for reform. The cases referred to in chapter four confirm the link between politics and white collar crime and in doing so recognise that the role of the investigating magistrate is

itself highly political. In England, until the creation of the SFO, there was an attempt to divorce the role of the investigating agencies from that of the prosecuting agencies, not all the power was vested in one authority. Clearly this has never been the case in France and consequently the conduct of white collar investigations provokes louder commentary at an earlier stage. At present neither the police nor the SFO are permitted, or it would appear are keen to, comment on the development of investigations. Press releases are factual and bland. This thesis suggests that perhaps the currently held perception that the investigation processes in England and France are widely different and incompatible, is not a wholly accurate picture. The SFO is a unique authority in this jurisdiction but in many respects it is remarkably similar to the investigating magistrate.

The final case study in this chapter was attended and observed in Evry, near Paris during March 1997. The value of case studies as tool for research and learning was commented upon in the methodology section of this introduction. A case study can be defined as 'An account or description of a situation, or sequence of events, which raises issues or problems for analysis and solution'.[9] The Alcatel case clearly identifies the differences that exist both pre-trial and in the courtroom, between the jurisdictions that are examined in this thesis. Much of the material that is examined in previous chapters, particularly two & three, where the investigatory controls and experiences are examined is now seen as an outcome in this chapter. In chapter three it was shown that the examining magistrate is charged with securing the truth and a number of stages exist to ensure that, to the requisite standard, this is achieved. The inquisitorial trial is, in many instances the last resort, and different in substance and form from that which the common lawyer is familiar with. The speed of the trial process is quite bewildering, in this particular case 4 defendants, who were charged with serious offences of fraud and diversion of company funds, were tried and convicted in 3 weeks. It is true to say that in England it is most unlikely that the Crown would have concluded opening speeches within the same time frame. During

the closing speeches little reference was made to the applicable law and established jurisprudence however, the personal nature of the remarks made by defence counsel towards the examining magistrate and state prosecutor would be considered wholly inappropriate in the English courtroom.

In the conclusion to this section there is a commentary on the recent jurisprudence in France that has sought to clarify the law relating to white collar crimes. On the 6th February 1997 in the case of Crasianski the *Cour de Cassation*, Court of Appeal, indicated a move towards the decriminalisation of some white collar offences. This reasoning, if applied in England would mean that a range of recent successful cases would in fact never have been prosecuted. The French Appeal Court held that for an offence to be complete there must be a loss to the company or shareholders, as well as a gain to the defendant. This decision raises a number of issues, which are of sufficient magnitude that they warrant further research beyond the scope of this thesis, however the matters are inextricably linked to the themes of this work and have implications for the future of a unified criminal law in Europe, *corpus juris*, and also for the development and application of any regulatory procedures that are in place within France and England. The decision to decriminalise certain white collar offences has not altered the method and process of investigation in France and the conviction rate of white collar offenders is considerably higher than in England. As the preceding chapters have shown, 'It is clear that as only five per cent of defendants are acquitted in hearings in the Cour d'Assises, the trial process is largely conducted in advance of the hearing'.[10]

A comparative study must seek to explain what is different and what is similar. In this chapter a number of cases, that have been subject to extensive criticisms, have been evaluated. The role of the agencies that are charged with investigating and prosecuting serious frauds have been subjected to analysis throughout the previous two chapters. Here in chapter four the outcomes of these investigations have been tested by the courts in England, France and Strasbourg and

commented upon by the public, the press and the Appeal Courts. By looking at the cases in France it is possible to evaluate and constructively criticise the systems that operate in each jurisdiction. Is it a perception that the systems are different? Are white collar offenders treated differently? Are the prosecutors protective of their position or do they accept public condemnation? Do the press in France blame the investigators and prosecutors or do they blame the courts when there appears to be an outcome that its not equitable? In the section that deals with cases in France it is shown that those agencies which are vested with the authority to investigate and bring about prosecutions, are themselves, not adverse to reporting a version of events to the press. In England the police, CPS and the SFO are conspicuously silent in the face of criticism. In France the investigating magistrate has been directly criticised for the publicity that they, the judiciary, have released prior to trial. A recurrent theme appears again in this chapter, what is similar and what is different? Much is different about the overall picture, the role of the police and the authority to proceed or continue with prosecution. Much is similar and again the SFO and the *juge d'instruction* appear to have unique and extensive powers which result in prosecutions that they evaluate as successful.

**Chapter 5.** The UK government has recently re-evaluated the interface that exists between the regulation and criminal prosecution of white collar offending. The outcome is the formation of the Financial Services Authority. The new regulator of the financial services industry is to have powers that extend beyond regulation and permit the Authority to bring criminal prosecutions against offenders. The legislation which grants these powers is contentious in much the same way as the powers granted to the SFO under section 2 of the Criminal Justice Act 1987 are. It would appear that rather than take the opportunity to resolve the differences that exist between the SFO and the rulings of the ECtHR in respect of the human rights of all

suspects, irrespective of the type of crime committed, the UK government is about to widen the division by granting the new agency even greater powers than the SFO.

In this chapter the legislation that is potentially in conflict with the European Convention on Human Rights, ECHR, is discussed. The formation of the Financial Services Authority is then evaluated and the contentious issue surrounding the power to impose fines, that are criminal in nature, but civil in law, is analysed. It is argued that the rhetoric used by the UK government implies that there is a desire to apply the 'Saunders' ruling, the reality is that little regard has been taken of the of the rulings of the ECtHR.

The development of the Financial Services Authority will consolidate the regulation of the financial services industry in the UK and this has benefits for consumers domestically and internationally, However the powers vested in the new Authority may mean that the future success of international investigations into alleged white collar crimes may be jeopardised due to the conflict between the interpretation of what is a penal sanction and what is civil.

In chapter six the international dimension of white collar crime investigation is discussed and the need for mutual cooperation between investigation agencies is highlighted. It is very difficult to see how effective cooperation can be stimulated when the proposed legislation, discussed in this chapter, is endorsed by the government and refuted by industry, practitioners and the rulings of the ECtHR. The Joint Committee on Financial Services and Markets is unique as this is the first time that a committee of Lords and MPs have sat together to scrutinise proposed legislation. It considers that there is a compelling case for the Government to respond to the concern expressed by witnesses to the Committee that the market abuse regime is criminal in substance, in ECHR terms, and that the necessary safeguards do not appear in the Financial Services & Markets Bill.

**Chapter 6.** The face of white collar crime is changing and as commerce becomes increasingly international so does the ability of the criminal to manipulate the differences that exist in the regulation and prosecution of white collar crime. To effectively combat offending that transcends national borders it is necessary for investigation agencies to overcome legal, linguistic and cultural barriers. Chapter 6 evaluates the current provisions and recognises that there is considerable need for improvement in the training and understanding of those charged with investigating serious frauds each side of the Channel. International co-operation frequently develops along two lines, formal and informal. The response to this has resulted in the development of Interpol and more recently Europol and a range of legislative provisions. This chapter outlines the formal responses and then progresses to evaluate the tensions that exist for those charged with investigating international white collar crimes which are expressed clearly by one officer who said, 'Who is really interested in dealing, the British Transport Police, SNCF or the Belgian Railway Police. It exemplifies the problem we have in international cases, they're easy to achieve, difficult to detect and very difficult to prosecute'.

Quasi-judicial requests for inter-jurisdiction assistance have and will continue to develop. All the agencies referred to in this work have both formal and informal lines of communication. The former are largely relied upon once personal contact has been established and an atmosphere of confidence has been achieved. Formal channels of communication are frequently created by legislation, European and national. The European Convention on Mutual Legal Assistance in Criminal Matters 1959 and 1978 Additional Protocol go some considerable way towards filling the lacuna in formalised mutual assistance, particularly in providing legislation that equalises the authority of agencies to investigate serious criminal offences inter and intra jurisdiction. During ratification in 1991 the Minister of State stated in the House of Lords, '...having recognised the inadequacies of our existing legislation, we have

been determined to secure arrangements which will place us in the first rank internationally in our ability to co-operate with other countries...'[11]

In the previous chapter the formation of the Financial Service Authority is discussed and it is argued that the Authority steps over the divide between regulation and criminal investigation. Traditionally the alternative to criminal investigation has been regulation. Criminal investigations into white collar crime are reactive, whereas regulatory measures aim to curb bad practice. Regulation is initially proactive. This section evaluates and comments on the criminal and civil interface and the channels that currently exist for mutual assistance between police, judiciary, lawyers and regulators.

The opportunity to commit unpalatable business practices without being prosecuted is enormous. The situation has continued to escalate throughout the 1990s with a number of international financial services companies being fined for the activities of their former staff .The summer of 1996 saw Sumitomo, Jardine Fleming and Morgan Grenfell all suffer due to in house 'rogue traders'. The volume of money in circulation within the financial capitals makes London and Paris magnets to the white collar criminal. To apportion some sense of scale to these claims the turnover of domestic and foreign equities on the London Stock Exchange in 1992 was £381.7 billion, in Paris it was £72.2 billion.

Official investigations within each jurisdiction are frequently sub-contracted out to professional bodies, government departments and Self-Regulatory Organisations. They have the mandate to fine, ban and prosecute offenders. The Bank of England and *Banque de France* are empowered to take sanctions against banks and their employees. The number of bodies empowered to investigate white collar fraud allows for wide variations in practice and the method of investigation used by these market regulators does not have to conform with criminal codes of conduct. This has posed problems for subsequent investigations within England & Wales which have gone to the centre of the debate over the acceptability of using

evidence obtained prior to a criminal investigation in proceedings at a criminal trial. Such difficulties would not arise under the French model as a re-investigation of facts is the specific responsibility of the investigating magistrate during the pre-trial proceedings.

There remains a conflict of interest between the applicable criminal laws of France and England & Wales and the objectives of the financial markets. Creating a competitive environment with an efficient regulatory system is uncontroversial. Operating such a system to the satisfaction of the market and the demands of the legislative is not so easily achieved. This is a problem within a national context. To achieve harmony and mutual goals within an international context continues to be a considerable challenge. 'The nature of protectionism means that there will always be money to be made by evading the regulations, if the criminal entrepreneur can work out where the opportunity lies after the rules have been changed or, better still, predict how the rules will be changed'.[12]

The white collar offender in both jurisdictions is in danger of being caught in a maelstrom of inefficient processes and the public are serviced no better by either jurisdiction. High costs and low conviction rates in England & Wales and an increased number of 'scandals' in France. Both jurisdictions are clearly overburdened and consequently are prone to frequent 'knee-jerk' reactions and hasty legislation. The preponderance of money laundering legislation on a national and international basis is arguably just such a response to the developed world's inability to curb predicate drugs related offences. Prosecuting the financial operators is perceived as easier than containing and preventing the developed world's insatiable appetite for drugs. The legislators have in reality created a new criminal class, the sanctifiers of money, truly white collar criminals, the money launderers.

This chapter identifies a theme of waste, competition and petty rivalry, in part attributable to domestic isolationism and also to the lack of representation at European Commission level. Perhaps there have been improvements and the old

'dining club'[13] mentality is not as obvious as in previous years, but the autonomy of investigation agencies remains remarkably different, so much so that the argument for increased regulation and relaxed criminal prosecutions is increasingly attractive. The ability of either jurisdiction to effectively deal with increasing numbers of reported serious frauds via the criminal process is questionable and patently ineffective as a deterrent. The dilemma for the future is that whereas in England there are extensive reforms proposed for the regulation of the financial services sector, reforms which will increase the 'policing' conducted by regulators, there are no such comparable provisions on the political agenda in France and as this chapters identifies, 'In comparison with France, the UK is unique in that there is a will to co-operate with regulators from other jurisdictions. This is totally lacking in France'.[14]

In the conclusion to chapter six there is an evaluation of the provisions of the Criminal Justice Act 1993 Part 1. This act would provide the means by which the English courts could more easily decide that they have the requisite jurisdiction to hear a wider range of cases which previously would not be justicable due to the offence having occurred outside of England & Wales. In anticipation of the enactment of the CJA 1993 some of the provisions of the existing Theft Act 1968 have been amended. The discussion in this chapter proposes that some of the rather elastic interpretations put on jurisdiction and the honourable though generous application of the common law would not be a feature of future trials if the CJA 1993 sections 1-6 were enacted. The trial involving Wallace Duncan Smith[15] was an example of judicial elasticity and the court found it necessary to hold that the deception had occurred in London. If the above provisions were in force then any future obtaining of funds in the Smith and later Preddy[16] type situations would be caught, regardless of where a money transfer took place. The implementation of all of the provisions of this Act are long overdue and continue to be a barrier to increased mutual co-operation and facilitation within the area of study of this thesis and also the wider international judicial community.

There is no easy solution to the tensions that all investigation agencies are facing such as local accountability and international offending. However, these are contemporary issues that are addressed in this chapter and must continue to be debated within the academic and practising legal communities.

**Chapter 7**. This chapter draws together the research, interviews and case studies to present findings that confirm some of the differences between the legal systems of France and England and also indicate the similarities. This thesis has used the very specific course of investigations into white collar crime as a vehicle through which a greater understanding of the tensions that exist can be understood, within and between the two legal cultures. France has designed a range of specific offences to cater for the white collar offender. In order to achieve greater consistency in the application of criminal laws across the European Union then it may be advantageous for England to adopt similar provisions. Throughout this thesis references have been made to the use of juries, as the case studies have shown the entire trial process in France is considerably quicker than in England and at this time the UK government is again looking at alternative ways of progressing serious fraud trials in order to reduce costs and trial times. In chapters three and six of this work it is demonstrated that there are both advantages and disadvantages to following the model of investigations that are common in France, but also there is much that can be achieved through legislation.

As well as reflecting and commenting on the findings of this thesis in chapter seven there are also proposals for the future. The current picture of investigations into white collar crime is fragmented and predominantly reactive. What is needed is a more flexible approach to investigations whereby joint operations can be mounted under the framework of common objectives. The thorny issue of national sovereignty is frequently a barrier to effective criminal investigations and it is the responsibility of the legislature, both sides of the Channel, to develop legislation that promotes the

exchange of legal and investigation personnel. It is also the responsibility of both governments to ensure that if legislation is proposed that will facilitate greater mutual co-operation then that legislation is implemented. This thesis has shown that all too often legislation promoted by the European Community is left languishing for years before adoption, in some instances this is in addition to national legislation, which interviews conducted in this work have shown investigation agencies need now if they are to effectively combat increased cross-border criminality.

The accusatorial method of investigation and trial is traditional and trusted by practitioners of the Common Law. The inquisitorial system also has its advocates and adversaries. Recent and often well publicised, white collar criminal appeals have questioned the continued application of these current provisions in both jurisdictions. There are commentators and practitioners within the financial communities who believe that regulatory controls are more effective than legislation. There are commentators and investigators who believe that enhanced multi-jurisdictional co-operative measures will effectively combat serious fraud in the future. There are those within each jurisdiction who seek to maintain the *status quo*. This thesis has assessed the viability of these competing themes, and evaluated current investigation and prosecution procedures within each jurisdiction.

Investigations into white collar crime are both fundamentally different and very similar in England and France. The role performed by the Serious Fraud Office is extraordinary, there is no equivalent in either jurisdiction. The office of Investigating Magistrate is also extraordinary and, like the SFO, has been subject to considerable criticism. This thesis has identified and reflected upon these issues and this chapter concludes by looking to the future and setting the scene for further research into the reforms proposed by each country.

It is expected this thesis will make a contribution to knowledge in the field of comparative law as currently no piece of work, either in France or England, has been

written which specifically focuses on a comparative study of the investigation of white collar crime.

## Endnotes.

[1] The agreement was entered into 14th June 1985. Initial signatories included the Benelux countries, France and Germany. Italy, Spain and Portugal have now joined.
[2] De Cruz, P. *Comparative Law in a Changing World*, London, Cavendish Publishing Limited (1995) p.9.
[3] Mawby, R.I. *Comparative Policing Issues: The British and American Experience in International Perspective,* London, Unwin (1990) p.4.
[4] As unified hostility to its progression was demonstrated at a workshop at Selwyn College, Cambridge, in 1998. The Director of the Serious Fraud Office, the head of the DTI legal services, the head of Customs & Excise legal division and a senior police officer indicated that *corpus juris* is academically alive but operationally dormant. Source: Author.
[5] See further: Drever, E. *Using Semi-Structured Interviews in Small-Scale Research*, Glasgow, Scottish Council for Research in Education (1997)
[6] 'Staple puts Fraud Law in the Dock' Frank Kane, *The Sunday Times*. 03/11/96
[7] cited in Mawby, R.I. *Op.cit.* note 3. p.3-4
[8] *ibid*
[9] Heath, J. *Teaching and Writing Case Studies: A Practical Guide,* Bedford, The European Case Clearing House (1998) p. xi
[10] Cooper, J. 'Criminal Investigations in France', *New Law Journal* (1991) p. 381 cited in Uglow, S. *Evidence, Text and Materials*, London, Sweet & Maxwell (1997) p.7.
[11] Minister of State of the Home Office in the House of Lords, cited in *Journal of International Planning* (1992) Vol. 1. No. 3 p. 137
[12] These comments are taken from an article relating to fraud against the European budget, however they are equally applicable to the areas of criminality referred to in this thesis as frauds are rarely mutually exclusive. See further: Tupman, W. A. 'The Search for Supra-National Solutions: Investigating Fraud against the European Budget' *The Journal of Financial Crime* (1998) Vol.5. No.2 pp. 152-159 at 152.
[13] Reference made by Tupman, W. A. *supra* to the author about the Commission under the former K3 framework to describe the approach and mentality of the members.
[14] Comment made to author by former employee of Bank Paribas
[15] *R v Smith* (Wallace Duncan) CA (Criminal Division) November 3, 1995 and [1996] 2 Cr. App. R. [1996] Crim LR 329
[16] *R v Preddy and Others*. HL. 3 WLR. 1996

## Glossary of Terms

| | |
|---|---|
| Accusation | Charge |
| Accusé | Defendant |
| Abus de Biens Sociaux | A specific criminal fraud committed by the director/s of a company who have acted in bad faith and used the assets of the company for their own personal gain or to favour another company |
| Ancien Régime | Pre-revolution regime with monarchy |
| Appel | Appeal against a decision of first instance court to a Cour d'Appel |
| Arrêté | Regulation or decision issued by a Mayor, Prefect or Minister |
| Audition | The questioning of a witness |
| Avocat | Advocate/Barrister |
| Brigade Financière | The financial investigation division of the police |
| Cautionnement | Bail money |
| Centres de semi-liberté | Open prisons where inmates are permitted access to employment and home visits |
| Centres Pénitentiaires | A multi status closed prison which houses all categories of inmates |
| Chambre d'accusation de la Cour d'Appel | Specialist chamber of the Court of Appeal with responsibility for overseeing the investigations conducted by an examining magistrate |
| Code | A written branch of the law; e.g. Code de Procédure Pénale |
| Cour d'Assises | The highest criminal court of first instance. The court comprises of; a president magistrate, two assessors and nine jury members '*magistrates non-professional*' |
| Cour d'Appel | Court of Appeal. Divided into chambres (divisions) each with a general and also specific jurisdiction e.g. *chambre sociale* (social Security and Employment Division Civil), *chambre des appels correctionnels* (Criminal Division) |
| Cour de Cassation | The highest court in France. Frequently referred to as the Supreme Court |
| Code Procedure Criminale | CPP. The approximate equivalent of a code which outlines procedure and evidence. |

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| Commission Rogatoire | An official judicial request or order issued by an investigating magistrate during the course of an investigation |
| Contravention | A minor offence, comparable to summary matters |
| Crime | The most serious category of criminal offence punishable with imprisonment of more than 10 years. |
| Crime en Col Blanc | White collar crime. Any anti-social behaviour conducted within the business environment whether specifically a criminal act or conversely, even if not penally reprimanded, is detrimental to the activities of the company. |
| Délit | A serious criminal offence punishable with a fine and/or imprisonment not exceeding 10 years |
| Droit Pénal | Criminal Law |
| Enquête Préliminaire | The preliminary enquiry, which is not *en flagrante*, and limits the power of the police to investigate without judicial authority. No power of arrest |
| Enquête sur infraction flagrante | Where a serious criminal offence is being or has just been committed the police are given authority to conduct immediate inquiries and for this purpose they are granted a wide range of powers, including a power of arrest |
| Escroquerie | A criminal deception most frequently attributted to cheque fraud |
| Fraude | The term may be used to describe a criminal or civil fraud |
| Garde à vue | Police custody |
| Greffier | A legally qualified clerk/registrar who keeps court records |
| Infraction | All crimes are an infraction |
| Interrogatoire de première comparution | The initial interview held in the offices of the investigating magistrate |
| Judiciare | Judicial |
| Juge | Judge |
| Juge du Fond | Trial Judge |

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|---|---|
| Juge d'Instruction | Examining Magistrate, Investigating Magistrate. The equivalent term in English is judge not magistrate |
| Jurisprudence | Case law of the courts |
| Loi | Statute law passed by the National assembly and Senate and promulgated by the President |
| Magistrat | *La Magistrature* refers to the professional judges of the courts or public prosecution departments |
| Maisons d'Arret | Remand centres for defendants sentenced to less than two years custodial detention |
| Maisons Centrales | Top security prisons |
| Mandat d'arrêt | Arrest warrant issued by a juge d'instruction |
| Mettre en examen | Formally charge a suspect |
| Officier de la Police Judiciare | The judicial police who are authorised to conduct criminal investigations |
| Offices Centraux de Répression de la Délinquance Financières | O.C.R.G.D.F. Serious fraud department of the Police la Nationale divided into two branches; counterfeit Grande currency investigations and corporate crime investigations |
| Ordonnance | An order issued by a juge d'instruction |
| Ordonnance de renvoi | Order by juge d'instruction for criminal proceedings to proceed to next stage |
| Partie civile | The civil party, most frequently the victim, who may cause the examing magistrate to open an investigation. The *partie civile* is also represented at any subsequent criminal trial by counsel |
| Parquet | The prosecuting judge who presents the case on behalf of the state. They are a *magistrat debout*, or a standing judge as during the court proceedings the , *parquet*, stands in the court to address the defendant. They are 'given the floor'. |
| Préfet | Administrative leader of a *Département* |
| Prescription | The prosecution of criminal offences are subject to time limits and cannot be instigated due to the 'Lapse of Time' They are effectively statute barred |
| Procureur de la République | The public prosecutor, a judge of the same category and status as a trial judge and the examining magistrate but whose work remit is comparable with the lawyer employed by the Crown Prosecution Service |

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| Procès-verbal | The record of interview and details of custody. This is not exaclty equivalent with a custody record as it is compiled *post facto* |
| Tribunal Correctionnel | A criminal court with has authority to hear délits. This court sits with three judges, a president and two assessors. |
| Tribunal de Police | The lowest category of courts, where the prosecution is frequently conducted by the local Commissaire (superintendent) of police. A custodial sentence may not be imposed by this court |
| Vol | Theft |

# Chapter 1

# Serious White Collar Fraud *et Le Crime en Col Blanc.*

## 1.1 Introduction

The aim of this chapter is to trace the development of fraud throughout history and the establishment of a class of criminal activity committed by members of the business community. There have been a number of attempts to legislate against white collar crime as a specific offence and these efforts have thrown up many problems of definition. The definitions of white collar crime that are proposed by a number of authors are explored in this chapter and it becomes clear that there are a range of generic features that have been attributed to white collar crime. Many authors make frequent references to the employment status of the criminal participants, others attribute the term white collar crime to a type of activity. In this chapter the wide range of terms currently used are drawn together and I doing so the distinguishing features of white collar crime are analysed and used to form the basis of a definition of white collar crime. Finally the conclusion to this chapter acknowledges the controversies that surround this subject of white collar crime and states the definition that is used throughout this thesis.

## 1.2 History and law

The history of deception is of respectable antiquity. The ability of those in authority and power to usurp their position for gain appears in the book of Genesis where, 'Eve was tempted by a serpent to eat the fruit of the Tree of Conscience, or of good and evil. The serpent falsely represented that she would be godlike if she did so'.[1] In Sicily, formerly known as Syracuse, and a Greek colony in 360 BC, Hegestratos, a ship owner, and his accomplice Xenothemis persuaded the purchaser of corn to advance the payment on a ship laden with the cargo. The ship in fact sailed empty.

Hegestratos's attempts to scuttle the vessel at sea were discovered by his passengers and Hegestratos died whilst making good his escape.[2] A further example of fraud in ancient Greece, which was achieved due to the position and status of the offenders, is cited by Croall.[3] In this instance a prominent family used concrete infill to marble veneer in place of solid marble, in the building of a temple. Fraud is directly linked to theft in the *Institutes of Justinian* where under Roman Law 'Theft is a fraudulent dealing with the thing itself or with the use or possession of it. It is prohibited by the law of nature'.[4] This awareness of the potential for fraud also appears in Title XXIII where, 'A sale may be contracted conditionally as well as absolutely, ... but if the seller leads him to believe it to be private property he has an action *ex empto* against the seller to recover the damage arising from the deceit...'.[5] Returning to the criminal law of Justinian, it is here where the most severe sanctions existed and 'A patron who defrauds his client shall be sacrificed to the gods '.[6]

The development of trade throughout Europe during the middle ages brought with it a range of punishments to restrict fraudulent practices by the growing merchant classes. In 1469 Louis XI of France promulgated an act to curb fraudulent practices in the sale and delivery of market produce.[7] The year preceding this had seen Charles VII order a major investigation into frauds committed by the farming community, resulting in the imprisonment of *Le Grand Argentier* Jaques Coeur.[8] In England an Act[9] of 1542 specifically referred to '...divers and sundry persons, craftily obtaining into their hands great substance of other men's goods...'.[10] The use of uncorrected weighted balances, a practice particularly common amongst medieval metal dealers, resulted in excommunication.[11] The sale of underweight foods could result in a fine and banishment.[12] An edict of 1481 in France decreed that for the offence of frauds on produce the offender was to be pilloried.[13] Concern over increased fraudulent acts was expressed in 1602 by Sir Edward Coke who said, 'Fraud and deceit abound in these days more than in former times'.[14] In fact the

expansion of the law relating to fraud had started more than one hundred years earlier than Coke's comments, 'Through a strange quirk in history, the evolution of the law of fraud began about five hundred years ago in the English common law, about the same time that double entry book keeping came into vogue in Italy, through the efforts of Pacioli, an Italian mathematician and Franciscan friar'.[15]

The seventeenth and eighteenth centuries saw a growth in fraudulent practices and attempts by the legislature to inhibit their development further.[16] At this time foreign trade in both England & Wales[17] and France was dominated by companies that were regulated either by Royal Charter or an Act of Parliament. Colbert codified taxation law in France in 1680.[18] The financial crisis of 1720 in England[19] led to the introduction of white collar crime as an offence, although at this time it was referred to as a scandal. The outcome of this event, which established the involvement of government ministers in financial corruption, led to the creation of the office of Prime Minister.[20] During the Eighteenth century competition between the traders of France and England resulted in the passage of legislation which permitted British traders to use alternatives routes of travel which enabled them to avoid costs which were levied at the port of Marseilles.[21] The result of this and other legislative provisions on both sides of the Channel was an increase in fraudulent trading between the countries. The mechanisms for preventing fraud had been rudimentary and poorly structured in both countries and combined with a desire by the growing business classes to avoid costs, the development of a specific class of criminal enterprise became inevitable. Evasion of duty payable on imports and exports was not restricted to smugglers, it increasingly involved the merchant classes,[22] as Vouin stated, 'Business and criminal law have never ignored each other'.[23]

The increased volume of trade passing through the financial institutions of London and Paris also created increased bankruptcies which in turn compelled the legislatures of each country to pass specific laws. For the first time laws were

introduced which dealt with the bankrupt not necessarily as a criminal [24] although overtly criminal acts and deliberate concealment of funds remained a felony. In 1734 Sir John Barnard's Act was passed.[25] This measure sought to prevent the practice of 'stock jobbing' and provided that premiums were to be paid, under the contract, for delivery, receipt, acceptance or refusal of any public or joint stock and that wagers on the price of the stock were to be void.[26] Those concerned in making of such wagers were liable to a fine of £500. Penalties were also levied on those who sold stock to which the vendor did not have possession or entitlement.[27]

The current system of criminal law used in France is directly attributable to the Napoléonic Penal Code of 1810. Criminal procedure was formerly governed by the Ordinance of 1670 which was rejected by the Constituent assembly of 1791. The Code of 1810 attempted to reconcile the differences between these two ordinances, but in doing so ultimately relied heavily on the original provisions of 1670. This resulted in a return to the established inquisitorial model and a final rejection of the accusatorial system. These periods of transition in France between 1670 and 1810 created a mixed approach to criminal provisions, one which has been successfully exported[28] as the rival to the English system. While there have been a number of successors to the original Napoléonic codes[29] the basis of the substantive law is the Code of 1810 and the provisions of the later codes are directly attributable to this.[30] The terminology and classification of offences established in the code are attributable to the influences of Roman law in continental Europe and are still in use today.[31]

### 1.3 The 19th and early 20th centuries

In England the law struggled with the concept of fraud throughout the nineteenth century[32] and largely restricted itself to remedies in contract and at equity. In France

the law relating to the prevention of frauds was improved[33] and reinforced by further provisions in 1905.[34] During the latter part of the 19th century Kipling[35] wrote,

'Unswayed by gift of money
Or privy bribe, more base,
Of knowledge, which is profit
In any market place'.

White[36] suggests this may be a fitting introduction into the complexities of white collar crime. The reality of this prose is that the 20th century has seen prolific development in insider dealing and offences related to deceit performed by members of the international business community who have used their knowledge to profit in the financial market place. Regardless of how white collar crime has been received and commented upon in history, the offences deal with a particularly unpleasant aspect of human nature, that is with deceit.

In *Re London & Globe Finance Ltd,* Buckley. J. established a vinculum between white collar offences and fraud when he stated '...to defraud is to deprive by deceit'.[37] Case law throughout the 20th century has consistently maintained this connection.[38] Attempts at enforcement in cases of white collar crime can be seen in the case of Horatio Bottomley who had sixty-seven bankruptcy petitions and writs filed against him between 1901-1905. It was not until a period of recovery turned to failure again that Bottomley was sentenced to seven years imprisonment for fraud in 1922.[39] In the memoirs of GD Roberts QC he refers to '...the share pushers, who in the twenties and thirties dragged the good name of the City of London in the mud with appalling scandals'.[40]

For many years legislators have worked to counter the disruption of the operation of financial markets resulting in theft from companies and individuals, though, as we have seen, the response to this during the Eighteenth and Nineteenth centuries was

largely to rely on civil remedies.[41] The massive increase in market activity globally, during this century has, by necessity, prompted the volume of civil and criminal provisions now in force in England and France.[42] Transactions between financial institutions and their traders which in previous centuries were based on a 'gentleman's' word are now regulated. Business Crime as a specific criminal offence was established in France in 1935[43] in response to the economic problems of 1929 and a feeling from within the financial community that commerce needed protection from price depreciation and growing overseas competition. During this period a series of financial scandals[44] in France further prompted a move to bring moral order to business life and government efforts to clean up the image of the financial institutions. The objective was to re-launch investment in France, but increased activity in the markets also brought increased criminal operations[45] which in turn have stimulated a range of legislative measures since 1945.[46]

**1.4 Contemporary perspectives**

The social exclusivity of the business world is rapidly evaporating and entry to financial markets employment is now based on entrepreneurial skills and not solely on social origins and whether the applicant attended a specific school or university.[47] The opportunity to commit white collar crime has expanded in response to the globalisation of commerce and financial transactions. [48] As we move towards the end of this century it would seem the spiral of white collar offences and resultant legislative and regulatory measures are set to continue in growth. The experiences of the 1990's have already reduced the major frauds of the 1970's to minor incidents[49] and rates of recorded frauds rose dramatically during the same period.[50] White collar crime is indubitably an expanding criminal enterprise. The correlation between organised and white collar crime has been clearly established and it is recognised that money laundering poses a threat to the stability of the world's financial markets. The governments of England and France have responded by the creation of

specialist squads whose remit is to curb the expansion of the infiltration of the financial institutions by white collar criminals working directly or indirectly for organised crime groups[51] and to protect the unwary and innocent victims of fraudulent schemes.[52]

## 1.5 Defining white collar crime

> 'The Lilliputians look upon fraud as a greater crime than theft. For, they allege, care and vigilance, with a very common understanding, can protect a man's goods from thieves, but honesty hath no fence against superior cunning...where fraud is permitted or connived at, or hath no law to punish it, the honest dealer is always undone, and the knave gets the advantage'.[53]

There are many views as to what exactly is meant by the term 'White Collar Crime'. It is used to encompass a wide range of criminal and antisocial acts which all involve fraud committed by members of the business community. The phrase was first introduced by Edwin Sutherland as 'A crime committed by a person of respectability and high social status in the course of his [her] occupation'.[54] This interpretation has been criticised as the analysis is based on the combination of employment environment and social class.[55] I would accept this criticism of Sutherland as his defintion does does convey the idea that all white collar offenders may consider themselves to be 'divine' as they all have the opportunity to achieve the criminal objective due to an exalted work status. Regardless of whether it is used to the benefit of the individual or the collective benefit of the company. 'Corporate Crime' it is argued [56] includes offences committed individually or by groups in legitimate organisations within the discharge of their workplace duties. This analysis is restrictive also as it implies that the offence is sanctioned by the company as it is the

company which benefits. That is inherently different from where an employee abuses a position of trust within a company to achieve his own criminal objective.

A group of employees working in concert to achieve a fraud might be termed as organised in their criminal objective. The expression 'Organised Crime' is most commonly used to define organised criminal groups; the Mafia, Camorra, Triads, Yakuza and Colombian Drugs Cartels.[57] Martin and Romano[58] give examples of crime by category and differentiate between white collar crime, as those offences which include; bank fraud, embezzlement, insider trading, consumer fraud, price fixing, criminal corporations, corporate bribery of public officials, and Organised Crime which includes; gambling, prostitution, extortion, loan sharking, labour racketeering and truck highjacking. If one accepts these proposals it is difficult to include 'Organised Crime' under a definition for white collar crime. Conversely if the approach of the Home Affairs Committee[59] is adopted then '..the search for intelligence about organised criminal activity should not be hindered by concern about precise definitions of what is and what is not "organised" crime'.[60] Van De Bunt believes there is a fundamental difference between Corporate Crime and Organised Crime, 'As the facade of legality conceals the illegality in corporate crime'. He contends this is not the case in organised crime and may or may not be the case with white collar crime.[61]

A simpler and far wider net is drawn over the term white collar crime by Reuvid [62] who defines it as 'Crime in business of all kinds, or what we shall for greater simplicity call "white-collar crime'.[63] Clarke refers to the development of business crime in the United States as '...crimes committed on a widespread basis within mainstream business'[64] and a phenomenon which has crystallized since the late 1980's. Common fraudulent acts conducted by members of business organisations are unequivocally criminal. Implicit in this 'simple' definition is that white collar

criminals are insiders in an employment position which affords them the opportunity to commit a fraud. Frequently these insiders are in a position of authority or power and this position is respected within the legitimate economy. This veneer of legitimacy and respectability provides the veil behind which deceits can be conducted. The transition from legitimate to illegitimate business conduct may be unclear and the nature of the market that white collar criminals operate within will frequently reward innovative practices. This creates its own problems in defining when an act is criminal and consequently the apparent problems in defining white collar crime.

Despite definitional problems, white collar crime, seems to be '...an inevitable concomitant of business, trading and commerce'.[65] Crime in business includes those offences which involve theft by deception and also a range of misconduct which spans incompetence, negligence and questionable, though not defined as criminal, business practices. The divide between crime within the business arena perpetrated by the white collar offender and other criminal offences is the environment. The white collar criminal operates within a business milieu where the legitimate status of employment, the 'privacy'[66], provides the opportunity required to facilitate the subsequent offence.

Certainly the evidence of fraud within the business community in the past year alone, in England and France[67] allows no room for complacency. The 'unmanaged risk' of company fraud is estimated to have effected 90% of respondents to a recent survey of business directors in the UK[68] and threequarters of those discovered were committed by employees.[69] Whether all these alleged frauds would amount to any criminal offences is a further problem in defining precisely what white collar crime is.

The Serious Fraud Office, SFO, is an organisation comprised of lawyers accountants and police officers which has the statutory authority to investigate and prosecute serious fraud. In the context of the SFO white collar crime which involves fraud will be serious in nature when the fraud is complex or large scale. This was clarified by George Staple[70] in that '(i) The case must be complex in fact and/or law; or (ii) it must be of considerable public interest or concern; and in addition (iii) the value of the fraud must normally exceed £5 million'.[71] The Criminal Justice Act 1987 is the basis for these terms of reference but does not assist in defining a substantive criminal offence. Fraud is a generic term for a type of criminal offence and it is used in the same context in both the legal jurisdictions of France and England & Wales. There is a blurred line between some activities and this is compounded by the fact that there is no specific definition of fraud in either English law or French law.

In France *fraude* is categorised as a deceit at criminal law which may be expressed as a *tromperie.* Deception is divided into specific classes which stem from the basic offence of theft, *vol*, however, the terminology present within French criminal and civil law[72] is extended within the business law context where the offences of cheating exist under the provisions of Article 313-1 of the penal code.[73] It is this code which creates specific business crime offences.[74]

In France the development of the law relating to business crimes, as a particular class of offence, was the theme of the *13th Congrès de l'Association Internationale de droit Pénal 1984.* The congress identified the existing business law as imprecise and subject to the same polymorphemic dilemma which the authorities in England & Wales are still faced with. The use of the term *abuse de biens sociaux,* which refers to a person in authority using their position dishonestly to profit, either personally or for another company, was originally legislated against in 1935.[75] Under French law a framework to the meaning of white collar crime offences is derived not from a legal

but a sociological definition. ' *Le crime en col blanc* is to be understood as any anti-social behaviour conducted within the business environment whether specifically a criminal act or conversely, even if not penally reprimanded, is detrimental to the activities of the company. It is the act of somebody who has a high socio-economic status, is respectable and respected, who violates a rule, legal or not, connected to his [her] professional activities. This act consists of exploiting other people's confidence and trust and faith in such an ingenious manner that the possibility of its discovery is nearly excluded'.[76] This definition is more precise than the term *abuse de bien sociaux* but in interpretation returns to the paradox that white collar criminals may not be committing crimes and if they are, they may not have perceived their acts as criminal. The difference between the two terms in French lies in the position of the criminal actor. *Le criminel en col blanc* is not necessarily a manager or director but will be in a position of authority within the company. Crucial to the offence is the position of trust, it is the status of the offender within the company that will allow them to act criminally and yet not attract suspicion.[77] This accords with Nelken's[78] interpretation and is distinguishable from the meaning given to *abus de biens sociaux* which specifies the status of the offender within the business environment and stipulates that he is aware that his conduct is unlawful.[79] These linguistic variances do not interfere with the investigation of alleged offences under either category, and neither term is mutually exclusive, however, as one commentator has stated, 'This area is imprecise at the moment in French law'.[80]

**1.6 Criminal conduct or accepted business practice**

The nature of global business is highly competitive and company officials may not interpret their actions as criminal. Nelken[81] feels that business and professional people are '...apparently caught out in serious offences, quite often for behaviour which they did not expect to be treated as criminal, and for which it is difficult to secure a conviction'.[82] To support this assertion Nelken relates the incident which

occurred in 1992 involving Carlo De Benedetti the chairman of Olivetti. Benedetti expressed concern at the fall in the shares price of the company 'Is this because of a general fall in prices on the Milan exchange? he asked 'No', came the reply, 'it is because you have just been sentenced to six years in prison for your role in the Banco Ambrosiano crash of 1982'.[83] Clarke[84] believes it is futile to pursue criminal prosecutions against business crime offenders. This may be economically prudent but his non-prosecutorial approach fails to clarify exactly who the offenders are that we should *not* be pursuing through the courts. Where is the division between the unintending business criminal and the opportunist offender who capitalises on the business environment as the conduit through which wholly and deliberate criminal acts are perpetrated, Clarke believes the outcome of criminal prosecutions of white collar offenders does little more than achieve 'public hysteria and expense'[85] and if criminal sanctions are continued with as the appropriate method of deterring business crimes they are only effective against the 'less lucky and competent villains'.[86] I do not accept Clarke's interpretation. It cannot be argued that white collar offenders are intelligent, educated and influential members of the business community and then propose that it is only the unfortunates who are prosecuted. The investigations and convictions of Saunders in England,[87] Tapie in France[88] and Leeson in Singapore do not support his claim[89]. These men were not unlucky, they were subject to complex criminal investigations and prosecutions which uncovered elaborate methods used by the offenders to prevent detection.

The diversity of opinion that exists as to how white collar offences should be categorised and deterred does little to help in the formulation of a common definition. Aubert[90] is specific 'White collar crimes are numerous and, as it follows from the definition, committed by people of high social status, which usually means income'.[91] He contrasts this with Hartung's[92] definition which is clearly narrower than either Sutherland's [93] or Aubert's own 'A white collar offence is defined as a violation of law

regulating business, which is committed for a firm by the firm or its agents in the conduct of its business'.[94] This is not white collar crime and is more suitably placed alongside corporate crime, where the beneficiary of the criminal conduct is the company not the individual.

Brants[95] refers to the 'crimes of the powerful'[96] when attempting to distinguish between the established categories of deviance and the increasing development of sophisticated frauds. This concern for appropriate labeling is not misplaced. If criminal acts are conducted by a certain class in society and the reason for their deviant behaviour is attributable to lack of life chances within that class, then a solution to spiraling crime is to improve the life opportunities for those caught in that cohort. Conversely if white collar criminals are from a privileged class or employment, then eradicating their deviant behaviour is more complex. Effectively the circle of criminal behaviour is widening and the divisions between criminal conduct and business practices are in danger of becoming blurred. White collar criminals are 'powerful insiders'[97] and there is a real danger of serious white collar crime being fully submersed into the legitimate economy. Complex fraud is becoming a synonym for white collar crime.[98]

Rider[99] also uses the term 'Crimes of the Powerful' in his discussion of those offenders who exploit the financial systems and, like Levi,[100] he interchanges terminology to incorporate a broad range of activities which are deemed contrary to self-regulatory and legal regulatory provisions. It has only been within the past twenty years that the problem of white collar crime has been effectively legislated against in either France or England. The legislation that has been implemented has needed adjusting as the pattern of criminality takes shape within a changing business environment. In the case of England the proposal to establish a new regulatory authority with statutory powers is one example of the attempts by government to

enlarge the parameters of control and to strengthen the sanctions that can be imposed against white collar criminals. On 22nd July 1992 France created a new criminal Code and for the first time, under Article 121-2, corporate bodies are submitted to criminal liability. The frustration that is experienced by prosecuting authorities when a case has collapsed will not all be resolved by greater powers, as 'This is not just a problem when dealing with fraud and other economic crimes, but is part and parcel of the wider debate on sanctioning so called "white collar crime" '.[101] The desire to define in absolute terms can in itself prove to be elusive. Whilst legislatures are seeking to attribute a meaningful label to fraudulent business practices the perpetrators of these acts are able to continue to exploit any loopholes that do exist in the laws of France and England. Organised crime groups, conscious of the incongruity that exists between regulatory and prosecutorial objectives, are increasingly identifying the financial business sector as one which is susceptible to infiltration. 'Whilst mention has already been made of the characterisation of such perpetrators as "white collar criminals" with all this signifies, it should also be recognised that there is an increasing amount of evidence indicating that organised criminals have moved into economic crime to a significant extent'.[102]

There is a danger in compartmentalising offences and white collar crime should not be seen as an exclusive term as criminal systems develop from a wide range of origins. To distinguish white collar crime from corporate crime, organised and economic crime may be dysfunctional. Levi[103] states, 'The controversial and ambiguous criminological term 'white-collar crime' ... is used here in the sense employed by Wheeler, Weisburd, and Bode, who state that "white-collar crimes, for our purposes, are economic offenses(sic) committed through the use of some combination of fraud, deception or collusion'.[104] Levi rightly chooses not to distinguish between Corporate Crime and White Collar Crime as the distinction may 'overstate implicitly the homogeneity of crime *against* business' (original emphasis)[105] and he

dismisses class labeling attachments because the 'social-class composition of 'white-collar criminals' [is not] simple: they include members of 'the upperworld, and 'the underworld', and comparatively junior employees. Even upmarket-sounding crimes like insider dealing- where shares are bought or sold unlawfully on the basis of confidential information- may be committed by the company chairman or the company typist'.[106] Nevertheless Levi does avoid some of the debates surrounding the definition of white collar crime and he mixes terminology throughout his book.[107] He defends this stance as '...although this is not an *apologia* for the kind of sloppy thinking that is all too prevalent in the white-collar crime debate, there is a paradoxical sense in which the neat pigeonholing of crimes into different compartments can perpetuate their divisions and make it more difficult for practitioners and students to think laterally about issues of fairness and consistency'.[108] The proposal that white collar crime should not be compartmentalised is supported in the findings of Savonna[109] who found that, 'Moreover, organized (sic) and white-collar crime must be considered on a continuum which includes illegal, and does not exclude legal, activities'.[110]

### 1.7 Definitional analysis

From the plethora of definitions above it is possible to construct generic features that many of the writers have attributed to the term white collar crime. For example in the definitions referred to in this chapter there are 18 references to what has been done, that is references to the criminal act, there are also 18 references to fraud (this is particularly interesting given the lack of any fraud statute in England & Wales) 19 references are made to the exalted work status of the white collar criminal and 18 references are made to those actors who are members of the business community.

By associating two terms, actor and activity, to the definitions above it is possible to break down the definitions into generic features. In total there are 20 references

concerning 'the actor' or the person/employee. These include the terms; person in authority, high socio-economic status, respectable, respected, by firm or agents, upperworld, employee theft, position of authority, legitimate status of employment opportunity, crimes of the powerful and legitimate employment. There are 22 references to the 'type of activity' including; violation of rules, violation of law regulating the business community, economic offenses, use of fraud, deception or collusion, cheat, manipulation, conceal a deception, intentional distortion of financial statements, theft and deception and abuse of occupational role.

It is proposed that the generic features of white collar crime are employment status and criminal activity combined. These are features that distinguish this type of offending. In the following section consideration is given to the development of organised white collar crime and how, if at all, this is different from white collar crime.

### 1.8 Professionals and organised crime

Organised crime is now of such international proportions that it is unrealistic to think that the transference of illicit to licit can be achieved without the assistance of white collar criminals who hold professional qualifications. It may be attractive to think that at present the business criminal has resorted to criminal conduct after admission into the professions. The reality may be that in the future organised crime groups will specifically target the 'professions' and seek to place members of the crime groups into universities and training establishments solely for the purposes of that member becoming qualified.

Opportunities for the white collar criminal may be expanding and prospects for the money driven entrepreneur[111] to move into wholesale criminality are increasing. Established criminal groups need the skills of the business community in order to survive themselves against competing criminal organisations. The recruitment of

lawyers, accountants and financial experts will be essential to the established crime syndicates if they are to survive the competition from newly emerging groups[112]. In effect the crime groups will themselves develop a framework which incorporates white collar criminals working for the criminal corporation. As Ruggiero[113] suggests, 'When organized crime establishes connections with the licit economy, it undergoes a learning process whereby its criminality will increasingly resemble white collar and corporate crime. In the licit economy, criminal entrepreneurs will frequently find aspects of their own previous activity, or they will acquire skills to be used if intending to go back to it. Undertaking a licit entrepreneurial career, in other words, may become part and parcel of their criminal career, the boundaries between the two being extremely blurred'.[114] This 'professional white collar criminal' would in fact be a corporate criminal as their endeavours would be for the benefit of the crime group or corporation and not for the individual concerned. In this context Savonna[115] sees the restructuring of the Mafia as inevitable. Firstly, as the increasing need for external specialist advice is hazardous, using criminals who are professionally qualified but not members of the 'family' will always expose the Mafia to the future potential of a lawyer or accountant having been arrested now assisting the authorities. While it may be said that members of the 'family' have broken the alleged code of silence, *omerta*, outsiders will always pose an additional threat. Secondly, employing professional lawyers, accountants and brokers is expensive, this has been seen in the increased cost of money laundering over the past twenty years where prices have risen from a 3% charge for cleaning money up to the current 25%.[116] The solution is a white-collar Mafia that will '... combine its efforts on the international markets with the activities of the blue-collar Mafia on the local extortion markets'.[117] These observations may be a reality if the findings of the Home Affairs Committee[118] are correct and the implications are of immense proportions. 'If the traditional criminal justice system has enough difficulty in dealing effectively with what might be termed the ordinary

"white collar" criminal, its ability to control organisations which may have resources comparable to the state is an entirely more worrying prospect'.[119]

An investigation into the meaning of the term 'white collar crime' will therefore need to include some of the criminal acts committed by organised criminal groups. The overlap between large scale corporate criminal ventures and the individual business offender can occur by means of legitimate placement within the business arena in order to facilitate the criminal act. Neither an individual nor group can succeed in a criminal venture within the business community unless the actor has established credentials and a legitimate work placement. There is, therefore, a distinction between organised criminals and white collar criminals as the former employ a range of overtly criminal conduct in order to facilitate the group members' shared goals. Organised crime groups will also frequently adopt a hierarchical structure based on a company format but they extend the criminal conduct to include the use of violence and intimidation. These overtly criminal acts are easily identified and accordingly can obscure any developing covert activities specific to the business environment. It is therefore possible to distinguish individual offenders as members of an organised crime group as they are working for the collective outcomes of the criminal corporation regardless of the level at which they operate, white collar or blue collar.

The Home Affairs Committee on Organised Crime[120] did not develop its own definition of organised crime but referred to that used by the German CID, the Bundeskriminalamt, BKA, that is; 'The planned commission of criminal offences, determined by the pursuit of profit and power, which, individually or as a whole, are of considerable importance, whenever more than two persons collaborate for a prolonged or indefinite period of time, each with their own appointed tasks: - by using commercial or business-like structures; by using violence or other means suitable for

intimidation; or by exerting influence on politics, the media, public administration, judicial authorities or the economy'.[121]

In the previous section on the development of definitions, I raised the issue of whether those organised crime groups which were active in white collar crime, were for the purposes of definitions, white coller criminals. It is recognised that the sample of author definitions is fewer in this section however, two features are very clear. The previous catergory of 'for whom' is different and a new ingredient has been added that is the use of violence. It is not proposed that a breakdown of terms is repeated here, but, for the purposes of definitional use in this thesis, the distinction between organised crime and white collar crime is that the activities conducted by organised crime actors are to facilitate group members' shared goals. Furthermore, organised crime groups use violence and intimidation techniques that are not commonly employed by the offenders referred to as white collar criminals. However, I am of the view that it would be prudent for investigative and regulatory authorities to include awareness training of organised criminal groups into anti-fraud development programmes as it would seem that in the future the distinction between organised crime and white collar crime may not be as clear as it is currently perceived to be.

### 1.9 A global definition

There is a developing dimension to global organised crime which necessitates a common understanding of the term white collar crime. To infiltrate the world's financial markets you need the capacity to do so. Individual offenders have found penetration remarkably easy[122]. It would be naive to think that organised crime groups have not also exploited the divergent opinions as to the way in which white collar offenders should be categorised and treated and that they will not continue to develop ways of manipulating and profiting from these current contradictions. The lack of clarity in desired outcomes, such as whether the white collar offender be

criminalised or regulated, stems from the lack of definitional focus. White collar offenders in England[123] and France[124] have frequently regarded themselves as innocent of criminal behaviour and as unfortunate in that they have been prosecuted for offences which are common practice within the relevant workplace community. In the Guinness affair the principals considered themselves devoid of criminal liability. They did not consider that market manipulation constituted a deception on shareholders. Had this been held to be correct, then any inclusion of deception in the definition of white collar crime would be otiose. This cannot be so. The link between fraud and white collar crime is that the offender has successfully perpetrated a cheat, whether by manipulation or active deceptive conduct, the conduit for which has been the established position of trust within employment.

The position of trust may be vested in all levels of employee and it will certainly include the management within a company. If the term white collar criminal is applied to those in positions of authority then the stigma attached to this label will be beneficial throughout all levels of the business community . If white collar criminals are those previously respected leaders in the field of business who have been found to be simple thieves, the message to potential offenders is clear. Authority and power does not negate criminal liability.

Bologna[125] advocates leadership by example as a preventative measure 'Because if superiors steal, then what prevents subordinates in the company from doing so? From a loss point of view, proactive policing/internal regulation at the higher echelons of business would appear more/potentially cost effective'.[126] Incorporated in this usage of stealing is fraud which is defined as '...an intentional deception or a willful misrepresentation of a material fact'.[127] This definition may be of value and has an application at both criminal and civil law however, when Bologna[128] defines white collar crime he is all encompassing.

'White collar crime can be viewed in terms of losses incurred by industry as the result of employee theft, fraud, embezzlement, corruption, and sabotage and losses incurred by industry as the result of customer shoplifting, vendor, supplier, or contractor overbilling and short shipment, predatory practices by competitors, and larceny, burglary, robbery, extortion, and frauds committed against businesses by unrelated parties, i.e., outside criminals'.[129]

I reject this definition as it incorporates a multitude of criminal acts which are already clearly defined. These offences are not specific to the business community and a number of those outlined such as, shoplifting, robbery and burglary, do not create the range of evidential problems which are associated with deceptive criminal practices by those in a position of authority and trust.

If consideration is given to the interpretation of deceit as defined by the California Supreme Court[130] as 'A fraudulent and cheating misrepresentation, artifice, or device, used by one or more persons to deceive and trick another who is ignorant of the true facts, to the prejudice and damage of the party imposed upon'[131] then Bologna's[132] definition has very little application. The Michigan Criminal Law [133] is precise in the usage of fraud as applicable to one participant,

> 'Fraud is a generic term, and embraces all the multifarious means which human ingenuity can devise, which are resorted to by one individual, to get an advantage over another by false representations. No definite and invariable rule can be laid down as a general proposition in defining fraud, as it includes all surprise, trick, cunning and unfair ways by which another is cheated. The only boundaries defining it are those which limit human knavery'.[134]

There is a recurrent theme in that all commentators link white collar fraud to the business environment and to an offender who is legitimately at the scene and thereby able to conceal a deception. This combination of factors means that it may

be possible to develop a common understanding of the complex and controversial term white collar crime. The Chartered Institute of Public Finance and Accountancy, CIPFA, define fraud as: 'The intentional distortion of financial statements or other records by persons internal or external to the organisation which is carried out to conceal the misappropriation of assets or otherwise for gain'.[135] Al Capone called white collar crime 'The legitimate rackets'[136]

In 1993/94 there were £6,000 million of loss investigations conducted by the Serious Fraud Office, SFO, of which 31% was defined as fraud on companies.[137] Bologna[138] believes that, 'The literature of white collar crime is replete with theft rationales. Unfortunately, most of the rationales are supported by nothing but anecdotal data or the author's own bias. Worse yet, the theft motivation rationales that are offered are neither categorized nor classified'.[139]

Where white collar crime involves a cheat, which it invariably does, then the CIPFA definition is quite clear in its classification, 'Fraud is a deliberate act by an individual or group of individuals. Fraud is therefore always intentional and dishonest'.[140] White collar crimes may be committed by a subsequent offender, that is the actor who does not intend criminal conduct from the outset, as was alleged in the BCCI investigation[141] and they also they may be committed by the intentional offender, whose criminal motives are the driving force of the offence from the outset. Coleman[142] suggests that 'All types of white collar crimes are rational calculating crimes, not crimes of passion. The goal of the vast majority of white collar criminals is economic gain or occupational success that may lead to economic gain'.[143] I do not propose that white collar crimes are crimes of passion and I accept that the intended outcomes of the offence are frequently those depicted by Coleman. I would, however, reject this definition as too broad. Not all serious frauds which are white collar crimes have been calculated from the outset.[144] I would also reject the

definition of white collar crime proposed by Hirschi and Gottfredson[145] which is '...crime committed by the advantaged class, especially those in positions of economic power'.[146] I do not dispute that those in positions of authority are able to usurp their authority to achieve a criminal advantage. I reject the contention that these acts are restricted to the advantaged classes rather than the employed business classes. I would accept that the criminality of the employed classes within the business arena creates an exclusive criminal class, as these actors have the opportunity created by their employment to activate large scale fraud and thefts. I reject the proposal by Hirschi and Gottfredson that the invention of the term 'white collar crime' had '...two desirable consequences: it falsified poverty-pathology theory and it revealed the criminality of the privileged classes and their immunity to the law'.[147] It can no longer be said with any degree of certainty that the 'privileged' classes are immune from prosecution in either England and France[148].

Reiss and Biderman[149] adopt a similar approach to Aubert[150] as 'White collar violations are those violations of law to which penalties are attached that involve the use of the violator's position of significant power, influence, or trust in the legitimate economic or political institutional order for the purpose of illegal gain...'[151] There will frequently be overlap between the activities of the business fraudster and politics. Criminal participation by politicians can, however, be conveniently categorised as corruption albeit the white collar crime may transcend both environments.

**1.10 Conclusion**

White collar crime has proven extremely difficult to define and a vast number of commentators have expressed divergent opinions as to its appropriate limits. Bologna[152] has listed 296 categories of white collar crime related frauds.[153] Nelken[154] does not define white collar crime but outlines the ambiguities that surround this contested subject.[155] This is a subject unlike conventional crime, where labels have a

limited range of interpretations, as white collar crime has legal, social and political definitions of criminality.[156] The volume of definitional applications does little to assist the prevention of the crime though and while it may be of value to construct a cogent working model of white collar crime, the offenders are continuing to profit. Perhaps the most satisfactory conclusion would be to say that the term 'white collar crime' is illusive and uncertain, it means many things to many people. Croall[157] states 'In conclusion it can be argued that the predominating image of the "crimes of the powerful" perpetrated by the corporation or high-status, respectable business offender can both disguise the variety of white collar crime and exaggerate the distinction between 'conventional' and white collar crime'.[158]

The environment is perhaps the only distinguishing feature of white collar crime. The crime, though invariably complex, is frequently theft or deception. 'Our principal hypothesis, as the title suggests, is that the organization (sic), size and profitability notwithstanding, is for the white collar criminals what the gun or knife is for the common criminal- a tool to obtain money from victims'.[159] Whilst attractive in its simplicity what this definition does not include is outcomes. The common criminal gains money and perhaps peer group status. The white collar offender gains money but loses status and future employment possibilities. Aubert[160] is dismissive of the 'futile terminological disputes' [161] and argues that the very nature of white collar crimes makes a meaningful definition ambiguous, but it is this controversy around the criminality of the offences which make them so attractive to study. Croall[162] states that, 'Essentially, many argue, white collar crime is crime that is committed in the course of legitimate employment and involves the abuse of an occupational role...'.[163] Raphael[164] reflects the concerns of practitioners in that a precise definition is not as crucial as the creation of '...an informed body of specialist lawyers in white collar crime'.[165]

In this chapter I have identified the controversies that surround the definition of white collar crime and I have introduced the growing concerns of those vested with the task of investigating and prosecuting the offences which seem so hard to define, also I have commented on the perceived expansion of criminal activity within the category of offending which incorporates but is not exclusively white collar crime and that is where organised crime and white collar crime come together.

In this chapter references have been made to UK legislation where there have been attempts made to focus on white collar crime. It is suggested that the legislature has predicated the sanctions against white collar crime based largely on corporate liability which has to date been determined as civil rather than criminal in nature, but this is not the same construction that can be put on the development of definitional terms which are largely attributable to the academic community.

It is recognised that there may be a dichotomy between the academic perception of white collar crime and the legislatures perception. Essentially Parliament legislates to protect people whereas those responsible for constructing definitions try to define who the criminal actors are. Resolving this issue is beyond the scope of this thesis, however, it is recognised that there remains an enormous uncertainty in defining white collar crime, a composite definition is complex and controversial 'white collar crime' means many things to many people.

*Crime en Col Blanc,* regardless of which side of the Channel it is activated, is an offence which, by all commentators' definitions, includes fraud and theft by members of the business community. A definition common to England and France is that: **white collar crime incorporates those acts committed by means of a fraud or theft by members of the business community who have used their position of**

**trust or responsibility to achieve the criminal objective.** I will employ that use throughout this thesis.

## Endnotes.

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[1] Bologna, J. *Corporate Fraud. The Basics of Prevention and Detection*, London, Butterworth (1984) p.ix.
[2] This example is cited by Clarke, M. *Business Crime. Its Nature and Control*, New York, St.Martin's Press (1990) p.13.
[3] Croall, H. *White Collar Crime. Criminal Justice and Criminology,* Buckinghamshire, Open University Press (1992) Reprinted 1994 p.5-6.
[4] Cracknell, D.G. & Wilson, C.H. *Roman Law. Origins and Influence*, London, HLT Publications (1990) p.120.
[5] *ibid*. Croall. p.113 The Institutes of Justinian. Book III
[6] *ibid*. Cracknell. Table VIII: Of Wrongs. p.41. The Twelve Tables (451-449 BC) were the initial venture into written law by the Romans. These tables were a combination of codification and innovation. Due to inflation the monetary amounts quoted bècame meaningless and the tables were reformed in 287 BC into the *lex Aquilia*.
[7] The Pronunciation of Fines. Louis XI 1469.
[8] This investigation into major fraud was caused by the increasing concern over *La Ferme Générale,* which included dishonesty, in the business environment, of large produce markets, social and economic crimes and of particular concern to the monarch, tax evasion. Jaques Coeur referred to as the 'Leading Fraudster' was convicted of tax offences.
[9] 1542-1543. (34,35 Henry VIII c.4. Coke. Fourth Instit. 277,278 Vol. i )
[10] *ibid.* at 470.
[11] *Op.cit*. Croall. note. 3. p.6. see also *Chandler v Lopus*. (1603) Cro. Jac. 4.
[12] *ibid.* Croall.
[13] *Edit de Louis XI de 1481, portant sur les fraudes en matières d'oeufs, de lait et de buerre et sanctionnant les fraudeurs du pilori.* This *prohibition de l'accaparement* of 07/01/1481 attempted to develop a network of rule implementation throughout France, placing import and export obligations on producers to sell at designated markets, at an agreed time. This law particularly sought to curb the increasing development of stock hoarding which distorted the market prices. The overall intention was to prohibit i) The refusal to sell produce ii) To prevent price rigging iii) To control price payments.
[14] Hutchinson, I. & Davies, D. *Fraud Watch. A Guide for Business,* Milton Keynes, Accountancy Books (1994) p.1.
[15] *supra*. Bologna. note 1. p.7.
[16] *supra.* Croall. note. 3. p.6.
[17] Hereafter all references to England include Wales.
[18] *La Grande Ordonnance de 1680*, which was introduced by Jean Baptiste Colbert (1619-1683) in his capacity as Controller-General, in response to growing concern over fraud by the merchant classes, particularly tax evasion. This was initially abolished by the Revolution, then re-established by the decret of *First Germinal An XIII.*
[19] The South Sea Bubble Co. which offered to take over the national debt in exchange for concessions in South America led to a rapid shares rise from £100 to £1,000. When the 'bubble burst' thousands were financially ruined.
[20] Sir Robert Walpole. 1st Earl of Oxford. (1676-1745).
[21] 6 George I c.14. (1719).
[22] Holdsworth, W. *A History of English Law,* London, Sweet & Maxwell (1973) Vol. XI. p. 443.
[23] *Vouin, R. 'Les affaires et le droit pénal ne sont jamais ignorés.'* in Giudicelli-Delage, G. *Droit Pénal des Affaires, Deuxième Édition,* Paris, Dalloz.(1994) p. 7.
[24] *supra*. Holdsworth.note 22. p.445. cites. 4,5 Anne. c 17. (R.C. c.4.)
[25] 7 George II C.8. and 1736 (10 Geo.2.) Chap. 8. Stock Jobbing. r. 23-4. V.c. 28.
[26] *ibid*. section 5.
[27] *ibid*. section 8.
[28] The German Code of Criminal Procedure 1877 which is still in force.
[29] e.g.,. 1958 and most recently 1993.
[30] e.g. The prosecution, investigation and trial of offenses in economic and financial matters. Arts 704, 705, 706 (1,2,3).
[31] e.g. Criminal offences are divided into categories of seriousness. A *délit* is a criminal offence punishable max. 10 years imprisonment and derives from the same usage in Roman law where theft (*furtum*) was a delict.

[32]e.g. see footnotes 1-11 of *Halsbury's Laws of England*, London, Butterworths (1992) Vol 16 4th Re-issue. para 663.
[33] Law of 16th April 1897 was similar in objectives to the laws promulgated by the monarchs in the 15th Century and a particularly important regulation had been introduced 24th July 1867, which again sought to reduce fraudulent trading and manipulation of the produce markets.
[34] *La loi sur la répression des fraudes.01/08/1905*. This was one of a range of laws which had been introduced throughout the mid nineteenth and into the early 20th centuries specifically relating to price regulations and the prevention of fraud. e.g. laws of 20th July 1841, 28th May 1858 and 13th December 1906
[35] Joseph Rudyard Kipling. (1865-1936) From his poem 'Gehazi'.
[36] White, M. 'Insider Dealing and the Criminal Justice Act 1993'. in Rider, B. & Ashe, M. (eds) *The Fiduciary, the Insider and the Conflict,* London, Brehon and Sweet & Maxwell (1995) pp.56-74. at p.56.
[37] *Re London & Globe Finance Ltd.* [1903] 1 Ch 728.
[38] e.g. *DPP v Ray* [1974] AC 370. '...to deceive is, I apprehend, to induce a man to believe that a thing is true which is false and which the person practicing the deceit knows or believes to be false'.
[39] For an account of the business dealings and frauds committed by Bottomley see Widlake, B. *Serious Fraud Office*, London, Little Brown (1995) pp. 8-11.
[40] Roberts, GD. *Law and Life: the Legal Memoirs of GD Roberts QC*, London, WH.Allen (1964) cited in Kirk, D. & Woodcock, A. *Serious Fraud: Investigation and Trial,* London, Butterworths (1992) p.2.
[41] Rider, B. & Ashe, M. (eds). *The Fiduciary, the Insider and the Conflict,* London, Brehon and Sweet & Maxwell (1995) p198.
[42] e.g. currently 49 Acts relate to market manipulation and theft or theft related offences which could be used against a white collar offender. See also: Marty, G & Raynaud, P. *Droit Civil: Introductioin Générale à l'Étude du Droit*, Paris, Sirey (1972) and *Index to Statutes*. (from 1235ad -1990) London, HMSO (1990) Lists 89 Fraud related statutes. pp.897-904. also see Appendix at rear.
[43] *Décret-loi du 30 Octobre 1935*. This legislation addressed 'Loan-Sharking', Door to Door Selling, False Accounting, White Collar Crime as an offence of *abus de biens sociaux*. The creation of the Price Surveillance Committee by the law of 9th August 1936 was particularly forceful in causing the creation of a class of 'Business Crimes' Due to a lack of clarity over the precise use of the terms and provisions of the law the area of Business Crime was the subject of a conference in 1984. The 13th Congress of the Association on Criminal Law. .
[44] e.g. The Stavisky 'Affair'. Alexandre Stavisky (Stavinsky) formed a credit company in Bayonne, France which in December 1933 collapsed. The bonds issued by him were found to be worthless and the resultant financial ruin of many leading politicians caused a major crisis for the Third Republic (1870-1940). This was compounded by allegations of complicity between Stavisky and the extreme right wing. Stavisky was found dead in 1934. The official verdict was suicide though many believe the government were responsible for his murder. His death did not prevent a scandal and resulted in riots on 6th February 1934 in which 15 protesters were killed. This caused the resignation of two prime ministers and the fall of the government which brought a left wing coalition to power under the leadership of Gaston Doumergue.
[45] The decade 1930-1940 saw an increase of convictions for business crimes rise from 6% for the entire period for which records were kept to 12% in just ten years. Source. *supra* note 23. p.10.
[46] 30th June 1945, Ordonnances relating to monopolies implemented, amended 19th July 1977. 6th August 1975 the *Code Procédure Pénale* introduced a section on Economic and Financial Crime. (Arts 704 and 705).
[47] e.g. Nick Leeson who came from a modest working class background in Essex.
[48] The increase in global white collar crime led to the 'War on White Collar Crime' of the 1970's and 1980's. see further, Katz, J. 'The Social Movement Against White Collar Crime', *Criminology Review Yearbook* (1980), pp.161-184.
[49] *Op.cit* Clarke.note. 2. p.11. Also it was not uncommon during the 1970's and 1980's for investigation to deal with loses of 'tens of millions' during this decade the figure has frequently risen to 'hundreds of millions' as per Barings Bank losses, £800million, Sumitomo Corp loses $2.6 billion and *Groupe Schneider* alleged hidden funds of $168 million.
[50] e.g. Between 1977 and 1982 per 100,000 population from 4.5 to 14.6 Belgium, 323 to 586 Finland, 693 to 1168 Sweden, 97 to 179 Northern Ireland and Spain 21 to 42. Source. Raphael, M 'Economic Crime', *Lawyers in Europe,* (February 1994), Issue 29. pp.9-11.
[51] In France the establishment of OCRB, *Office Centraux de la Répression du Banditisme*. In England currently the RCS, Regional Crime Squads which it is proposed under the Police Act 1997 will become

a National Crime Squad of 1900 Officers. At NCIS, the National Criminal Intelligence Service, there is the Organised Crime Unit. All these units are also able to refer to Europol and Interpol for transnational intelligence assistance.

[52] *Op.cit.* Bologna. note. 1.p.ix.

[53] Swift, J. *Gulliver's Travels,* London, Penguin (1967) p.94.

[54] Sutherland, E. *White Collar Criminality*, New York, Holt, Reinhart & Winston (1949) p.9.

[55] Van De Bunt, H.G. 'Corporate Crime', *The Journal of Asset Protection and Financial Crime* (1994), Vol.2. No.1. p.12.

[56] *ibid.* Van de Bunt.

[57] See further. Anderson, M. 'Control of Organised Crime in the European Community', *Working Paper Series on European Police Co-Operation.* Unpublished, Edinburgh University (1993) Paper No. 9. and Block, A. & Chambliss, WJ. *Perspectives on Organised Crime*, New York, Elsevier (1981)

[58] Martin, JM. & Romano AT. *Multinational Crime. Studies in Crime, Law and Justice,* California, Sage (1992) Vol.9. p. 23.

[59] *Organised Crime,* House of Commons. Home Affairs Committee, Third Report.. Session 1994-95. Introduction para 13.

[60] *ibid.*

[61] *Op.cit.* Van de Bunt.note. 55. at p. 12

[62] Reuvid, J. (ed). *The Regulation & Prevention of Economic Crime Internationally*, London, Kogan Page (1995).

[63] *ibid.* Reuvid. p.11.

[64] *Op.cit.* Clarke. note. 2. p.14.

[65] *Op.cit.* Croall. note. 3. p.8.

[66] *Op.cit.* Clarke. note. 2. at p.20. Clarke identifies one of the crucial characteristics of the crime as being the ability of the offender to effect the criminal act in the privacy of their natural work environment as they are legitimately at the scene.

[67] e.g. 'Former Power Chief on Insider Charges' *Evening Standard.* 26 June 1996. p.33.
'£10 M Loan Missing at Morgan' *Sunday Times.* 22 September 1996. Section 2. p.8.
'Wild Cards in Trading Pack' *Financial Times.* 21 September 1996. p. 7.
*'Le Dernier Cinoche de Tapie' Le Point.* 24 August 1996. pp. 26-35.
*'Carigon: 4 Ans de Prison Ferme'. Le Figaro.* 10 July 1996. p.8.

[68] 'Business Hit by Rampant Fraud' *Sunday Times.* 19 May 1996. Business section. p. 9 and see also 'The Corporate Investor-Fraud Prevention and Investigation'. *Economic Crime* (February 1994) p.13. '...regarded as a growth industry of the 90's- white collar crime is now a lucrative business'.

[69] *ibid.*

[70] Former Director of the Serious Fraud Office.

[71] Staple, G. 'Serious and Complex Fraud: A New Perspective' *Modern Law Review* (March 1993), Vol.56. No.2. pp.127-137 at p. 129.

[72] *Fraude* is a criminal offence in the same broad sense that fraud is used within England & Wales. It is also an offence at civil law as a tort, and the remedies of *voidable for fraud* exist.

[73] Art. 313-1. A. Outlines a new simplified definition of the offence and its relevant applications. Sec 1 *Definition de l'escroquerie .*

[74] Giudicelli-Delage, G. *Droit Pénal Des Affaires,* Paris, Mémentos Dalloz (1994) deuxiéme édition. pp.92 *et s.* and 141 *et s.*

[75] *supra* note 43.

[76] *supra.* Giudicelli-Delage, G. note 74. pp. 1-2. *Définition: C'est l'acte d'une personne d'un statut socio-économique élevé, respectable at respectée, qui viole une règle, légale ou pas, relative à ses activités professionelles, cet acte consistant en l'exploitation de la confiance et de la crédulité des autres et étant réalisé de manière ingénieuse excluant presque sa découverte.*

[77] *supra.* note. 23. p.2. *Citoyen au-dessus de tout soupçon.*

[78] Nelken, D. (ed) *White Collar Crime*, Aldershot, Dartmouth Publishing (1994)

[79] *Abus de biens sociaux: Délit dont se rendent coupables les dirigeants de sociétés par actions ou de S.A.R.L....Loi 24 juillet 1966. art. 425-(4) et 437-(3)*

[80] *ibid.* p. 10.

[81] *supra.* Nelken. note 78.

[82] *ibid.* Nelken. p.73.

[83] *ibid.* Nelken.

[84] Clarke, M. cited by Nelken, *supra.* p.77. 'Pursuing business crime as fraud, through criminal prosecution, though appropriate for a minority of cases is irrelevant and impossible for the majority.

Furthermore if criminal prosecution is pursued as the sole or even the principal means of control, it will fail to achieve anything more than public hysteria and expense, and the jailing (sic) of a few of the less lucky and competent villains'.

[85] *supra* Clarke.

[86] *ibid.*

[87] Ernest Saunders, former Chief Executive Officer of Guinness PLC was charged with 39 offences and was finally sentenced on 12 counts to five years imprisonment. This was reduced on appeal to two and a half years imprisonment.

[88] Bernard Tapie, former président directeur-général of Marseilles Football Club was sentenced to eighteen months imprisonment for tax fraud and thirty months (suspended) for fraud and corruption.

[89] Nick Leeson the 'rogue' trader who caused the collapse of Barings bank returned to Singapore voluntarily as he believed that in doing so and co-operating with the authorities he would receive a lighter sentence. Leeson received a total of six years imprisonment for a total of eleven charges. See further 'Leeson's Last Deal' 'Lucky' Nick Gambled on a Light Sentence in Singapore and Lost Again', *The Sunday Times*. 3 December 1995. p 13.

[90] Aubert, V. 'White Collar Crime and Social Structure' in Nelken, D. (ed) *White Collar Crime*. Aldershot, Dartmouth (1994) p.33.

[91] *ibid.* Aubert.

[92] *ibid.*

[93] *Op.cit* Sutherland.note. 54.

[94] *supra*. Aubert. note. 90. p.33

[95] Brants, C. 'The System's rigged-or is it?' *Crime, Law & Social Change* (1994), Vol. 21. pp103-125.

[96] *supra*. Brants. p.103

[97] *ibid.* p107

[98] *Op.cit* Brants. note 95. p.112. Outlines that during the early period of his study white collar crime was not perceived as a major threat to the stability of established social structures and the terms fraud and white collar crime were mutually exclusive. This is not, he argues, any longer the case.

[99] *Op.cit*. Rider, B. & Ashe, M. note 41. pp. 193-229.

[100] Levi, M. *Regulating Fraud. White-Collar Crime and the Criminal Process,* London, Tavistock Publications (1987)

[101] *supra* Rider note. 41. p.203.

[102] *ibid.* see also 'The Business of Crime and the Crimes of Business', *Covert Action Quarterly* (Fall 1996), No 58. pp. 24-31.

[103] *Op.cit*. Levi. note. 100.

[104] *ibid*. preface xviii.

[105] *ibid.* xix.

[106] *ibid.*

[107] e.g. Fraud and white-collar crime at xxii, 'rich man's law' xxvi, fraud at p.1. fraud and economic crime, p.31. commercial crime, pp. 75. commercial fraud, pp. 211-272.

[108] *ibid*. xxv.

[109] Savonna, E. 'Social change, organisation of crime and criminal future systems' in Hebenton, B & Thomas, T. *Policing Europe Co-operation, Conflict and Control*, New York, St.Martin's Press (1995).

[110] *supra*. Savonna. p. 155.

[111] The origins of this French word *entrepreneur* stem from the sixteenth century when individuals would contract themselves out to recruit mercenaries for principalities. Their methods were not always above suspicion and it is interesting to note that by the eighteenth century the term 'undertaker' in English had the same usage as *entrepreneur* in French. See further Ruggiero, V. *Organized and Corporate Crime in Europe Offers that Can't be Refused,* Aldershot, Dartmouth (1996) Chap. 3.

[112] For an assessment of current and emerging organised crime groups in UK. 'An Outline Assessment of the Threat and Impact by Organised Crime and Enterprise Crime Upon UK Interests', *NCIS Briefing Paper* (1994), NCIS. PO Box. 8000. London. SEll 5EN.

[113] *Op. cit*. Ruggiero. note 111.

[114] *supra.* Ruggiero. p. 44.

[115] Savonna, E. 'Mafia money-laundering versus Italian legislation', *The European Journal on Criminal Policy and Research* (1993), Vol. 1-3. pp. 31-55.

[116] Author interview with DC Glyn Jones. (Transcript supplied)

[117] *supra*. Savonna. pp. 53-54.

[118] *Op. cit*. Rider. note 59.

[119] *supra*. note 99. p. 204.
[120] *Op.cit.*
[121] *Op.cit*. note 59. p.90. Annex B.
[122] See further: Johnstone, P. 'Wire Frauds and the Criminal Justice Act 1993' *FT Fraud Report.* September 1997. pp 21-23. In this example a Russian citizen, Levin, infiltarted Citibank Corp and over a period of 2 years removed $10.7 million form accounts around the world without leaving his St.Petersburg residence.
[123] For an account see Kochan, N. & Pym, H. *The Guinness Affair,* London, Croom Helm (1987)
[124] e.g. 'The Strange Case of Didier Pineau-Valencience', *Chief Executive* (October 1995), pp 24-26.
[125] *Op.cit*. Bologna. note. 1.
[126] *supra*. p.2.
[127] *ibid.*
[128] *Op.cit*. Bologna. note. 1.
[129] *ibid*. p.11.
[130] *People v Chadwick*. 143. Cal 116. cited in Bolgna, *Op. cit.*
[131] *ibid*. p.16
[132] *Op.cit*. Bologna. note 1.
[133] *Michigan Criminal Law*. Chap. 86. Sec 1529. cited in Bologna, *Op.cit.*
[134] *ibid*. p.18.
[135] *The Investigation of Fraud in the Public Sector*, London, CIPFA (1994) 2nd edition. p.3.
[136] *Op.cit*. Reuvid. note 62. p 5.
[137] *ibid*. p.13
[138] Op.cit. Bologna. note 1.
[139] *ibid*. p81.
[140] *supra*. note 135. p 3.
[141] Clarke, M. 'Conversion, Fraud and the Politics of Morality'. *The Journal of Asset Protection and Financial Crime* (1994), Vol. 2. No. 1. 1994. pp. 37-48. at p44.
[142] Coleman, JW. 'Toward an Integrated Theory of White Collar Crime', *American Journal of Sociology* (September 1987), Vol. 93. No.2. pp. 154-186.
[143] *ibid*. p155.
[144] See further Clarke, M. *supra* note 141. who cites Clowes, Warburg, Slater and Cornfield investigations. p.45.
[145] Hirschi, T & Gottfredson, M. *Criminology* (1987), Vol. 25 No. 4. p.949. In Nelken. *Op.cit.* note 78.
[146] *ibid*. p.114.
[147] *ibid.*
[148] *ibid*. pp. 116-117.
[149] cited by Hirschi & Gottfredson. note. 145. p.116
[150] *Op.cit*. Aubert. note 90.
[151] *ibid*. p.117.
[152] *Op.cit*. Bologna. note 1.
[153] *ibid.* pp 201-204.
[154] *Op.cit*. Nelken. note 78.
[155] i) It is a contested subject. ii) are all white collar offences criminal. iii) can white collar crime be explained using the normal frameworks of criminological explanation. iv)risks of over explanation in accounts which relate it too closely to ordinary business behaviour. v) confusion over the best way to control- criminalise or regulate. vi) ambiguity over the re-definition of some behaviour that was not and now is criminal i.e. Insider Dealing. vii) regulation of white collar crime as the locus of a number of different awkward choices- risk taking in a capital market or a safer healthier work environment. i.e. Is there a reasonable level of pollution.
[156] *ibid*. p.84.
[157] Croall, H. 'Who is the White Collar Criminal', *British Journal of Criminology* (Spring 1989),Vol. 29. No. 2. pp. 157-174.
[158] *ibid*. p.173.
[159] Wheeler, S. & Rothman, M. 'The Organization as a Weapon in White Collar Crime', *Michigan Law Review*. Vol. 80. pp 1403-1426. at p.213 in Nelken. *Op.cit*. note. 81.
[160] Aubert, V. ' White Collar Crime and Social Structure' in Geis, G. & Maier, RF. (eds) *White Collar Crime: Offences in Business, Politics and the Professions-Classic and Contemporary Views,* New York, Free Press, Collier and Macmillan (1977) Revised Edition.
[161] *ibid*. p. 88.

[162] *Op.cit.* Croall. note. 3.
[163] *ibid.* p.9.
[164] *Op.cit.* Raphael. note. 50. pp 9-11.
[165] *ibid.* p.11.

# Chapter 2

# Police Investigations in England & Wales and France

## 2.1 Introduction

This chapter examines the formation of the police forces of France and England. Initially, in order to contextualise the role of the specialist white collar departments, the recruitment, training and accountability of the mainstream forces from each jurisdiction are discussed. Having established the similarities and differences that exist in policing within both countries this chapter then progresses to consideration of the development and current role of the specialist departments which are tasked with investigating white collar crimes.

In the conclusion to the previous chapter it was established that there is a type of criminal conduct referred to as white collar crime that is hard to define. The police forces of France and England are frequently frustrated in their attempts to detect white collar offences and they are often compounded by the lack of understanding of each countries' legal systems and the channels that exist for mutual co-operation and the exchange of data. In the conclusion to each section and then again as an overall conclusion these matters are addressed and suggestions are made for the future.

## 2.2 The Accusatorial model and the Inquisitorial model

If it is expected that investigating officers and lawyers from different countries are to effectively co-operate over criminal matters that cross each others borders, then a sound grasp of the alternative jurisdiction's legal framework is, I would propose, an absolute necessity. In fact there is very little training in respect of this matter as far as police officers are concerned. As is shown later in this chapter, for the English police officer there are very few opportunities, and none during initial training, for the

constable to have exposure to alternative legal systems. This may change in the near future as Parliament has now introduced a Human Rights Act into the English law. However, this Act will not be effective until some time during 2000 and for the present there is no formal framework to accommodate the application of the European Convention on Human Rights into everyday policing in England. In the section on recruitment and training of the French police it is seen that during the training of the officer ranks new recruits spend considerable time familiarising themselves with the policing implications of Human Rights legislation. This issue is one of a number that are contrasted and compared throughout this chapter. These issues demonstrate both the similarities and differences that exist in the structure and role of policing in England and France. However, more fundamental to mutual co-operation is the following question; do the police from each jurisdiction understand what is the accusatorial model and conversely what is the inquisitorial model?

The Anglo-Saxon accusatorial model is also referred to as the adversarial model. In previous centuries a person who been wronged would seek to clear their good name by challenging a person to combat and in the case of women they would be represented. Each party, or representative, to the dispute would then challenge each other physically. More recently the combat has been 'fought out' in the courtroom and the physical combat has been replaced by a verbal battle between adversaries. There is no procedural code within the accusatorial model and the role of the judge resembles an umpire who is charged with ensuring that the combatants challenge each other by means of the agreed rules. The judges are not professional judges in that they do not qualify as a judge through training and examination. They are appointed from the ranks of the lawyers who have learnt the role and function of the courtroom through experience and practice.

By contrast the inquisitorial model is a system which has far greater judicial involvement and the roles of the participants are dictated by the provisions of a Code. Under the accusatorial system each party to the dispute may cross-examine the witnesses. Police investigations are conducted in accordance with the Code of Criminal Procedure and in the case of complex investigations, they may be conducted by a professional judge. The term inquisition implies examination and in the courtroom the judge plays an active role in asking specific questions of the witnesses and the defendant. This basic analysis demonstrates that there are considerable differences in the legal frameworks of France and England and it is from these different positions that the police forces have evolved.

### 2.3.1 England

Policing in England is decentralised and regional. This model was developed in contrast with the police forces of mainland Europe, which had followed the French pattern of centralised forces or forces with accountability to the relevant Minister of State rather than the local community. At the turn of this century specialist plain clothes departments were formed and immediately after the second world war a specialist commercial branch was created in London. White collar crime is now investigated by fraud squad officers and their selection, training and powers to gather evidence will be addressed in this chapter after the general powers of arrest, the questioning of suspects, access to legal advice and the 'right to silence' have been examined and the divergent practices in France are introduced. The conclusion to this section on the police in England focuses on the considerable degree of power and autonomy that is vested in the English police officer, who remains the primary agent for the investigation of white collar offences.

The establishment of a police force in England was in response to industrialisation and the resultant growth in city dwelling. The increasing population produced public order situations that required an organised and formal response.[1] During the eighteenth century policing was arranged on a local basis and comprised of night watchmen, rural constables and Justices of the Peace. One such magistrate, Henry Fielding, formed the 'Bow Street Runners' as a professional team of criminal investigators.[2] This did not lead to universal appreciation of the merits of forming a police force and this mistrust was compounded by the suspicion that was held of the already established policing system in France.[3]

When the model for a police force was finally secured and formalised in England it was the antithesis of the French police. This is not so unusual when one considers that England had recently been at war with France and was no doubt adverse to accepting a role model from a previous enemy. Also, when later in this chapter the formation of the French police is discussed it becomes clear that policing in France has always been seen as a state activity. There is no concept of 'policing by consent' a term that has been associated with policing in England. Furthermore, the *Gendarmerie* are historically the 'people's army, that is an army of the state who provided protection to citizens in the countryside. The English police have never been associated with the military. Napoleon established the civilian police force in France and it could be argued that this was so in order that whilst he was campaigning overseas, at times with the domestic military police, there was an effective national force which could ensure that any domestic problems would be dealt with in the absence of the Emperor. On the basis of these two observations alone one could posit the argument that any attempts to mirror the continental model of policing would be likely to fail in England during the early 19th century.

In 1829 The Metropolitan Police Act was introduced by the Home Secretary, Robert Peel, and its enactment created the modern police force, initially in London, by the use of uniformed officers under the control of two commissioners[4] and then through the 1856 County and Borough Police Act. This force, though supervised by the Home Office, was administered locally. The evolving model for the Anglo-Saxon police was a de-centralised force, which was unarmed, locally appointed and accountable to the citizens that they policed. In direct contrast with the Continental model, the English forces were non-political and non-military.

Complex investigations into crimes were originally conducted by senior officers who directed local constables. In 1878 a Criminal Investigation Department was formed and in response to the increasing numbers of bombings conducted by the Irish 'dynamiters' a new political branch, the 'Special Branch', of the police was established in 1887. The number of officers in the police increased progressively throughout the remainder of the nineteenth century until a number of constables went on strike in 1918. This led to the immediate sacking of all those police officers who took part.[5]

In 1939 there were still 183 separate police forces in England. This situation remained until the amalgamation[6] of these forces to the present 43. There are currently 126,877 officers serving in the police[7] who are appointed to prevent and detect crime and maintain public order. The powers to conduct these functions derive from common law and statute law. The main statutes affecting contemporary policing are the Police Act 1964, the Police and Criminal Evidence Act 1984 and the Police Act 1997.[8]

### 2.3.2 Recruitment and training

Recruitment into the police service is a single point entry system irrespective of the academic qualifications of the new recruit. There is a Graduate Entry Scheme,[9] which guarantees rapid promotion, to the rank of Sergeant, to graduates provided they successfully complete the probationary period[10] and then pass the qualifying examination. On completion of twelve months service in this rank and passing the qualifying examination to the rank of Inspector, a graduate may be promoted to this rank. All promotions above this level are on merit and are not related to academic entry status.[11]

Initial training is conducted at a regional training centre where the new recruit will learn basic police powers. This period[12] will include a brief overview of law relevant to a patrol officer as well as an introduction to criminal law and traffic law. During the probationary period of 24 months, the new recruit will attend training courses run by her force and will be assessed on her suitability to patrol unsupervised. There is in total 31 weeks of formal training during this two year period.[13] On successful completion of the probationary period officers may apply for a posting to a specialist department.

### 2.3.3 Powers of investigation

The investigative powers of the police are defined in the Police and Criminal Evidence Act 1984, PACE.[14] This act sought to clearly define the role of the police when investigating crimes and was accompanied by Codes of Practice, designed to be guidelines for the police and the public. This act caused a complete review of the training of police officers and had particular implications for officers acting as custody officer, who should be of the rank of sergeant, and the senior officer rank of superintendent. The custody sergeant is responsible for the initial decision to detain a person after arrest and is accountable for his welfare whilst in custody.[15]

Superintendent's must authorise detention of suspects who have not been charged, for those periods of detention beyond the initial 24 hours and up to 36 hours.[16]

The rank of superintendent is equivalent with that of *commissaire* in France. However to hold that rank in France, with very few exceptions, a recruit must enter the police service as a graduate. Under the provisions of Code C of the Police and Criminal Evidence Act 1984, PACE, a superintendent is authorised to suspend the right of access to legal advice and the right that a suspect has to have a person informed of his detention. While there is no requirement on officers in the English police to hold a relevant degree to enter the police service it is perhaps a little surprising, given the responsibility that superintendents have for decision making in general and specifically in authorising questions relating to civil rights infringements, that they can enter the police service with no academic qualifications whatsoever.

Minor crimes are investigated by uniform patrol officers[17] and more serious offences will be investigated by officers of the CID. Specific crimes may be passed on to specialist investigation units.[18] White collar crimes are categorised as a specialist crime and will be dealt with by officers from the fraud squad,[19] White Collar Crimes Unit or Commercial Branch.[20] In 1986 there were a total of 588 police officers seconded for the investigation of fraud.[21] This figure is now 799.[22]

### 2.3.4 Detective training

Initial training of detectives consists of attendance at a regional training centre and the successful completion of a seven week course. This course contains elements of evidence gathering and statement taking, as well as the interviewing of suspects and the compilation of a dossier of evidence for presentation to the Crown Prosecution Service. Course attendees then return to their own forces and hold the rank of detective. Most frequently these officers will then serve as 'divisional detectives'

dealing with the range of crimes which occur locally. Once an officer has experienced of a range of criminal investigation, he may apply for secondment to a specialist investigation unit. Under the present arrangements that exist these specialists will then attend further training at regional detective training schools, courses here will range from a few days to a number of weeks in duration.[23]

In 1946 the Metropolitan Police formed a Company Fraud Department[24] which comprises officers solely from the Metropolitan Police force.[25] This department was formed in response to the increasing opportunities that arose for fraudsters to operate in the developing markets after the second world war. Previously complex frauds had been investigated by divisional detectives who conducted fraud investigations alongside their other investigation commitments.[26] Due to the small number of officers involved in the investigation of complex financial frauds, the role of the police has traditionally been reactive.[27] By 1987 the average 'at risk' amount dealt with by each member of the Company Fraud Department had risen to over £5 million.[28] The majority of white collar offences that would be classified as serious[29] occur within 'The Square Mile' of the City of London[30], for largely historical reasons this one square mile of London is policed independently from the rest of the metropolis by the City Police force. Its first priority is the prevention of terrorism, its second priority is the prevention and detection of financial fraud. This can be contrasted with the policing priorities of the provincial forces where the white collar criminal stands a far better chance of conducting illegal activities without detection as these forces are set up to deal with public order matters and the less serious criminal offences. However, a general increase[31] in the number of offences of serious fraud reported throughout England has seen a growth in the number of officers now serving in commercial fraud investigation departments.[32]

Officers who apply for a posting to the fraud squad[33] will be interviewed by a panel of senior officers after the submission of a detailed application form, this is followed by a written personal overview of what that officer perceives the role of a fraud investigator to encompass. The successful applicant will then attend a course of training at a regional training centre.[34]

The training of detectives within England is becoming more fragmented. This is particularly apparent within the specific field of white collar investigations. At present, officers from the Metropolitan police who wish to work in CID, no longer attend a specific training course at Hendon,[35] but receive all their training at a local divisional level. The current format is not dissimilar to National Vocational Qualification training, where officers new to CID keep a 'record of achievement' which is endorsed by their Detective Sergeant. This will incorporate such skills as having completed a taped interview with a suspect and having completed crime inquiries. This style of training is not without its critics, many of whom feel there is no substitute for a thorough grounding in criminal law and evidence gathering.[36]

Training co-ordination and the national standard is the remit of the National Crime Faculty.[37] This department is responsible for the design of detective training courses, both initial training and at advanced level. The initial detective training course, the National Foundation Course, is then conducted at one of five regional schools.[38] Higher level management courses and the management of serious crime courses also comply with a national standards. Courses are again conducted at the regional centres.[39]

The Metropolitan Police run two courses that are specifically aimed at the training of officers for the investigation of financial and company frauds, these are the Financial Investigation Course, which lasts for one week and the Fraud and Financial

Investigation Course, which lasts for two weeks. These courses are not restricted to officers who are posted to the fraud squad and frequently participants may be uniformed as well as detective personnel. The basis of the course is that it services the requirements of divisional, specialist and major crime inquiries. Attendants are required to complete a course of pre-reading prior to attendance and the opening morning includes an examination on the applicable law. At the conclusion of the course officers are then entered on the Register of Financial Investigators.[40]

The two week course focuses on money laundering and the applicable legislation. Officers attending are also required to conduct an in depth financial investigation report. The basis for this report will be work conducted on a target fraudster prior to commencement of the course. The financial profiling of suspects is then developed on the course and specific financial investigation skills are discussed amongst participants and guest speakers.[41]

Provincial police forces send their fraud squad officers to one of three specialist training schools.[42] Participants are sent pre-attendance reading material and on arrival sit a multiple choice exam based on the law relating to fraud offences. The remainder of the three week course is facilitation based and is supplemented by numerous guest speakers. Course content includes an overview of the work of Official Receivers, the DTI and an introduction to company legislation. This is followed by a detailed study of investigation techniques and the preparation and compilation of fraud files. This is supplemented by lectures on accounting, banking and the overlap between the work of the prosecution agencies and the regulators. The design of these courses was a joint project involving the training schools at Birmingham, Wakefield and the Business School at Liverpool John Moores University. Attendance is not limited to serving police officers and other participants are encouraged to attend.[43] These courses are also linked to national qualifications

and lead to accreditation towards the Diploma in Financial Fraud and the Masters Degree in Financial Fraud.[44] The 'ideal' course candidate will have been appointed to the fraud squad six months prior to attendance. This is rarely achieved.[45]

### 2.3.5 White collar crime investigations

There are a number of public sector agencies in England who conduct investigations into serious white collar crimes[46] and they have a wide range of powers available to them to help manage inquiries. Criminal investigations are defined[47] as an investigation conducted by police officers with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it. The functions of the police are divided between the Officer in Charge, the Investigator and the Disclosure Officer[48] and the focus of investigations is that all reasonable lines of inquiry are pursued.[49]

The principal role of the police is to gather evidence in response to an allegation. In fraud cases the victim is frequently asked to gather further information themselves and report back to the police again.[50] During this initial stage of an investigation it may not be clear whether a criminal offence has been committed. If further evidence is available, the investigating police officer will then decide whether to proceed with further inquiries on behalf of the victim. It is true to say that in the case of highly complex and serious frauds, officers will always consult with their supervisors. They may also choose to consult the specialist departments within the Crown Prosecution Service. However, there is no statutory requirement on any investigating police office to consult internally or externally.

The powers to gather evidence and to conduct an investigation are subject to the provisions of The Police and Criminal Evidence Act 1984, PACE.[51] Section 8 covers the general provisions in respect of the search and seizure of material and on

application before a magistrate a constable may apply for a search warrant. The criteria for issue of a warrant are that (a) a serious arrestable offence has been committed[52] and that there is material on premises specified in the application which is likely to be of substantial value (whether by itself or together with other material) to the investigation and that the material is likely to be relevant evidence. This material may not consist of or include items subject to legal privilege,[53] excluded material,[54] or special production material,[55] and that any of the conditions specified in subsection (3)[56] apply. If all these criteria are met then a magistrate may issue a warrant authorising entry to and the searching of, the named premises.

### 2.3.6 Obtaining evidence in serious fraud inquiries

The provisions relating to the obtaining of material subject to special procedure are of particular relevance for the investigator of serious white collar crimes and the legislature has recognised the need to deal with these matters in a particular manner to protect suspects, investigators, and those placed in a fiduciary relationship with suspects or victims. There are five categories of material which are relevant to complex investigations;

- material covered by statutory warrant powers pre-PACE,
- material obtained under S.8. warrants of the 1984 Act,
- special procedure material defined by S.14.1984 Act,
- excluded material defined by Sections 11,12 and 13 1984 Act and
- legally privileged material.[57]

A warrant to search and seize material subject to special procedure material may be obtained under Section 9 Schedule 1 of PACE[58]. Applications are made by a constable to a circuit judge and the application is subject to considerable scrutiny. The police are not encouraged to apply in the absence of the suspect, ex *parte,* without substantial grounds for doing so.[59] It is possible for the police to circumvent

these procedures under the general arrest conditions, whereby if an arrest is made for a serious fraud the arresting officers may conduct a search of the premises which the arrested person has just left.[60]

The introduction of the provisions which control the application and issuing of warrants to search for and seize special material in fraud cases was largely in response to the growing number of mortgage frauds which arose at the time of the economic boom in the early 1980s. The opportunity to commit large scale frauds prompted the government to review the law and increase the power of the investigating authorities to deal effectively with increasing numbers of white collar crimes.[61] The most useful weapon in the armoury for the police when investigating serious frauds are the conditions contained in Section 14.[62] Prior to this provision the police were restricted in their inquiries as there was no overlap between the conditions under which material could be seized for investigations into one offence and another, and in respect of financial investigations particularly the restrictive conditions of the Bankers' Books Evidence Act 1879, meant that access to a bank account could only be obtained once charges had been laid.[63]

S 14 (2) Art (16) (2) applies to business and financial information which is not legally privileged nor excluded material. It therefore includes material in the possession of a person who acquired it or created it in the course of their trade, business or profession. An application under Schedule 1 may be for the production of material,[64] which will take the form of an *inter partes* hearing,[65] at which a petition to resist a production order may be made. Applications for a warrant are generally made *ex parte*.[66] There is a requirement on the police that prior to an application under Schedule 1, they must seek to obtain the material by consent. This may be effective in limited circumstances, however, it would be potentially prejudicial to an investigation if the party from whom the information was sought were always aware

in advance of the investigation. In the case of banks and financial institutions it would be rare for them to voluntarily divulge confidential information.

If the application for an order is successful then the party believed to be in possession of the material sought is required to produce it to the police for them to take away or allow access to it within seven days of the order.[67] Failure to comply with the order is an offence contrary to S.1 of the Contempt of Court Act 1981. If a warrant has been issued the subsequent search of premises must be conducted by an officer not below the rank of Inspector,[68] who is responsible for the conduct of the search and the securing of premises on conclusion of the search. If legally privileged material is inadvertently seized it must be returned.

The admissibility of material obtained as evidence is governed by the provisions of the developed common law and ss 76 and 78 of PACE. Whereas it is incumbent on the police to return any legally privileged material, the method by which evidence is obtained, whether lawful or not, may not necessarily render that evidence inadmissible. The collation of evidence by the police in serious white collar crimes will frequently involve the assimilation of financial records and correspondence between suspects and business associates. It may also be necessary to obtain evidence by covert means, particularly if the police operation is in response to informant information and the source of the information needs to be protected.

### 2.3.7 Covert operations and privacy

The definition of white collar crime proposed in chapter 1 states that the criminal offender will be a member of the business community. The fact that the criminal participant is employed in business means that many of those committing white collar crimes will possess specialist skills as well as academic and professional qualifications. The account above of the recruitment and training of police officers

indicates that the police in England may be considerably disadvantaged in two ways. Firstly they can lack academic and professional qualifications and secondly they lack training in law relating to human rights. This can have thoroughly damaging implications for the status of the police locally and transnationally.

The following section deals with the area of covert operations that *de facto* may involve human rights issues. Later in this thesis the theme of Human Rights is discussed in greater detail, this part demonstrates clearly the position as it currently exists in respect of police operations in England and the wide interpretation given by the Appeal Courts to current statutory provisions.

There is currently no privacy law in England, although this is high on the political agenda and may be subject to legislation in the near future. At the present time the law[69] permits the use of covert surveillance devices by the police. The provisions of the new Police Act 1997 are a means of reinforcing the jurisprudence that has consistently endorsed the use of covert means to obtain evidence in criminal investigations. Under English law the only form of redress available to the party whose privacy may have been invaded is a civil action against the police for trespass. Modern surveillance equipment frequently allows observations to be conducted without a trespass being committed.[70] The sophistication of modern surveillance equipment is such that it is possible for the police to listen to private conversations without the need for the authority which is required to place a listening device inside a property.[71] Authority to use covert listening, recording and transmitting equipment, which includes tracking devices, must be obtained from an officer of the rank of Assistant Chief Constable.[72] The police are also permitted to conduct covert visual observations of an individual. If these are to be at the place where the suspect resides, then the same provisions with regard to authority apply, permission must be granted by the Assistant Chief Constable.[73]

Evidence may also be secured by other means that may in themselves be illegal. This will not necessarily render the evidence inadmissible at a subsequent trial.[74] The law is stated by Crompton J 'It matters not how you get it; if you steal it even, it would be admissible in evidence'.[75] This proposal has been followed in a number of cases since[76] and clearly reinforces the established discretionary powers that a judge has in all proceedings. The use of judicial discretion to allow or exclude unfairly obtained evidence came before the House of Lords in *R v Sang*[77] where the defendant had been coaxed into a conspiracy to utter forged banknotes by a police informant. The informant had allegedly been acting under the direction of the police. At the preliminary examination of evidence stage, *voir dire*, it was submitted that the trial judge had the discretion to exclude the prosecution evidence if the judge was satisfied it was secured by the use of a police officer who employed overt tempting tactics, *agent provocateur*. The House of Lords unanimously rejected the submissions and endorsed the ruling of the trial judge. There was no defence of entrapment at English law. All trial judges have the absolute authority to exercise discretion as to the admissibility of evidence under the provisions of S.78 PACE.[78] The scope of this section applies to any evidence on which the prosecution proposes to rely which is more extensive than those issues dealt with in *R v Sang* at common law.[79]

The obtaining of evidence unregulated by law is not without bounds and the police may find that evidence obtained by a trick or deception may not subsequently be tendered in a trial. The distinction appears to exist between the actions of the police involved in the undercover operation and the actions of the defendant. In *R v Christou and Wright*[80] the Metropolitan Police rented a shop and opened a jewelry business which purchased stolen goods. Transactions in the shop were recorded on video camera. The Court of Appeal found that the actions of the police were appropriate and the evidence obtained was rightly not excluded by the trial judge.

The distinction lay in the actions of the defendants who were held to have tricked themselves and not as they alleged to have been tricked by the police. *R v Governor of Pentonville Prison, ex parte Chinoy*[81] concerned a covert police operation which involved the setting up of a bank account to launder the proceeds of drug trafficking transactions. The Divisional Court held that although the methods employed involved entrapment and were, therefore, something which should be taken into consideration by the trial judge when exercising his discretion under S. 78 PACE, the circumstances of the operation did not warrant the exclusion of the evidence. The Court confirmed that certain types of criminal activities required the police to employ underhand and sometimes illegal means to secure evidence and convictions.

In 1994 in *R v Smurthwaite* and *R v Gill*[82] undercover police officers posed as contract killers in response to a request from both defendants to hire killers to murder their wives. The Court of Appeal endorsed the admission of the evidence of the police officers and considered the relevant factors when applying S.78 of PACE, these included, (i) whether the undercover officer was acting as an *agent provocateur*, i.e. had the officer enticed the accused to commit an offence they otherwise would not have committed, (ii) the nature of the entrapment, (iii) whether the evidence relates to admissions of a completed offence or relates to the actual commission of an offence, (iv) how active or passive the officer's role was in obtaining the evidence, (v) whether there is an unassailable record of what occurred or whether it is strongly corroborated' and (vi) whether the officer abused his role to ask questions which ought properly have been asked as a police officer in accordance with the Codes of Practice.

In *R v Khan*[83] the police planted a bugging device outside a house which was regularly visited by the defendant. This device was placed without the knowledge or consent of the house owner and Khan was recorded holding incriminating

conversations about the importation of heroin. Khan argued that the evidence obtained by use of the listening device was inadmissible as the police had no statutory authority to place the equipment on the premises. He contended that this was a trespass and a breach of his rights under Art. 8 of the European Convention of Human Rights[84]. He further argued that if the recordings were admissible they should be excluded under the provisions of S. 78 PACE. The Court of Appeal acknowledge there had been a trespass and that some damage had occurred as a result of the planting of the listening device. The Court upheld the decision of the trial judge not to exclude the evidence as the appeal Court found the factors alleged were of little significance and the strong public interest in the detection of crime and the seriousness of the offences outweighed the minor damage and invasion of privacy issues. Khan appealed to the House of Lords. Their Lordships relied on the previous decision in *R v Sang*[85] and found that Sang might only be inapplicable if there were a right to privacy in English law, since there is no such right the evidence obtained was rightly held to be admissible. On the second point, would the inclusion of the evidence be prejudicial to the fairness of the proceedings, the House of Lords felt that the manner in which the evidence was obtained was such that even if it were possible to breach Art 8 ECHR the evidence should not have been excluded. It would of course be open to the House of Lords, if the provisions of the ECHR were part of English law, to find that the provisions of S.78 PACE allow the trial judge a discretion which is in accordance with the ECHR[86].

By comparison the position in France is subject to far greater scrutiny and the actions of the police are constantly subject to the authority of an investigating magistrate who is responsible for the investigation of all serious crimes. In the context of those offences which would be investigated by the fraud squad in France a specialist investigating judge, discussed in chapter 3, would have statutory authority to take control of the investigation and direct the police actions.

There will always be a number of barriers to effective policing and to police offences that transcend national borders increases the potential problems significantly, as Tupman has stated, 'Policing is more of an art than a craft and difficult to teach in a formal way... No Western European police education system relies solely on formal lecturing or classroom work to train constables'[87]. As a former police officer I would agree with these comments entirely. In addition it should be added that in the context of investigating complex white collar offences it is difficult to establish credibility with police officers from France when their level of training, understanding and application of fundamental Human Rights issues can appear to surpass the judiciary of this country.

### 2.3.8 Arrest

All police officers in England have the power to arrest and this constitutes the first procedure in a sequence of events which may lead to a suspect being brought before a court to answer to an allegation. Arrest is the detention of a person and the securing of that person at the police station for interview with a view to gathering evidence by questioning. It has been defined as 'The apprehension or restraining of a person in order to detain him at a police station while the alleged or suspected crime is investigated and that in order that he be forthcoming to answer an alleged or suspected crime'.[88]

The role of arrest has been modified over the years since the formation of a police force. The present position is provided for at statute in PACE. The sentiments contained in the function of arrest are, however, contained in the rulings of the House of Lords in the case of *Holgate-Mohammed V Duke*.[89] In this case a police officer arrested a burglary suspect solely on the grounds that by securing his attendance at the police station the suspect would be more likely to confess to the offence. The House of Lords held that the police officer was authorised to consider the coercive

atmosphere of the police station and he was rightly entitled to take that into consideration when effecting the arrest.

This interpretation would not be possible in France as the situation itself could not exist in the first place. The following section on France describes more fully the power of police officers to arrest in France, however, for the purposes of comparison here it is the case that in order to arrest in France the police must either have the authority of a professionally qualified judge who operates as an examining magistrate or the police themselves must be in immediate pursuit of a criminal who has been 'caught in the act'. It follows therefore that the ability of a police officer to consider and then weigh up the likely outcome of the coercive measures available to them is a function that can be exercised by the English police officer but not his counterpart in France. Again it is relevant to point out that it is the police officers from this jurisdiction that do not require formal qualifications in order to hold the office of Detective and be charged with the investigation of complex frauds and associated white collar offences.

The power to arrest exists both at common law and by statutory provision. There are two categories of offences where a power to arrest exists and four powers by which an arrest may be made. Offences committed by the white collar offender will often be offences contrary to the Theft Act 1968. This will therefore, be an offence under the first category of offences and the first category of powers to arrest. These offences are classified as *arrestable offences*. Whereas the civilian may arrest if they see a person committing one of these serious offences a police officer in England has the additional power to arrest if she suspects a person of having committed an arrestable offence. What determines an arrestable offence is the range and severity of the actual offence and/or the punishment that offence attracts. The statutory power therefore allows a police officer to make an arrest summarily, without a warrant, and

on suspicion that the offender is that person detained. It is sufficient that the police officer suspects that an arrestable offence is about to be committed or that one has been committed and that the officer reasonably suspects that person to be guilty of that offence.

The list of offences included in the category of arrestable offences are listed in Section 24 of PACE. The section provides that, *inter alia*, an offence which attracts a potential sentence of more than five years imprisonment on first conviction will, *per se*, be an arrestable offence.[90]

A police officer may also arrest without warrant under the provisions of Section 25 PACE. This power is frequently referred to as the '*general arrest conditions*' power. This allows a police officer to arrest for minor offences when the suspect refuses to provide sufficient details to allow the officer to ensure the service of a summons. The third power of arrest derives from those that existed before the introduction of PACE, these are the 'preserved powers of arrest'.[91] The final category is those powers which have come into effect post PACE[92]. The remaining common law power of arrest is for a breach of the peace.

The range of powers available to arrest in England are far broader than those available to the police in France and most importantly it is the discretion to inhibit a suspects liberty, that is so evident in this country and lacking in France, that marks out a fundamental difference in attitudes towards the power that should be vested in the police.

Upon arrest the detained person must be informed of the reason for his arrest as soon as it is practicable for the arresting officer to do so.[93] The suspect must be informed at this time that he is not obliged to answer any questions put by the

arresting officer, however a failure to do so may result in this being commented upon at any subsequent proceedings. This caution, which has been subject to modification,[94] does not remove the right to silence at any time and it remains a fundamental principle of English law that an accused has the right not to incriminate themselves.

This concept is distinctly different from the position in France where the very nature of the inquisitorial process is to seek the truth by examination. It is in the interests of the arrested party to answer questions, whether at the time of arrest or subsequently when examined by an investigating magistrate. It can be appreciated from this that when officers from each jurisdiction are involved in joint operations the provisions of a right to silence can cause considerable misunderstanding. The French police officer will expect that a suspect will answer questions and until recently, when the new penal code of 1994 forced changes to protect the rights of suspects during interrogation, French police officers could detain a suspect until they gave an account of the events. These diametrically opposed starting points, when entering an interview, have the potential to cause evidential problems at trial when officers from both countries are compiling evidence.

The protections afforded to a suspect under English law are such that, in the case of a complex white collar crime investigation, it may well be in the interests of the police to delay arrest until such time as the alleged involvement of the accused is established sufficiently for a charge to be laid, regardless of whether any answers are given to any questions put during an interview. Should a suspect then remain silent then under the provisions of the Criminal Justice and Public Order Act 1984 inferences may be drawn and commented upon at trial. In *R v Cowan; R v Gayle; R v Ricciardi*,[95] the scope of Sec.34 CJPOA 1994 was tested. The case concerned three appeals against conviction following jury trials. Cowan had been convicted of

unlawful wounding and assault occasioning actual bodily harm. Gayle was convicted of attempting to pervert the course of justice and Ricciardi had been convicted of attempt theft. All had remained silent when interviewed by the police and during trial. The appeals had been brought as each defendant alleged that the trial judges had failed to give adequate directions to the juries under the provisions of Sec.35. Prior to the implementation of this section a defendant could rely on the established principle that no jury could draw any inferences from a defendant who chose to remain silent. The appellate court held that the clear intention of parliament was to change the previous law, however the right to silence had not been abolished.[96] The argument that this new provision had altered the burden of proof was dismissed as misconceived and it remained incumbent upon the prosecution to establish a *prima facie* case and prove this to the required standard. No one could be convicted solely because of their silence. Their Lordships then highlighted five essentials which the trial judge should consider when directing the jury on inferences from silence[97] and they concluded that the Court of Appeal would not lightly interfere with a trial judge's discretion when directing juries on the issue of inferences to be drawn from silence. Accordingly the trial judges for Cowan and Gayle had failed to correctly give adequate directions to the jury and the appeals were allowed. In the case of Ricciardi, the trial judge had directed the jury appropriately and the appeal was dismissed.

### 2.3.9 Police questioning

In England the questioning of suspects by the police will normally be conducted at a police station and this should commence as soon as possible after the completion of formalities which ensure that the reason for that persons detention is valid and lawful.[98] It is essential that the officer responsible for the authorisation of detention of the suspect is not involved in the inquiry. Due to the specialised nature of white collar fraud inquiries this is highly unlikely. However, a clear separation between the

investigative and custodial functions is fundamental. On arrival at the police station the detention of the suspect will be authorised to secure or preserve evidence or to obtain it by questioning. Under the provisions of S.41 of PACE the police then have 24 hours during which they may detain without charge or release. Detention beyond 24 hours is only permissible in respect of 'serious arrestable offences', as defined in s. 116. Serious frauds may fall into this category of offence if the financial gain to any person is substantial and there is serious financial loss to any person.[99] In order to detain a suspect beyond the prescribed period of 24 hours a superintendent must authorise the continued detention. This extends to a maximum of a further 12 hours and any detention beyond these 36 hours is only permissible if a warrant of further detention is issued by a magistrate.[100]

In France it is the J.I., not the police or an independent civil magistrate, who has the authority to detain a suspect. This power has been the cause of considerable criticism over recent years in France and is the subject of a proposed legislative change. The role, powers and proposed changes to the office of examining magistrate are considered in detail in the following chapter.

### 2.3.10 The suspect's rights

The detainee is entitled to inform someone of his arrest and consult with a solicitor[101] and it is only in exceptional circumstances that these rights to notify and consult with a legal representative may be delayed. After 36 hours of detention the right to delay notification ceases. This coincides with the period of further detention at which point any further detention must be authorised by the issuing of a warrant.[102] The right to notify a person of the detainee's whereabouts is different from the right which an arrested person has to communicate, by telephone or letter. The authority to deny or delay this right is delegated to an officer of the rank of inspector and unlike

conversations with a legal representative the police are entitled to listen to telephone conversations or read any correspondence subject to these provisions.[103]

The right to legal advice is unqualified in respect of suspects detained for offences that are not classified as serious arrestable offences. On request these detainees may consult privately with a solicitor at any time.[104] The person detained on suspicion of having committed a serious arrestable offence has a qualified right to consult with a solicitor. This is qualified as it may be subject to delay[105] and may also be subject to the presence of a uniformed officer.[106] In serious fraud inquiries the suspect may attend the police station by appointment, in these instances the police are not obliged to inform the attendee of his rights until, and unless, at a point in the meeting the interviewing officer formulates the opinion that the party is now a suspect. If this stage is not reached then the suspect remains a volunteer and is free to leave at any time. The voluntary attendee has an unrestricted right to consult with a solicitor as they are not in detention. There is no obligation, however, on the police to inform these parties that they are entitled to consult with a legal advisor.[107]

In *R v Samuel*[108] Hodgson. J. suggested that,

> '... persons detained by the police are frequently not very clever and the expectation that one [of the conditions subject to Sec. 56 (Art. 57) (I) to (v) PACE 1984] will be brought about in this way seems to contemplate a degree of intelligence and sophistication in persons detained, and perhaps a naiveté and lack of common sense in solicitors, which we doubt often occurs. When and if it does, we think it would have to have reference to the specific person detained. The archetype would, we imagine, be the sophisticated criminal who is known or suspected of being a member of a gang of criminals'[109].

These sentiments may indeed be apposite in the majority of cases. The white collar crime investigator will invariably be dealing with the few exceptions that exist. These offenders are frequently intelligent, educated and holders of professional qualifications.

### 2.3.11 Conducting interviews

In the case of inquiries into complex white collar offences, the investigating officers will frequently prepare written questions in advance of the taped interview. This method is advantageous for the suspect if he or his solicitor is given a copy of the questions in advance. It is also advantageous to the investigating officers as the complexity of serious frauds will often require questioning which spans considerable periods of time and transactions which may have taken place in a number of jurisdictions. The subsequent transcript of an interview will be appreciably more straightforward and more palatable to a jury if the questioning flows and follows a logical pattern.

The questioning of detainees is controlled by the provisions of PACE[110] which have been developed in the *Codes of Practice*.[111] Breach of the provisions will not automatically render the evidence obtained as inadmissible, however, the wide ranging discretion available to the trial judge is more likely to be exercised to preclude evidence obtained in contravention of these provisions than in any other area of evidence gathering. The overriding principles are that an investigating officer must have reasonable grounds to suspect that the detainee has committed an offence and that the officer wishes to interview them. What determines an interview is outlined in paragraph 10.1. Code C. The Codes are not of statutory authority though and the courts are free to interpret when an investigating officer has conducted an interview.

On commencement of the interview the interviewing officer will remind the suspect that he is under caution. If the officer fails to administer the caution, upon arrest or at the commencement of the interview then the subsequent interview, including any admissions made, may be deemed inadmissible at trial. This is of particular importance to the officer investigating serious white collar offences as the suspect may have attended the police station voluntarily[112] and as a result of what they have said now become a suspect. If, at that point in time, when the interviewing officer suspects the person in attendance to have committed an offence, they omit to administer the caution, then any subsequent conversations are likely to be held as inadmissible.[113]

### 2.3.12 Confessions

The admission of a confession will be precluded where it has been obtained by oppression or it has been obtained in circumstances which are likely to render the confession unreliable.[114] If an interview is not excluded under the provisions of Sec. 76. it may be excluded under Sec.78. and the application of these provisions will be applied where a confession has been obtained illegally or improperly. Denial of access to a solicitor would be an example of where a confession may be deemed inadmissible under these provisions. The police officer investigating an alleged white collar crime will frequently be dealing with a suspect who is familiar with the concept of access to legal advice and may himself employ a company lawyer. In one instance the Court of Appeal felt it appropriate that the trial judge had considered that a merchant banker was sophisticated and intelligent when considering the degree of oppression the defendant claimed he had suffered during his interview,[115] however, the fact that a suspect is familiar with the relevant legal provisions does not negate the responsibility of the investigating officer to comply with the provisions of PACE. When the interview is finished a decision must be made as to whether the suspect should be released, charged or bailed by the police pending further enquiries.

When investigations are conducted by the Serious Fraud Office, SFO, it has a range of powers distinctly different from those of investigating police officers and consequently white collar offenders can be subjected to two different processes depending on whether the investigation is being conducted by the SFO or the police. If the investigation is being conducted by the police then the white collar offender will be treated in exactly the same way as any other suspect. The work of the SFO is discussed in detail in the next chapter.

Code C. note 16.1 PACE requires that the interviewing officer has sufficient evidence to secure a conviction of the suspect before a court. Then, and only then, may the investigating officer present the suspect before the custody sergeant who has the statutory authority to accept or reject the charge. This is a stringent requirement that places the responsibility of the investigating officer in England far beyond the role of the French police.

In France the police are subject to the control and directed supervision of a professionally qualified magistrate. Effectively, if the police are to be criticised for their actions then they can legitimately claim that they were ordered to act in a specific way on the directions of the *juge d'instruction*.

### 2.3.13 Charging

The decision to charge starts with the investigating officer who must prepare an appropriate charge and then convince the custody sergeant to accept that charge. This is a curious requirement, as neither officer is a qualified lawyer and yet the degree of evidence required to accept a charge is the criminal standard of proof, beyond reasonable doubt.

Previously in this section the training of detective police officers was discussed and one of the criticisms of the system in this jurisdiction is the distinct lack of academic or professional qualifications that the police hold, formal training for complex white collar investigations ranges from one week to a maximum of three weeks. In view of the complexity of issues which frequently accompany white collar investigations, the police may well adopt a cautious approach towards charging and seek to have the suspect bailed to return to the police station at a future date[116]. Whilst this may appear to be a legitimate use of the legislative provisions it must be asked whether this is compromising the suspect's rights. On one hand it could be said that this was good practice as it may prevent the charging of a suspect in cases where there is insufficient evidence and the matter is later discontinued by the Crown Prosecution Service. Conversely, from the suspect's point of view he may be well known in the business community and his arrest may have been publicised. Being released on police bail does not clarify the status of the suspect in the eyes of the public or shareholders and the period of uncertainty, whilst he is on bail, can be damaging to him personally and to the company concerned.

In France the police are subject to the control and directed supervision of a professionally qualified magistrate. Effectively, if the police are to be criticised for their actions they can legitimately claim that they were ordered to act in a specific way on the directions of the *juge d'instruction*.

In France it is a qualified judge, the examining magistrate, who conducts the investigation into serious white collar offences and subsequently the decision to prosecute is made by professionally qualified personnel within the judicial system. The French approach is not without its problems and there are examples, cited in the following chapter, of detentions in custody authorised by an examining magistrate, that have subsequently been found to be unlawful. Nevertheless, this is a further

example of the considerable autonomy that is vested in the police of England and distinguishes the office of police officer from that in France.

The investigating police officer has the opportunity to use the time available whilst the suspect is on police bail to liaise with specialist lawyers and seek advice over the compilation of the file of evidence and the wording of any appropriate charges. This facility was available in police stations until 1985, as prior to this, the police employed lawyers, referred to as the Legal Branch, who had offices at police stations. This is no longer the case, although there have been recent returns to this model on a trial basis.[117]

In the following section the considerable degree of autonomy that the English police have is contrasted with the substantial controls to which the French police are subjected. As the first part of this chapter has shown, in England the decision to accept an investigation rests solely with the police. The decision to proceed with arrest and interview rests solely with the police and the decision to charge, and thereby start the initial stages of the entire prosecution procedure also rests with the police.

The practical application of the authority to charge is that the police are given the opportunity to test the proposition that a suspect is guilty of a criminal offence. In the case of the investigation of serious white collar offences, the police officers, who are subject to limited resources, are able to determine the viability of continued investigations in relation to the likely successful prosecution of that offender. If resources are limited, the police can control their expenditure by concluding the investigation. This may in reality be more of an expression of police attitudes than a control over expenditure and as is shown, *post*, the police in France are also able to

exercise discretion in the application of orders from the J.I., to conduct specific inquiries.

Police culture is such that officers believe that at the submission of a file of evidence, the work of the police officer is complete. Further requests for evidence by a lawyer from the CPS are frequently met with animosity and incredulity.[118] The potential difficulties that police attitudes may present are clearly exemplified in the provisions of the Criminal Procedure and Investigations Act 1996. This Act requires the compilation of all relevant material and its location to be recorded by the '*disclosure officer*'.[119] It is the function of the prosecuting lawyer to determine what material should be disclosed to the defence but the function of the disclosure officer to decide whether this should be a copy or merely access to sight of the material at the police station. This is a most curious provision, as paragraph 2.1 of the code of practice contained in Section 23 of the Act would seem to place the onus of responsibility on the police officer to decide on the appropriateness of the release of case material. Given that the disclosure officer will frequently be of the rank of detective constable, it appears to delegate a disproportionate amount of responsibility to this low rank. This may be taken as a further example of the considerable degree of freedom and trustworthiness afforded to the lower ranks of the English police force when compared and contrasted with the forces of France.[120]

The combination of all these factors is such that it may be attractive to the police to end an inquiry into alleged white collar crime with the submission of a 'detected' file that recommends *no further action*. It is the police, not the judiciary, who have the choice. It is the police who can decide on the most appropriate action. It is the police who can select how to use their resources. Fraud squads can invest considerable time and officer hours on the investigation of one suspected offence. Conversely the same officers can 'detect' a number of crimes which are more easily investigated,

such cases will produce statistical results within budgetary guidelines and can prove the viability of continuing to run a white collar crimes unit.

### 2.4.1 Police Investigations in France

This section commences with a brief overview of the organisation of the regions and districts of France and gives insight into the origins of policing in France, a country which has one of the oldest continuous policing systems in Europe. The structure of the courts and functions of the various officials are briefly mentioned to contextualise place within the legal system that the police in France have. The format of the first part to this chapter is then repeated and the methods of recruitment, training and specialist departments of the French police are then commented upon generally before the criminal investigation police, OPJ, and specialist white collar crime units are discussed in detail.

The structure and role of the police in France is fundamentally different from the police in England. They are are armed, centralised and accountable to the relevant ministry. Police powers of arrest, interview and detention are controlled by the judiciary in France and the police have very little autonomy compared and contrasted with their colleagues in England. The lack of discretion and desicion making has implications for the investigation of all serious criminal offences and later in this chapter, the controlling influence of the examining magistrate is discussed in the light of recent cases in which the police have been extensively criticised.

### 2.4.2 The legal context

France is divided into 22 regions which are subdivided into 96 departments.[121] The departments are further divided into 324 *arrondissements* and finally the smallest division of area are the communes, of which there are 36,394. A department is

managed by a *préfet* who, historically has also been referred to as the *Commissiare de la République*. Legislation is the primary source of criminal procedure in France and the Code of Criminal Procedure, CPP, of 1959, a particularly important statute, contains 802 Articles.[122] There have been a number of revisions to the CPP,[123] most recently in 1993.[124] The CPP also contains a section of regulatory texts, *inter alia*, decrees of the *Conseil d'Etat*, ordinary decrees and orders.[125] These texts are frequently used as a guidance and reference point by the judiciary.

France operates a legal system that is referred to as Inquisitorial and as was shown in the brief discussion at the beginning of this chapter there are some considerable differences between the English accusatorial model and the French inquisitorial. However, there are connections between the two systems and they are not wholly incompatible. One example of procedural similarity is in the use of precedents where the French also rely on the previous decisions of the higher courts when they find that the codes do not adequately cover the particular point relevant to a specific case[126].

As in most democratic jurisdictions judges do take previous cases into account and statute is open to revision and modification. However, case law is of minor importance within the civil law legal system when compared with the relevance of case law in the Anglo-Saxon model. The decisions of the *Cour de Cassation*[127] do contribute to criminal procedure particularly where interpretation of a concept is required.[128] Jurisprudence may also be instrumental in changing the law by creating a rule which will then be applied as a principle.[129]

### 2.4.3 Investigating authorities

Investigations into alleged criminal acts are conducted by two authorities in France. The police and the *juge d'instruction*, J.I.[130] There are several alternative translations for the term *juge d'instruction* including; examining magistrate, investigating judge and examining judge. All these terms refer to the J.I. who is a professionally qualified judge who investigates serious criminal offences

The law in France remains silent on a number of coercive measures, such as electronic surveillance, the application of which have caused comment and condemnation from the European Court of Human Rights[131]. In the previous section the authority vested in the English police was discussed and criticised and the fact that a relatively unqualified superintendent can be required to authorise the abrogation of a detainee's rights was commented upon. In France, this area of decision making rests with the J.I. not the police. The law in France requires that the examining magistrate carries out any investigation he deems necessary to discover the truth and this provision can cause conflicts of interest because the J.I. who is investigating also has the power to sanction the detention of the suspect.

It can be seen immediately that with regard to the investigation into a serious criminal offence the balance of power in England lies with the police and yet in France it is vested in the J.I.[132] The powers of the *juge d'instruction*[133] are extensive and feature as a main cause of complaint amongst defence counsel and human rights activists. The system of *Commission Rogatoire*, formal instruction, effectively allows the J.I. an absolute control over the direction of an investigation and the contents of the file, *dossier.* The wide ranging interpretation of the provisions of the Code of Criminal Procedure, CPP, sanctioning whatever means are reasonable for the magistrate to

establish the truth is one example of the means by which covert operations can receive the full authority of the legal process, without the protections of independent scrutiny.

In France investigations into the range of offences categorised under the heading *crime en col blanc* are investigated by teams of specialists that will include police officers and accountants, but the dominant and controlling role will be played by the J.I. who has ultimate responsibility for the co-ordination of the case. All initial allegations of serious crime are filtered through the public prosecutor, *parquet*,[134]who has the authority to decide whether the offence requires an investigation to be conducted by a J.I. Matters of *abus de biens sociaux*[135] and other frauds perpetrated by company officers, particularly those involving a fraud against the state, are widely legislated against in France. The initial complaint, which stimulates the gathering of evidence in serious fraud cases, is frequently from the victim. This may trigger an investigation directed by the J.I. or the police. Whether the complaint remains with the police or not the J.I. has absolute authority to order the compilation of all evidence, which, in complex frauds, will frequently include obtaining relevant bank records, and endorsing the searching of premises and seizure of material. The implications for cross-border assistance are enormous considering that the English police may naturally expect that a request for assistance would be directed through and implemented by an equivalent police department in France. This of course ultimately be the case, but in the first instance it will be the J.I. and not the police who should receive a request for assistance. If the English police seek to circumvent the bureaucracy and 'short cut' the system and deal with police officers in France directly then they may well jeopardise the evidential value of the material that is being sought as well as hamper future mutual co-operation in legal matters.

Whether covertly or overtly obtained, one of the most striking features of the evidence gathering procedure is the inquisitorial nature of the proceedings, whereby the J.I. may not only question witnesses under oath individually, but also, arrange for a confrontation between a number of witnesses. This is extended in respect of the suspect who, after an initial interview[136], will then be interrogated in the office of the J.I. and the proceedings recorded. Direct questions will be put and the replies are summarised by the judge. The judge may introduce witnesses to the interrogation and the parties are invited to comment on the other parties' version of the facts. Suspects are not, however, able to be sworn witnesses in their own case.[137]

The above procedures are distinctly different from those in England where confrontation is rare and only available as a method of suspect identification, all of which is a police function. There is no facility in England for witness confrontation before a trial and also no chance whatsoever of there being a verbal confrontation between the suspect and a witness that is sanctioned by the legal process.

### 2.4.4 Categories of offences

The function of the criminal courts is governed by the *Code Pénal*. There are three types of criminal court which exist according to the gravity of the offence charged.[138] A *contravention* is a summary offence which will be dealt with at the *Tribunal de Police*. This court is commonly referred to as the police court. It sits with one judge who is assisted by a legally qualified clerk, *greffier*, and the prosecution is most frequently conducted by the local *commissaire*, superintendent, of police.[139] The maximum punishment is a fine, *amende*, ranging from 250 to 10,000 Fr. francs.[140] A custodial sentence may not be imposed at this court.

A *délit*, is a criminal offence which is not of the most serious category but is however, a major crime. Fraud and theft are examples of this type of offence. Serious white collar offences will normally fall into this range as, although they may involve substantial loss or gain these offences do not involve acts of violence.[141] Under the new code, of 1st March 1994, a *délit* is now punishable with imprisonment ranging from 6 months up to a maximum of 10 years.[142] These matters will be heard at the *Tribunal Correctionnel*. This court sits with three judges, a *president* and two assessors.[143]

The most serious offences are categorised as *'un crime'* and cover murder and aggravated offences. The minimum sentence has now risen to 10 years imprisonment and the maximum is life. The *Cour d'Assises* hear these cases.[144] At the *Cour d'Assises* a jury of nine sit alongside the magistrate and assessors.[145] Jury members, referred to as *'magistrates non-professional'*, are selected from the electoral register and must be over 23 years of age. Proceedings are formal and similar in style to the English Crown Court, though this court deals with fewer cases than a comparable Crown Court. The *Assises* sit every three months or more frequently if required. There is a *Cour d'Assises* in each *Département*[146].

When a defendant is found guilty and a custodial sentence is imposed, there are a number of establishments at which the sentence may be served. The *centres de semi-liberté* are the equivalent of the open prison. Inmates are permitted access to employment and home visits. The *maisons d'arrêt* is a remand centre for those sentenced to less than two years custodial detention. The *centres de détention* are where prisoners are sent who are deemed suitable for rehabilitation back into the community. These centres will provide training and skills development. Top security prisons are referred to as *maisons centrales*, and a final category is the *centres*

*pénitentiaires* which is a prison that incorporates all three types of closed prisons with sections for the housing of each category of inmate.

### 2.4.5 The three police forces of France

The primary agency for the investigation of criminal offences is the police.[147] France possess the longest continuous system of policing and the most developed police tradition in Europe, and possibly the Western world. It is both comprehensive and complex. There are three police forces in France: The *Police Nationale*,PN, the *Gendarmerie* and the *Police Municipale*.

The structure of the police in France is wholly different from England and was developed long before the introduction of constables here in the early 19th century. The 13th century *maréchaussée* were the original guardians of the countryside[148] and this troop formed the framework for the current day *gendarmerie*.[149] The *gardes champêtres* were the original custodians of the towns and are today referred to as the *Police Municipale*.[150] In Paris the police were controlled by a Lieutenant General some 162 years before the formation of the Metropolitan Police.[151] This force had a continuous history in excess of three hundred years before amalgamation with the PN during the 1960's.[152]

The French police[153] are highly centralised and the maintenance of peacefulness within the state is at the core of policing objectives. Centralised policing has been referred to as 'high policing'[154] and this term reflects a model of policing whose mandate to maintain order is by state control rather than by consent of the public. The PN and *Gendarmerie* have a rigid hierarchy up to ministerial level and both

maintain a large public order reserve, state security intelligence gathering units and counter-espionage departments.

Returning to the observation made previously in this chapter, it might be said that Emperor Napoléon Bonaparte, who formalised policing in France, deliberately sought to impose rigid policing on the state to ensure no domestic uprisings whilst he was overseas attempting to enlarge the empire. To support this contention it is significant that Bonaparte appointed Joseph Fouché to head the Paris police after Fouché had shared in the *coup d'état* of 18 Brumaire which brought Napoléon to power. This minister developed a powerful interior espionage force that specialised in reporting potential insurrection.

If this position is compared with that in England there are few similarities. No public order reserve is maintained either on a temporary or permanent basis. When public order matters have reached the level at which a unified policing response is required then local forces operate a system of mutual support, but there is no formal, centrally funded force. In respect of intelligence gathering internally and externally these functions are conducted by the police on a local and national when related to the movement of criminals. Matters relating to state security are dealt with by the Intelligence Services. None of the intelligence services are part of the police service and all three are funded centrally. They are also accountable to central government and historically have evolved from military rather than civilian structures.

### 2.4.6 The Gendarmerie

The *Gendarmerie* remains a military police force under the direct control of the Ministry of Defence with military ranks and no separation of civilian and military

purpose. There are 96,313[155] personnel who are responsible for providing 24 hour cover in the rural regions of France. The *Gendarmerie Nationale*,[156] GN, does not perform the entire range of regular policing tasks and the investigation of serious white collar offences is an example of where, ordinarilly[157], they have no jurisdiction. The GN conforms to the normal codes of military discipline and officers are liable to both the civil law and military sanctions. As a military force they are not permitted to form or belong to a trade union.[158]

Common to both the GN and PN is method of entry. Both forces have a direct entry procedure to the officer class.[159] The GN as a military force has significant military duties, which include the enforcement of military law and the administering of the reserve forces to all three armies of France. However, it is their civilian duties which account for almost 90% of the entire GN workload and this is divided between administrative policing[160] and judicial policing.[161]

The career structure of the GN is more straightforward than the civilian police as most officers work within small brigades and there is no division between the role of the investigative officer and the non-crime police personnel. As uniform is worn for virtually all purposes there is a natural restriction on the ability of the GN to carry out covert operations.[162] It is a practical necessity that each brigade will have at least two members of staff who are trained as criminal investigators and accordingly there are far more officers of the GN who are qualified to investigate criminal offences, *Officiers de la Police Judiciare*, OPJ than are OPJ qualified in the civilian PN.[163] Entry into all police forces is by competitive examination for the officer ranks whereas, for the non-commissioned ranks there is a height restriction but no minimum academic requirement.[164]

### 2.4.7 Training of gendarmes

New recruits to the GN complete one years training which includes eight months at a training school and a minimum of four months 'on the job' training. As military personnel these recruits live in barracks. On completion of initial training NCO's take up their posting[165] and during the next two years retain their 'trainee' status until the successful completion of an aptitude test when they are then confirmed as *gendarmes*. Promotion within the service is achieved by passing a national course which leads to the Higher Diploma in Command.[166] The officer training schools run a three year course, the first year concentrates on the military aspects of the *Gendarmes'* work, the second year concentrates on the law and the final year includes 'on the job' training and specifics of command as a lieutenant in command of a platoon.[167] Once an officer has achieved the rank of *Captain* they may apply to take the five month Diploma in Headquarters Management course.[168] The GN is divided into three regions within France, each controlled by a *General*. All have administrative as well as criminal investigation functions. Within the regions will be a number of legions each controlled by a *Colonel*. As an OPJ the Colonel may take charge of criminal investigations or delegate these to a specialist criminal investigation unit.[169]

The GN has changed considerably in the past ten years. During the 1980's a series of complaints about conditions of service were sent to, and published by the national press. These 'letters'[170] prompted reforms and personnel are now working fewer nights on duty than ever before and the responsibility for policing an area is now divided at night between neighbouring brigades. Members of the public will now, as in England, speak to a central communications centre who will then instruct the nearest available *gendarme* to attend an incident. This effectively means that *gendarmes* are now off duty for half of the evenings on their working days as well as

having two evenings off in every seven. This is a broad move away from the concept of the *gendarme* being available to the community 24 hours per day. Further improvements which have been seen are the increase in annual budgets for individual brigades, an increase in staff numbers and improvements in equipment. There is also now a grievance procedure available to the junior ranks which provides a forum for open discussion between all levels of the service.

Some commentators suggest[171] that the differences between the role and function of the police forces of France are lessening. The GN has considerably improved the working environment for its staff and members now have more leisure time than previously. Training in all spheres of policing has improved and increased. The provision of equipment has increased and recruitment has expanded. However, intense rivalry between the PN and the GN remains though. Concentrated competition has existed throughout the history of these police forces and it has been argued this has '...been deliberately fostered by governments as a means of controlling them in order that one or the other does not become too powerful'.[172] Whether this inhibits the effective investigation of crime shall be discussed at the conclusion of the section on the police of France. It is necessary at this point to consider the structure and role of the PN and then compare and contrast the role each service takes in the investigation of serious white collar offences.

### 2.4.8 The Police Nationale

The *Police Nationale*, PN, is a civilian force of 116,000 active officers comprising of 93,000 uniformed and 23,000 non-uniformed. There are also 4,300 serving as part of the mandatory National Service in France.[173] The PN polices the cities and major urban regions. The present day PN follow the original statement of 1789 'A Police

force is required to guarantee human rights; this force is therefore set up for the benefit of all, not for the use of those who perform its tasks'.[174] The Directorate of Police Personnel and Training is divided into 3 sub-directorates who deal with; general administration which controls legal and statutory affairs, the setting up of new measures, disciplinary issues and financial resourcing. The Personnel Sub-Directorate recruit, control the officer entry examinations and implement the management of human resources and the Training Sub-Directorate define training policies and run the 27 training academies as well as the Officers National Institute.

Criminal investigations are conducted by plain clothes officers who are controlled by the Central Directorate of Crime Investigation, DCPJ.[175] This body of detectives is accountable to the Minister of the Interior and Public Security.[176] The Directorate employs 7,000 officers and comprises of a central directorate and 4 sub-directorates.[177] Since 1992[178] the Urban Police, Security Branch and Air and Border Police have been amalgamated into the Central Directorate of Territorial Policing, DCPT.

In Paris the structure remains unique and comprises of the *Préfecture de Police* that has a responsibility that in the provincial centres is divided between the *préfets* and mayors. As such, in Paris, the *préfet* controls the Paris defence zone of 8 provinces and has total responsibility for the police within the capital acting on behalf of the state. It also has command of the OPJ in respect of the investigation of any criminal matter within the metropolis.[179]

### 2.4.9 Training the PN

Training of police personnel is divided into several stages, all the stages are administered by the *Direction Général de la Police Nationale, Ministère de L'Intérieur.* The main governing body is the *Sous-Direction de la Formation*[180] which has recently been involved in the development of a Higher Institute of Internal Security[181] which holds training sessions for senior command officers and members of the private sector.[182] The *Ecole Nationale Supérieure de la Police*[183] is the training establishment for initial and further training of *commissaires* and the senior ranks. The lower ranks are trained at various establishments throughout the country and the *Ecole Nationale de Police,* for the training of constables and sergeants, is located at police headquarters in Paris.[184] A national training institute[185] formulates training policy and conducts the training of instructors who then teach at the academies. Additional training is conducted at a regional level in one of the 11 Recruitment and Training Delegations.

Issues relating to the implementation of the European Convention on Human Rights are specifically dealt with under the training objectives[186] which incorporate two main issues; the protection of human rights and police action at the European level and the dissemination of research on the police carried out in France or abroad[187]. Module 5/2 of the constables training covers the main principles contained in the ECHR and Module 1/05 deals with fundamental rights of the citizen and the development of Human Rights since 1789. Supplementary training is provided for by private organisations such as the International Society for Human Rights. Work is currently being conducted at the *Centre National d'Etudes et de Formation* to ensure that all police officers, regardless of rank, have been trained in understanding the fundamental concepts of the rights and freedoms of the individual and how this interacts with the professional conduct required of police officers.

> 'Police officers need to have a clear view of the issues, enabling them to distinguish between the fundamental principles sanctioned by the law and the principles sanctioned by morals and disciplinary authorities...this prospect, which will make it possible to absorb certain principles of Anglo-Saxon law, is based on the acknowledged mechanism whereby it is the law in its broadest sense that changes attitudes and thus shapes societies. It is to be hoped that this teaching based on the law, besides providing the necessary technical qualifications, will automatically be reflected in day-to-day police activity that is inspired by human rights.'[188]

Although the above text was developed by the Council of Europe it is not included in any of the training material used by the police training centres in England. It is of particular note that it is not until senior officers attend command training courses at the national centre, Bramshill, in Hampshire that they are required to address issues relating to human rights. It should be noted that in the text above, used by the French training schools, there is specific reference to the need for police officers to understand alternative legal systems, in this example Anglo-Saxon law.

### 2.4.10 Uniformed constables and plain clothed officers

*Les Gardiens de la Paix* are the equivalent of the uniformed constable in England, however, this rank has no authority to investigate crimes and must report suspected criminal offences to an officer of the judicial police at the earliest opportunity. This is in stark contrast with the constable in England who is increasingly required to take details of and investigate minor crimes. The constable in England is also frequently responsible for the compilation of crime reports and court files for submission to the Crown Prosecution Service. Neither the constable in France nor England are

required to have any academic qualifications to take up their post and yet the different levels of responsibility are really vast. In addition the levels of remuneration are substantially different in each country. In France a constable is relatively poorly paid when compared with average earnings. This is not the case in England where a new recruit to the force will earn in excess of the national average and can within 5 years be earning close to £20,000 *per annum*. It might be argued that the level of responsibility that the office of constable has in England justifies the levels of pay that are offered. Conversely it can be argued that the pay structure is not for what the police actually do but what they may be required to do. Part of the pay structure in both countries is based on working unsociable hours. However there is again a stark contrast as in England all uniformed constables are required to work shifts. In France constables can increase their earnings by electing to always work night shifts, and given the low pay scales it is the case that many constables will spend their entire careers working nights.

The officer corps of the uniformed branch are the *Officiers de la Paix*, who have a limited judicial authority. The plainclothes corps, divided into the lower officer rank of *inspecteur* and the senior rank of *commissaire* allow a new recruit to the police service to enter directly into investigation work, without supervision, and having not previously served as a uniformed officer. This contrasts sharply with the English model, where regardless of entry point qualifications, all entrants must serve a minimum of two years probation as a uniformed constable. The logic behind the French model is that since all crimes must be investigated by an officer rank then there is no need for that officer to be familiar with uniformed police work which is totally different from criminal investigations and evidence gathering. In addition, since all major crimes must be reported to the local public prosecutor, who will then appoint a J.I., there is no need for any officer who assists the J.I. to have experience of

uniformed police work. In England the position is different for, as discussed above, the constable is the initial entry point for all recruits and all entrants are required to spend time investigating minor crimes and compiling files of evidence for court. This represents another example of the significant difference that exists in the two systems, in France the police do not have the authority to investigate crimes unless they hold a certain rank and complex crimes are not the prerogative of the police at all. In England it is the complete reverse as the police are encouraged to investigate minor crimes and then through this experience progress into the investigation of major and complex crimes.

The different categories of police work and entry levels are reflected in the training provided which is carried out in entirely separate schools. The *gardien* spends 12 months training of which 4 months is on attachment to an operational unit or within a division. Uniformed *Officers de la Paix* spend 12 months at the officers training school in Nice followed by a further years practical training within a division. As a direct result of research into perceived training deficiencies a 'Charter'[189] was drawn up. However, an inherent problem in implementing the proposals was that ongoing in-service training was voluntary. By 1990 this became mandatory and now all officers are given a credit of 40 hours for training, *per annum*.

The police inspector's training alternates between the detective officers school at Cannes-Ecluse, operational training within a division and on attachment with a Regional Crime Squad. This initial training lasts for 16 months. Superintendents, *commissaires*, are trained for 2 years at the Senior Police College[190]. Part of this will be spent observing the work of operational senior officers at police stations. Once a candidate has received his final posting the training will conclude with a 2 month period specifically directed towards that individuals field of future police work.[191]

The organisation of the police in France appears to police officers in England as there appear to be four distinct professional corps within the P.N., uniformed constables and uniformed officers and then plain clothes *inspecteurs* and the higher officer class of *commissaire*. All of these levels can be entered as an initial recruit. In addition there are two entry points into the *Gendarmerie* and separate entry into the municipal police. These divergent entry points can be described as horizontal, the French police service may also be described as vertical, as parallel services exist within the corps discussed above. It can be argued that this is dysfunctional as the French police service is not one united body but an amalgam of disjointed forces with separate recruitment, training and most damaging of all, competing aims.

There is no suggestion in any of the literature read for this work that these arguments of dysfunctionality were put when the model for policing in England was developed. They are convincing if consideration is given to the examples, cited later in this chapter, of competition that have been displayed between the different police services in France during this century. However, this does not mean that the English system is in any sense better, only that it is different. The existing 43 mainstream police forces in England, each with a Chief Constable and independent budget, could make enormous efficiency gains if they were to pool more resources. Examples such as group purchasing of uniforms, agreeing on one computer system for use in major crimes, joint purchasing of vehicle fleets and harmonisation of standard report forms would all make a significant difference to independent force costs and 'free up' money for use in the investigation and detection of crime.

### 2.4.11 The Police Municipale

The *Police Municipale*, consists of a workforce of 15,000 in total. All personnel are locally appointed uniformed officers with limited parochial powers[192] to police communities of less than 10,000 inhabitants.[193] The size of a local force may vary considerably from 2 officers to as many as 200. In most regions these officers are unarmed and will patrol throughout the daylight hours only. In Nice the *Police Municipale* work a shift pattern to provide 24 hour police cover and they are armed.[194] Training of these officers is minimal and conducted locally. The entry requirement is by means of a competitive test. The closest equivalent to this force in England would be Special Constables, though the 'local' police in France are paid.

### 2.4.12 The Police Judiciare

The Judicial Police,[195] JP, are the 'civilian' or plain clothed, branch of the P.N. and the officers from the Gendarmerie who are authorised to conduct criminal investigations and make arrests. The terms of reference for investigating crime are established in the penal code and the methods to be employed are defined in the code of procedure, the CPP. Accountability for the conduct of a criminal investigation is to the Central Directorate of Judicial Police. The monitoring of methods used to conduct inquiries is by an internal hierarchy and supervision by the courts. In reality the actions of the JP are supervised by the *Procureur de la République*, public prosecutor, and individual investigations of any complexity are directed by the *juge d'instruction*. The authority to conduct an investigation is vested by the Court of Appeal and theoretically any abuse of this prerogative may result in authority being withdrawn.[196]

### 2.4.13 Evidence gathering and covert operations

The methods the JP may use to collect evidence may be subject to legal sanctions. An example of this is in respect of the controlled delivery of narcotics in undercover operations. This does not imply that covert operations into other criminal activities do not exist, only that these other criminal offences are considered to be governed by normal policing operations, that is, subject to the usual safeguards afforded by the control on investigations by examining magistrates. Undercover operations are therefore, controlled by a strict interpretation of the law of 19th December 1991,[197] '...which accords constant official jurisprudence to the court of appeal whilst putting in place certain formal conditions for the setting up of such operations'.[198] Telephone tapping was not controlled by legislation in France until 1996 and the wide powers of the juge d'instruction are such that under the provisions of art 81 of the CPP[199] when the office of an examining magistrate carries out any investigation, in respect of the JP as a directed agent of the magistrate, he may use whatever means he deems as necessary to discover the truth.[200] There are some absolutes contained in national law. A person may not be physically harmed by the police when they are obtaining evidence, privacy may not be violated, except as permitted by law, and the right to a fair trial may not be infringed.

### 2.4.14 White collar crime specialists

The work conducted by officers of the OPJ more closely resembles that conducted by the specialist units in England, than mainstream divisional C.I.D. Unlike their English colleagues, the majority of OPJ will spend their entire career within a single specialist department. In France greater use is made of small departments who have responsibility for investigating one type of criminal offences. In England much of the work conducted by specialists in France is considered to be the mainstream work of C.I.D. There is good reasoning behind each. In France the serious crimes will be

investigated by a J.I. and what is needed is a team of police officers who are known to the J.I. and can be trusted to comply with the requests for witness statements and other evidence gathering. It would be potentially unmanageable to have departments comprising of dozens of C.I.D. personnel as investigating judges would be continually dealing with different police staff. In England, the reverse is the case and detectives will investigate a wide range of criminal offences but once they have compiled a court file then a specialist police unit, the criminal justice unit, will liaise with the prosecution lawyers. There is a further issue that relates to specialisation and that is tenure of officer. Police officers in France may, as shown above, spend their entire career working in one specialist unit, in England this is not the case and detective officers are required periodically to return to uniformed patrol work.

In France those officers investigating major white collar criminal offences will not, unlike English police officers, be faced with the prospect of serving on a specialist unit for a fixed period of time, tenure. It is therefore the case that under the French model officers can become highly specialised and remain within that sphere of activity throughout their entire service. The *Directeur Central de la Police Judiciare* as a corps of the P.N. provides the workforce for the *Offices Centraux de la Répression de la Grande Délinquance Financière*, O.C.R.G.D.F. This is a serious fraud department that deals with counterfeit currency in one branch and corporate crime in a second.[201] Both branches come under the direction of the *Sous-Direction des Affaires Economiques et Financières*. Officers from this department have a dual role, they investigate major fraud on a national scale and they also provide support to local investigations in the form of expert assistance. '*Les offices centraux sont des structures crées pour intervenir dans des domaines précis du crime organisé connaissant des dévelopements préoccupants*'.[202]

The white collar crime departments in England comprise of officers who are seconded from divisional C.I.D. The time spent on these specialist units may vary considerably depending on a wide range of criteria such as; whether the individual officer due for promotion to another rank, for what period of time has that officer been attached to a specialist unit, when that officer last worked in uniform and from what department they came before joining the white collar crimes unit. On the face of it these may seem fairly mundane issues, but the reality is that they can be extremely detrimental to efficient work and the moral of individual officers. The English model of policing appears to give responsibility and autonomy to the lowest ranks, but this is not really the case when the same officers have such little control over their own career development.

Under the model of policing in France an individual may join the police force at a number of strategic points depending on his own academic abilities and career aspirations. If an individual wishes to spend his working life investigating complex frauds then he may do so. This is the same level of choice that exists in a number of careers where the entrant can select particular work. In England if an individual wishes to investigate drug trafficking then an array of obstacles may be presented and in reality that person may never succeed in gaining a place on the specialist unit that they wish to work on. Even if the objective is achieved and considerable expertise developed this will not be fully utilised throughout an entire career as inevitably the officer concerned must return to uniformed work.

There is also a national fraud squad[203] in France who has a responsibility to investigate allegations of fraud of a serious nature, which in turn may be passed onto the O.C.R.G.D.F. All of the 18 police regions in mainland France are eligible for assistance from specialist central departments. Within each region there are

numerous local police districts. There is now a national crime squad, NCS, in England which comprises of police officers drawn from all the 43 mainstream forces, the 1900 officers currently attached to this centrally funded unit are mostly from the former Regional Crime Squads. The NCS targets a range of criminal conduct but, unlike the French national fraud squad, does not specifically focus on fraud.

There is also exists within Paris, which is a region of 8 districts, a *Cabinet Financier*. This specialist department is the equivalent of a regional fraud squad but due to the nature of the financial markets in the metropolis, they have developed specialist skills appertaining to business crime and illegal practices at *La Bourse*.[204] The competence of this department is restricted to Paris and inquiries which need to be conducted outside the capital are generated by an investigating magistrate through the system of *Commission Rogatoire*.[205]

All investigations into an alleged criminal offence will commence with an *enquête préliminaire,* EP.[206] This may be classified as an *enquête sur infraction flagrante* or an *enquête à cas d'infraction flagrante*, EIF, where the offence is of a serious nature. An investigation is considered either, *flagrante* if the offence has just been committed,[207] or as a *commission rogatoire*, CR.[208]

The police enjoy a degree of discretion in that if a matter is reported to them that they determine to be of a minor nature then there is no obligation on the police to notify the state prosecutor. The police will log the report of an incident, *registre de la main courante,* and the lack of action may only come to light if the victim wishes to instigate proceedings. It has been suggested that this is the reason why many crimes are not prosecuted in France[209] as compared to England.

There is an exception to the above that is applicable in the case of in the case of some white collar offences and this is where the aggrieved party may institute proceedings as a *partie civile*. This action will cause the examining magistrate to be notified and is a very useful tool for the victim of an *abus de biens sociaux*, who is frequently apparent in the form of minority shareholder groups.

In the following chapter the authority to instigate proceedings in each jurisdiction is discussed in greater detail. It is useful to note though that whereas in France the victim has an absolute right to demand that there is an investigation this is not the case in England. Considering that the police in England are responsible for investigations but not the success of any subsequent prosecution there is little incentive for the police in England not to record details of an alleged crime, as the recording of the crime reflects the workload of the police but the prosecution result is irrelevant. In France the position is distinctly different for although the police are not responsible for successful prosecutions either they will still have to investigate any crime that they have recorded but under the direction of an independent body, the J.I. The incentive to decide that a matter does not warrant being recorded as a crime is therefore potentially greater in France than it is in England.

The criminal procedure code empowers the police to conduct inquiries into a *délit* without having to notify a J.I. in advance and therefore, in theory at least, some white collar offences may be investigated by the police without any judicial intervention. In the case of theft the offender is liable to imprisonment and/or a fine. This is limited to three years and 300,000 Fr. francs unless there are aggravating circumstances.[210] The law prohibiting the committing a criminal *fraude*, an *escroquerie*, is also contained in the *Code Pénal* and unless there are aggravating circumstances, the

penalty is limited to a maximum of 5 years imprisonment and/ or a fine of up to 2,500,000 Fr. francs.[211]

These provisions may appear to give extensive coercive powers to the police, but in reality they are tempered by Articles 59 and 76 of the CPP. Under the Code police officers are permitted entry into premises for the purposes of conducting a search to gain evidence of a suspected offence. The French police are not always required to obtain a search warrant from a JI in advance, these are similar to the equivalent provisions that apply under PACE 1984 in England. However, unlike the general powers to search under PACE, the practical value of the CPP is severely restricted as the authority to search is is limited to bars, clubs and venues to which the public have access. To enter and search private premises the P.N. require written judicial authority,[212] or the specific written authority of the person whose premises are to be searched.[213]

The powers conferred on the OPJ for the conduct of preliminary investigations into minor criminal offences are further limited as statements obtained are not made under oath. As is the case for the police in England, any witness attending the police station does so under his own free will. The power to hold a suspect in police custody is limited to 4 hours while the identity of the detained person is established,[214] unless a suspect has been arrested at the scene of a crime or has been arrested on the written authority of a J.I.

It can be seen that whereas it might appear attractive to the police investigating a white collar offence to deal initially deal with the matter as minor the restrictive nature of powers available means that it is simpler and more effective to record details,

inform the state prosecutor and then wait and be told which J.I. has been appointed to conduct the investigation.

The more serious offences which are clearly a *délit* or *crime* and are being or have just been committed, require the police to have considerably more powers. As soon as an OPJ is aware that a *flagrante* offence has been committed he must notify the *Procureur de la République.*[215] The OPJ must attend the scene to secure evidence and to these ends the judicial police officer is entitled to seal an area off and detain any potential witnesses.[216] Persons summoned by the police to appear at a police station as a witness are bound to appear.[217] The investigating police officer is also allowed to establish the identity of any persons present at the scene and may compel the attendance of any person to give a statement. In the case of an investigation into a minor offence the police may not enter premises to search and seize material. When investigating a serious offence the OPJ may take any material they deem to be relevant, with or without the consent of the houseowner.[218] If these powers are contrasted with those available to the police in England they are appear broadly the same given that the type of offence referred to is likely to be determined as an arrestable offence. There are some differences though which continue to reflect the increased powers conferred on the police in this country, noticeably that for an arrestable offence the police have the power to arrest a person on suspicion that they have committed the offence, also any searching of premises is without restriction whereas in France searches are still confined to between 6am and 9pm.

### 2.4.15 Arrest

The OPJ may arrest suspects and detain them at a police station for the purposes of interrogation.[219] The OPJ may initiate detention, *garde à vue,*[220] which, as in the case

of England, is limited to a 24 hours, afterwhich judicial authority for a further period of detention must be obtained.[221] The police are not required to notify the state prosecutor on arrest but *dans le délai le plus bref,* as soon as possible after arrest to ensure that the rights of the suspect are safeguarded. This seems an unusual provision given that the police must report any alleged serious crime to the state prosecutor but can have greater autonomy in respect of an arrested person. In particularly serious cases the *procureur* may attend the scene of the crime and in this capacity they have greater powers than an OPJ,[222] but less than the J.I.

### 2.4.16 Commission Rogatoire

An inquiry conducted under *commission rogatoire*, is where a *juge d'instruction* has opened an inquiry and orders either the OPJ or another J.I. to conduct, or continue, inquiries. It is frequently the case in serious white collar offences[223] that the matter will be reported directly to a judge. If so, this J.I. will then instruct a specialist department of the police, O.C.R.G.D.F. to conduct specific and necessary inquiries.[224] The inquiries may be local to that police department or a *commission rogatoire* may direct inquiries to be made elsewhere in France or abroad. The power to investigate under this procedure extends the authority of the OPJ to those of a J.I., except that the police cannot remand a suspect into custody nor assume an overall responsibility for the inquiry. The police in England also have no authority to remand a suspect into custody this is the prerogative of magistrates. They do, however, retain an absolute authority over investigations with the sole exception of those matters investigated by the Serious Fraud Office.

### 2.4.17 Interviews

The controls over police interviews and the rights of detainees in England were discussed in the preceeding section and the importance of the Police & Criminal Evidence Act 1984 was highlighted. In France, prior to the reforms brought into existence by the Law of 1st January 1994,[225] suspects and persons held in police custody had no right to silence, no right of access to a lawyer and no right to have a person informed of their arrest. At the police station an entry was made which gave details of the name of the arrested person, the reason for arrest and the time spent in custody. Interview records were recorded in summary note form by the interviewing officers and it was only after the initial 24 hour detention period that a suspect was allowed to request a medical examination.

*Garde à vue* may be used by investigating officers during the *enquête préliminaire,* or when an offender has been arrested at the scene of the offence, *flagrante enquête* and also during the *instruction preparatoire*. The purpose of police custody in England is to interview a suspect to gain evidence. In some instances police custody is used to secure a suspect for attendance at court to determine whether he should be released pending trial or remanded into a further period of custody. Other than for the purposes of interview it is generally not permissible to detain a suspect for the purposes of gaining further evidence. Consequently the police in England will generally not arrest a suspect until all the available evidence has been gathered.

The reforms contained in the law of 1994 were partially as a result of recommendations made by a commission headed by Mireille Delmas-Marty.[226] The Commission outlined 10 principles that it felt were central to reform. Ultimately 4 of these proposals were introduced. They were strengthening the presumption of

innocence principle, additional defendant's rights, the establishment of equality between parties and finally, proposals to increase the efficiency of the criminal law.[227]

### 2.4.18 Access to legal advice

It is now determined[228] that upon arrest the detainee has the right to be informed of his right to have a member of his family informed of his detention, a right to have a medical examination and that he is entitled to legal advice. The suspect will also be informed of his reason for detention and of the maximum period of *garde à vue*.[229] All these provisions are now recorded in the *procès-verbal* [230] which the arrested person is required to sign. At the end of a 24 hour period in detention the suspect must be presented before the *parquet.* The public prosecutor may grant an extension of a further 24 hours.[231] Such action was common practice before the reforms but now has a statutory basis[232]. The importance of this is that previously if the police failed inform a suspect of his rights it would not render the detention unlawful and any evidence obtained in the *garde à vue* would be admissible. If a defendant's rights are now compromised then the code specifies that the *garde à vue* is evidentially void.[233] The application of this is that any confession made will not be available to the prosecution at a later stage in the proceedings.

The adoption of these safeguards would appear to be a fundamental necessity in a first world country during the 1990s. Surprisingly, these provisions do not include a right of silence and more importantly, the police are not required to await the arrival of a lawyer before they commence an interview. Incredibly when a lawyer does attend, they have no legal right to sit in on an interview and are only permitted a maximum of 30 minutes consultation with their client.[234] Those rights that have been included in the new code are themselves restrictive. In respect of the right to have a

family member informed of his detention, the defendant cannot exercise this right himself, the OPJ investigating will notify the family.[235] A family member is defined as '...the person with whom he normally lives, his direct blood relatives or an employer'.[236] The right to have a lawyer present throughout interview was introduced in the January 1993 proposals, the draft allowed a lawyer to be present from the outset, this was rejected and the position is that a suspect may have access to legal advice only after 20 hours in custody.[237] Access to legal advice means that the suspect has a right to speak with a lawyer. It does not mean that the lawyer is entitled to be present during the police interview, he is not.

### 2.4.19 'A spectacle of disorder' contemporary policing issues

The reforms of 1993 have done little to appease the dissatisfaction that exists within a fragmented police force in France. The additional rights that a suspect now has are seen by many within the police services as a continuation of the softening of the investigation process. This is particularly apposite in a country where there is already a considerable degree of rivalry between the civilian P.N. and military *Gendarmerie* forces. The investigation of serious white collar offences is not the sole jurisdiction of the P.N. and an investigating magistrate may chose to order the *Gendarmerie* rather than the *Police Nationale* to conduct an investigation[238]. This provision has in the past, and continues to cause competition between the police forces and the formation of the specialist white collar investigation units within the P.N. has not averted this as certainly within the provincial regions of France, the Gendarmerie remains the primary policing agency.

The concerns that exist within the police forces in France have implications in three ways that are specifically relevant to this section. Firstly, the power vested in the J.I.

may be seen as divisive for the police but highly effective in controlling them from the perspective of central government. Secondly, the police services in France are principally agencies for public order control and safety and therefore it has never been the case that the police forces alone should conduct complex criminal investigations. Thirdly, for the police forces from England who may have to work with the French police it can be confusing as initially the correct force must be identified, i.e. P.N. or *Gendarmerie.* But more importantly, the police have considerably less authority to conduct independent inquiries than the police from this jurisdiction and if this is combined with the knowledge that there is a air of competition between the police in France then this may further impede cross border co-operation.

Criticism of police professionalism, frequently stimulated by rivalry, has been vociferous both within and outside of France. The *Tricot, Racines* and *Cabannes Commissions*[239] proposed solutions to ease the tension between the Gendarmerie and P.N. but to date none have been successful. Whilst the P.N have responsibility for policing urban France and the *Gendarmerie* responsibility for rural France there is nothing to prevent the *Gendarmerie* from conducting inquiries within the cities. The consequence of this has been confusion, resentment and tragedy.[240] The introduction of a law which permits members of the *Gendarmerie* to wear plain clothes[241] has only furthered the antagonism between the forces and this was regrettably followed by the shooting of a member of the *Gendarmerie*, whilst wearing plain clothes, by the PN in Paris.[242] Whereas the military *Gendarmerie* are not permitted to form or belong to a trades union, the civilian P.N. are. The Paris shooting caused widespread unrest amongst union activists,

> 'The idea of a militarised police which performs duties in civilian dress should be rejected. The fight against crime and delinquency should not be used progressively to implement measures which are dangerous for liberty'.[243]

The police wars, '*Guerre des Polices'* are frequently reported in the national press and this inevitably leads to discontent amongst colleagues within each sector, this can result in further mistrust and a feeling of insularity which is dysfunctional, as the energy expended on inter-force criticisms could be targeted at the effective investigation of crime.

> 'The war of the police services' is not only a favourite theme of a sensational press. It is a daily reality, a rot which is eating away at the police institution- as it has done for decades...This law and order force, which should present a reassuring image, instead too often presents a worrying spectacle of disorder'. [244]

Although the reasons behind the issues are different the outcomes are similar when comparing the matter of tenure within the police service in England and the rivalry that exists in France. Both situations, created by forces outside of the control of individual police officers, can result in wasted resources and loss of moral and yet it seems that although these issues are clear to outside observers the authorities wish to continue with these policies.

The spectacle of disorder was graphically illustrated during the murder inquiry of an English schoolgirl whilst on holiday in France.[245] The *juge d'instruction* appointed officers of the *Section de Recherches* of the *Gendarmerie* to investigate. What followed was a catalogue of ineptitude. Patrice Padé a vagrant was arrested 2 days after the murder and was held for questioning by the *Gendarmerie.* After 46 hours the suspect made an admission which was manifestly incorrect on the facts. Padé was charged with murder and remanded in custody. Gérard Zaug, the J.I., then held a celebratory press conference. 'It was a sensational, although short-lived, coup for the French detectives, eager to throw off their Inspector Clouseau image'.[246] A

subsequent DNA test proved Padé to be innocent. His lawyer René Blanchard, a civil rights activist, has demanded compensation for his client.

Gérard Zaug has now been replaced by Renaud van Ruymbeke. He has ordered the genetic testing of all males, aged between 17 and 35 years, that are resident in the village. The president of the Magistrate's Union, Jean-Pierre Boucher, explained that a J.I. may have the official authority to order specific inquiries however, 'If [Police] officers are unhappy with the way a judge is conducting his investigation, they simply ignore his orders'.[247] It is not clear whether this was the reason for replacing Zaug and in support of his colleague Boucher said,

> '...M. Zaug worked extremely hard on the case and it is not his fault that he could not find a culprit. He should not be criticised. The genetic tests are almost certainly useless, unless there is an extraordinary stroke of luck'.[248]

There is an issue here that exposes the French system of investigation to severe criticism from forces outside of France. If on one hand the French police have little control over the direction that an investigation takes and all inter-jurisdiction requests for assistance must go through a J.I. then, although different from other systems, it is clear through which channels other nations must operate. If however, the French police ignore the instructions of a J.I. and are unofficially free to choose which matters to pursue and which inquiries to reject, then for an outside force there is very little chance whatsoever of conducting a successful investigation, as regardless of who you ask to assist, each agency within France may deal with the matter differently. For the purposes of gathering evidence for presentation before an English court the differencies outlined above are highly likely to cause the material obtained to be inadmissible.

The internal tensions that exist within the French system continue also. The process is very slow and the J.I. appears to be accountable to his union, and not the public he serves. He is under pressure to resolve issues often at the expense of rigour, he remains poorly paid,[249] and Caroline Dickinson has joined the list of more than twenty Britons whose murders in France remain unsolved.[250] In a similar incident[251] the treatment of the crime scene was so poorly handled by the *gendarmerie*, under the control of the investigating magistrate, that within 2 hours of the discovery of the body a party of 100 schoolchildren was using the site for a school outing. In frustration at the lack of progress the aggrieved family visited France and handed out reward leaflets. Although a number of leads were forthcoming, the police failed to take up inquiries and the aggrieved family are still unaware of the outcome. The authorities in the region of Auxerre, had previously refused to re-open cases even though fresh and incriminating evidence was brought to their attention.

In desperation this year a lawyer took the authorities of Auxerre before the Paris Court of Appeal to secure an order for the re-opening of the case. The same lawyer, Gonzalez de Gaspard, has now sought to have the jurisdictional authority of the officials removed. The investigating judge from the region, Claudine Philippe, stated, 'There is no particular lead at the moment, but even if there was one I wouldn't tell you'.[252] This attitude of insularity is apparent in the Dickinson inquiry also, where the examining magistrate had ordered the *gendarmerie* not to speak to the victim's family.[253]

### 2.5.1 Conclusion

The police of France have traditionally been dominated by central government control. The one exception to this has been the more recent development of the

*Police Municipale*, a force who are directly accountable to the local population they serve. This local model is far closer in design to the Anglo-Saxon model than the traditional authoritarian and centralised continental force of France. The effect of centralisation is control,[254] a control which is manifest in the area of criminal investigations, indirectly by the *parquet* and directly by the *juge d'instruction* who controls the methods of investigation. In terms of accountability and function the police are controlled at ministerial level, as the head of each police service is the relevant minister of state.

> 'The republican police is sick - as a result of its complicated structures...its caste mentality...It is the victim of damaging influences of the government - the blackmail, the flattery and at times the manipulation. It is paralysed by its top-heavy hierarchy which excludes debate and internal communication... Ultimately the National Police is still a closed institution'.[255]

The nature of criminal investigation in France is hierarchic. The police, OPJ and the *magistrature*, which form an auxiliary investigative force, create what may sometimes appear to the English to be an impenetrable barrier to effective and accountable criminal investigations.

By comparison with both national police forces in France the English police have greater powers to effect arrests and determine criminal charges. The English police are better paid than the French and have greater autonomy. They are also the primary agency for the investigation of all criminal matters and retain this position in the field of white collar crime inquiries. Neither the P.N. nor the *Gendarmerie* have the power to conduct investigations into mainstream or specialist serious crimes without the authority of a professional judge. However, as has been discussed in this chapter, there is evidence to suggest that the police in France may have a fairly cavalier attitude towards the weight that should be given to the authority of the J.I. to

determine the direction that a particular inquiry should take. The English police are also purely a civilian force, they are unarmed and this may reflect the historical development of policing in this country which occurred later than in France and also was the very antithesis of the continental model. In this country the police were formed to protect and assist society and since the majority of society was unarmed there was no plausible argument for arming police officers, this still remains the case in England today. In France the origins of policing stem from the military where the 'people's army' were just that, military personnel who carried firearms. Napoléon introduced a civilian police force, this force is also accountable to central government and policing in contemporary France continues to be a function of the state. Many citizens of France might say that it is conducted for the state. Accordingly the models of policing and the accountability of the forces concerned is fundamentally different in France and England.

The differences that exist between the police forces of France and England have implications for the investigation of all serious criminal matters, particularly white collar offences where, as was discussed in chapter 1, the very nature of the offences is hard to define. White collar crime frequently transcends national borders and the need for effective mutual assistance between investigatory agencies is paramount in this particular field. There was historically a mistrust of forming any police force in England particularly if the formalisation of policing was seen to resemble a recent enemy, France. The result was that when a police force was formed it was, and continues to be, suspicious of alternative policing methods. The French police can, by comparison with the English police, seem to be military and political. Also, they train new recruits for longer and yet police officers have less powers in France than in England. The French police have multiple entry points whereas the English police have one, and therefore, to the suspicious English mind, the French have police

officers who have very limited authority, who are earning low salaries and are controlled by academically well qualified officers. This must mean that the uniformed patrol officer in France needs to be strictly controlled and perhaps should not be trusted to deal with sensitive information. It is easy to see how it is possible for such prejudiced attitudes to develop which could be very damaging.

It is difficult to assess the similarities that exist between the specialist departments of the police in France and England because there is no equivalent of the J.I. in the English legal system. Within mainstream policing it is quite possible for an English police officer, with 3 years experience, to be responsible for the welfare and rights of a dozen prisoners who are be held in custody for questioning. The same officer will later have to decide on whether or not those suspects should be released or remain in custody to appear in court. The charging and liberty of the suspect will be based on the information given to the custody sargeant by the investigating officer. The investigating officer, who has come from working shifts as a uniform patrol officer, might have a vested interest in charging a suspect, as detected crime figures are what can determine the extension of a period of attachment to a particular area of police work. The police officer responsible for deciding on a person's liberty may hold no formal academic qualifications, no professional qualifications and will have had no training specific to the field of human rights and how this operates within a framework of European citizenship. All these factors are relevant to the officer who is a specialist, particularly his training or lack of it and the knowledge that he must at some point return to uniform patrol and shift work. The knowledge that he can dictate the liberty of a suspect and also decide to charge a person with the most serious of offences, the knowledge that it is the investigating police officer, not a professionally qualified judge, who can decide to charge the chairman of a national or international company, the results of which may cause the collapse of a public listed company, are

all factors which place the role and function of the white collar department detective in England in a vastly different position from that of his perceived equivalent in France.

'But the UK constable, as part of a European police service *de facto*, if not *de jure*, needs to have some understanding of the essence of the European Union in order to be able to exercise that discretion which is at the heart of English policing. If you do not know what the social and political priorities are, how can you make decisions as to what to enforce and what not to enforce? To put it another way, if we are going to police the borders of the new Europe and these borders are no longer geographical, we need to be able to recognise what is supposed to be inside the border and what is not, and we need to be able to recognise what is a threat to the Queen's peace, tranquillity or whatever you want to call it, and what is not.'[256]

In white collar investigations the English police officer will receive a maximum of 2 weeks training specific to financial crime investigations, this is in addition to the 7 weeks training he may have received when entering C.I.D. The new style of detective training has been likened previously in this chapter, to an NVQ. Interestingly perhaps an NVQ is not considered as an appropriate qualification for entry to university in England, yet we allow detective officers to investigate major crimes and complex financial frauds that often involve other jurisdictions with no training in alternative legal systems or even a rudimentary introduction to the powers that are conferred on the police in other countries. To compound the problem, what financial crime investigation training is given can vary between the different police regions and not all courses will then qualify an officer to obtain information from certain financial institutions.

The original model for policing in England was based on trust and policing by consent of the public. This model is still apparent in contemporary policing in England, including when officers are required to investigate complex white collar offences. The trust vested in the police allows them a considerable degree of individual and collective decision making, such that it is the police who can determine whether a matter is a criminal offence or civil, whether a matter should be proceeded with, whether an allegation should be dealt with by *no further action* or whether an alleged white collar offender should be subject to a caution or charged with the offence. It is not appropriate to compare the costs of white collar crime with conventional crime. Much remains unreported, undetected or not prosecuted. The potential impact on society and the status of London as a major financial centre means that white collar offences demand exceptional investigative powers, powers which will deter the 'unpleasant and unacceptable face of capitalism'[257]. To this end, in England, the police remain the primary investigation agency. They may be assisted in their inquiries by experts, such as the *special case officers* of the CPS or alternatively, they may transfer the inquiry to the Serious Fraud Office.

In the following chapter the work and authority of the Crown Prosecution Service and the SFO are compared and contrasted with the role of the specialist criminal investigation judge, the J.I. in France. All of these agencies have been severely criticized over recent years and experts from England and France have visited each other's country to assess the alternative options. Some of the suggestions have been implemented while others remain discussion points for the future. The Serious Fraud Office has recently been given renewed government approval to continue largely as it is, '...but it can be said with confidence that, without the present structures and organisation, many of the heaviest cases successfully brought to trial and conviction would never have been tried at all'.[258]

The nature of white collar crime means that investigations are often contentious and may have a lasting effect on consumer confidence. Some investigations have compromised the rights of suspects and these crucial issues are considered in chapters 4 and 5 when recent white collar cases from France and England are evaluated.

It is proposed that there is a need for enhanced understanding of alternative legal systems for officers who conduct investigations into complex frauds as the offences themselves are particularly likely to transcend national borders. There is also an argument for regulation, rather than criminal prosecution, of white collar offences. In order to achieve either of these goals there needs to be training of staff and mutual cooperation. A number of channels exist for the exchange of information between investigatory agencies within Europe and a range of initiatives have been taken by some of the continental European countries to encourage policing without borders. It is in the nature of policing that police officers will be suspicious, it follows that police officers would rather deal with someone they know than an unknown party and consequently official lines of communication and requests for cross-border assistance may be circumvented. There are advantages, speed of action, direct contact and the lack of paperwork. There are disadvantages such as duplication and abrogation of internationally agreed policies. The penultimate chapter addresses the interface between regulation and criminal prosecutions and also evaluates some of the channels that currently exist for the transference of information to regulators and criminal prosecutors.

## Endnotes.

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[1] e.g. The Gordon Riots . A Protestant protest against the Catholic Relief Act 1778 led by Lord George Gordon, for which he was tried but acquitted of treason.
[2] The Bow Street Runners were formed in 1750 by Henry Fielding (1707-54) when he was a magistrate for Middlesex and Westminster. Some commentators believe that although the 'Runners' have a legendary place in the development of policing in England, the activities of this team were at times '...never entirely above suspicion' see further: Hebenton, B. & Thomas, T. *Policing Europe. Co-Operation, Conflict and Control*, New York, St. Martin's Press (1995) p.11.
[3] The 1785 London and Westminster Police Bill and 1812 Police Bill both failed.
[4] Colonel Charles Rowan and a barrister, Richard Mayne.
[5] The Desborough Committee 1920, which was appointed to look into conditions and pay decided , as a result of the police strike, to replace the Police Union with a Police Federation which had no power to call a strike. This provision exists today.
[6] 1974. Re-organisation and amalgamation created 41 provincial police forces plus the Metropolitan Police and the City of London Police .
[7] This figure does not include the specialised forces i.e. British Transport Police, The Royal Parks Constabulary, The Ministry of Defence Police, UK Atomic Energy Authority Constabulary and a number of Port, Harbour and Tunnel police. There are also approximately 3,000 police officers on secondment to specialist operational work e.g. Regional Crime Squads now superseeded by the National Crime Squad, NCIS and the Home Office. These officers do not feature in the national figure.
[8] The provisions of the Criminal Justice and Public Order Act 1994 have a number of applications for the police, particularly Section 34 which relates to the caution, *post*. This act does not, however, change the provisions of PACE, which remain the most important legislative measures.
[9] There are 11,072 graduates in the police service: 8,594 male and 2,361 female. Ethnic origin 203 (male and female). Source: Home Office. 04/12/96.
[10] Currently 2 years, this is under review by the Home Office.
[11] This contrasts directly with the system in France for the *Police Nationale* where entry point for a graduate is to the rank of *commissaire,* which is equated with the rank of superintendent in England.
[12] 10 weeks followed by 5 weeks at the relevant force under the guidance of a 'tutor' constable which is then followed by a further 5 weeks at the regional training centre.
[13] Provincial forces operate a Modular System broken down into 7 modules of i) 17 days initial familiarisation with your own force. ii) 10 weeks at a Home Office financed, Regional Training Centre. iii) 5 weeks 'on street' training under the supervision of a tutor constable. iv) 5 weeks further training at the Regional Training Centre. v) 5 weeks further tutorship during which time a decision will be made as to the recruits ability to patrol unsupervised. vi) 1 week at the local force headquarters for written assessments on the law and police powers. vii) completion of the probationary period with regular local appraisals. The Metropolitan Police operate a slightly different scheme which starts with an 18 week initial training programme at the training centre at Hendon. This facility is exclusive to the Metropolitan Police for the purposes of initial training. all subsequent training is done at a local divisional level.
[14] This act came into force on 1st January 1986.
[15] Section 39 and Parts IV and V and also numerous references in the Codes of Practice.
[16] Section. 58 PACE.
[17] e.g. Theft of pedal cycles, theft from unattended motor vehicles and shoplifting.
[18] Secondment to specialist units is subject to officers having already served in the CID and having successfully completed CID training. This initial detective training comprises of sitting a written criminal law and procedure exam and then attendance at a regional detective training school for a 7 week course. Secondment to a specialist unit may then involve further regional training e.g. Officers of the Fraud Squad attend a 6 week fraud course and then work with experienced officers to gain 'hands on' knowledge. Regional Detective Training Schools are not Home Office financed and are not located at the same venue as the initial recruits training centres. These detective schools are based at a police force headquarters and surrounding forces will pay that force for its training courses, e.g. officers from the City of London Police attend the Fraud Squad course at Wakefield, the headquarters of the West Yorkshire Police.
[19] All forces in England now have a Fraud Squad whose terms of reference vary from dealing with any commercial crime to dealing with all cheque frauds. The Metropolitan Police Fraud Squad, *post*, does not investigate any cheque or credit card frauds. These are dealt with by divisional detectives.

[20] The Metropolitan Police have a Fraud Squad and separate Companies Fraud Unit, both are under the control of SO6, which is the Organised Crime Branch. The City of London Police, City Police, have 45 officers and 9 civilian support staff in the Fraud Squad plus a further 13 officers in the Money Laundering Unit, 12 officers and 2 support staff in the Cheque Unit and 7 officers on detachment to the Serious Fraud Office, SFO. Officers from the City Police do not serve a specified period of secondment to the SFO they are released to the SFO on a 'case by case' basis. Consequently some officers remain with the SFO for a number of years. The total number of City Police officers involved in the investigation of white collar crime represents 8.5% of the force establishment, by comparison Sussex Police have 7 officers attached to the Commercial Branch, this represents 0.2%

[21] Levi, M. *Regulating Fraud. White Collar Crime and the Criminal Process,* London, Tavistock. (1987) p.144.

[22] Source. Author. 16.12.96. This represents a total of 647 officers of the provincial forces and the City Police plus a further 152 officers of the Metropolitan Police Force.

[23] e.g. On secondment to the Regional Crime Squad officers attend; pursuit driving courses, firearms training, surveillance and following suspects courses and undercover operations training. If then specialising in the 'drugs wing' of the RCS then officers attend further specialist courses related to this area of work.

[24] Primarily to implement the Prevention of Frauds (Investment) Act 1939. An act implemented to curb the practice of 'share pushing'. This unit is currently headed by Detective Chief Inspector R. Bloxham and based at 2 Richbell Place, London. WC1 N3LA.

[25] *Op.cit.* Levi. note 21.p.120 states ' ...the formation of a Company Fraud Department within both the Metropolitan and City of London police forces...has always been the titular head of the joint squad...' This is no longer a joint squad and the Metropolitan unit comprises of entirely Metropolitan police officers albeit they work very closely with officers from the City Police.

[26] For a further comment on the development of fraud investigations during the 19th and early 20th century see Levi, *Op.cit.* note 21. at p.120.

[27] This situation is now different as the provisions of the Police Bill have been enacted. (1st April 1997) This Act contains proposals for a greatly increased proactive role by the new National Crime Squad in the investigation of White Collar Crime and the related offences of Money Laundering.

[28] Levi, *supra.* note 21. p.122. This 'amount' was that carried by each of the 57 officers of the City Police and 127 Company Fraud Department officers. This method of calculation is no longer used. As a working guideline to divisional detectives the Metropolitan Company Fraud Department will not normally take over an investigation if the loss/gain is below £750,000. During December 1996 the Company Fraud Department was conducting a total of 650 case investigations and a further 20 had been referred to the SFO, which are now being investigated by a combined team of SFO and police officers. In one case alone the 'at risk' figure was £5 Billion. Source: Author.

[29] There are a range of factors which determine whether a serious fraud/ white collar crime will be investigated by the police or the SFO. These include the complexity of the case and the financial amount involved. As a working guideline the SFO will not usually take over an investigation if the loss/gain amount is less than £5 million or the method or perpetrating the fraud was particularly complex. Public interest will also be a relevant factor.

[30] Source: Media Office City Police.

[31] DCI Bloxham states that the total of fraud losses during 1992 exceeded the entire financial losses for all domestic and commercial burglaries plus all thefts from motor vehicles in the Metropolitan Police District during the same period.

[32] e.g. Greater Manchester Police 30 officers, Hampshire Police 22, Kent 19, Merseyside 28, West Midlands 47, West Yorkshire 46.

[33] This is a general term which covers Fraud Investigations, however, most forces divide this work again into Fraud, Cheque Frauds and Company Frauds. The latter are referred to as Company Fraud Branches in Metropolitan policing areas and Commercial Branches or Financial Investigation Units in the provincial regions. e.g. Avon & Somerset Constabulary have a Fraud Squad comprising of 1 Detective Inspector, 3 Detective Sergeants and 9 Detective Constables. This force also has 1 Detective Sergeant and 3 Detective Constables in the Financial Investigations Unit and a further 1 Detective Sergeant and 3 Detective Constables in the Cheque Unit. Source: Author.

[34] e.g. for the provincial forces Wakefield where the course lasts 7 weeks and for officers of the Metropolitan Police the Fraud Faculty at the Metropolitan Police Training School.

[35] Metropolitan Police Training Centre, Peel Centre, Aerodrome Road, Hendon, North London.

[36] It is interesting to note that 20 years ago the Initial Detective Training Course at Hendon lasted for 18 weeks. This was seen as the absolute minimum necessary before an officer was substantiated in the rank of Detective. Today there is no such course in existence.
[37] Based at Bramshill Police Staff Training College, Bramshill, Fleet, Hampshire. The Metropolitan Police are autonomous and devise and implement there own training programmes.
[38] Wakefield, Preston, Bristol, Maidstone and Birmingham.
[39] The initial course has now been reduced to 6 week duration as officers attending are required to complete a greater depth of 'pre-reading' at local level. The higher tier courses comprise of a 2nd level management course which lasts 3 weeks and the 3rd tier Senior course, for officers of the rank of Detective Chief Inspector, DCI, and above. This course lasts 6 days. The training school at Maidstone in Kent has now opted out of the national training scheme and runs its own initial detective training course which lasts 4 weeks.
[40] This register is held at NCIS and only officers who have successfully completed the Hendon course may be entered. The purpose of the register is to ensure that only those personnel who are familiar with financial institution methods are allowed to request assistance and information from banks. This is both beneficial to the police and the banks and develops a framework of professionalism and trust. The banks are supportive of this scheme as they know that an officer on the register is fully conversant with the law appertaining to the disclosure of bank/client information.
[41] The analysis of concealed incomes may be focused upon as this will assist is the completion of a financial audit. An audit preparation equips officers with practical skills from which the likely criminal involvement of a group or individual can be assessed.
[42] West Midlands Police Training School, Greater Manchester and Wakefield Detective Training Schools.
[43] There is a clear ethos of learning through sharing which the police are keen to foster. This is not so well received by those institutions which are in direct competition with each other, specifically the 'Big banks'. Source: Author interview with Wakefield course organiser. 06/01/97.
[44] Awarded by Liverpool John Moores University, Liverpool Business School.
[45] Two courses are run each year at Wakefield. On average 20 students attend each course. The second course of 1996 had officers from 8 forces, including the Royal Military Police, and a civilian researcher from a UK university. The serving civilian police officers had all served on the Fraud Squad for periods considerably in excess of 6 months prior to attendance. In one instance a Detective Sergeant had been on the Fraud Squad for 2 years before attending the initial training course.
[46] The police, The Fraud Investigation Group of the Crown Prosecution Service, FIG, The SFO, Customs and Excise, The Department of Trade and Industry, The Inland Revenue, The Bank of England, The Securities and Investment Board, the Self-Regulatory Organisations (under the general supervision of the Department of Trade and Industry), and a number of government departments, e.g. Department of Agriculture and Fisheries and the Department of Social Security.
[47] Para. 2.1 S.23 Criminal Procedure & Investigations Act, CPIA, 1996.
[48] One person can in fact perform all three functions. para. 3.1. S.23. CPIA. 1996.
[49] The debate stage of this Bill caused the inclusion of S.23 (1) (a) as a direct response to the single mindedness which it was felt the police had sometimes displayed when conducting investigations. It was felt that neglect of inquiries into potential alternative suspects had wasted police resources, led to miscarriages of justice and led to the true offender escaping punishment.
[50] Due to restrictions on the budgets of police forces this is now the normal procedure, and officers are encouraged to advise complainants that the compilation of evidence is not the sole responsibility of the police. Source: Author interview conducted 19.12.96.
[51] A constable has authority to conduct investigations derived from S.19 The Police Act 1964 and S. 160 of the Criminal Justice and Public Order Act 1994. How these are carried out are governed by PACE and the Codes of Practice.
[52] The definition of Serious Arrestable Offence includes four categories (A) Offences which are always serious arrestable offences: Murder, treason, manslaughter, rape, incest with a girl under age of 13 (under 14 in N.Ireland), kidnapping, buggery with a person under age of 16, indecent assault which constitutes an act of gross indecency and offences under paras (a) to (f) of S 1 (3) of the Drug Trafficking Act 1994 (S116(2)(a)-(c) as amended by Sch 1, para 9, DT Act 1994 (Art 87), a range of offences relating to explosive substances and firearms possession, the taking of hostages and causing death by reckless driving. In category (B) are those terrorism offences which allow the police the authority to delay access to a solicitor or delay notification of arrest to family . Category (C) states that 'All arrestable offences are serious arrestable offences only if their commission leads to, or is intended to lead to, any of the following consequences: Serious harm to the state or public order, serious

interference with the administration of justice or with the investigation of offences or of a particular offence, the death of any person, substantial financial gain to any person; and serious financial loss to any person. Category (D) includes those offences which consist of making threats which if in carrying out the threat would lead or be likely to lead to the consequences mentioned in category (C), e.g. threats to kill, or blackmail leading to serious financial gain and loss.

[53] Section 10 defines 'items subject to legal privilege', which reflects the position at common law where privilege attaches to items when in the possession of a person who is entitled to possession of them. These include; communications between a professional legal advisor and his client, or any person representing her client, made in connection with the giving of legal advice to that client. It is not restricted to advice given in legal proceedings. This privilege extends to all forms of communications and the privilege is that of the client not of the legal advisor. (see *R v Peterborough Justices, ex parte Hicks*.[1977] WLR 1371. This privilege can be waived by the client only. Items held for furthering a criminal purpose are not items subject to legal privilege. Section 10 (2) Art 12 (2). (see *R v Leeds Magistrates' Court, ex parte Dumbleton.* [1993] Crim. LR. 866.

[54] ss 11-13, Arts 13-15. This is personal and confidential material excluding 'journalistic material' e.g. personal records are personal, human tissue or tissue fluid taken for the purposes of medical diagnosis or treatment are confidential.(under the provisions of the Criminal Justice and Public Order Act 1994. Sch 9 para 39 and ss. 62-65 PACE hair and saliva may now be taken without consent). In respect of journalistic material s 13(1) Art 15 (1) includes all branches of the media and material obtained. If material is passed from a journalist to the media companies lawyers it is not received for the 'purposes of journalism', and if received from the journalist it will not be subject to legal privilege. In order that this potential problem may be overcome journalists are given the protection of The Contempt of Court Act 1981 Section 10.

[55] Section 14. Art 16. This contains two categories of material, (i) journalistic material which is not excluded material and (ii) material to which s14(2) (Art 16 (2) applies. In respect of journalistic material which is not held in confidence this would include photographs taken by a press photographer, which although taken for the 'purposes of journalism' are not held in confidence. This would also include film material and videotapings. e.g. if a journalist received a written letter, which they held in confidence, containing a threat to kill and the weapon subsequently used, the letter would be excluded material and the weapon would be special production material. Part (ii) applies to business and financial information which although held in confidence is of a less sensitive nature than legally privileged or excluded material. Banks and Building Societies are the normal holders of special procedure material as well as solicitors, financial brokers and the media.

[56] These provide that a constable may seize anything authorised in the warrant subject to the relevant entry provisions which include; entry is barred or the occupant refuses entry without production of a warrant.

[57] Of this last category it is always unobtainable and S 9 (2) Art 11 (2) specifically prevents the use of search warrants to search for legally privileged material.

[58] See *R v Guildhall Magistrates' Court, ex parte Primaks Holdings Co (Panama) Inc.* [1990] 1 QB 261.

[59] Following the decision in *R v Maidstone Crown Court, ex parte Waitt.* [1988] Crim LR 384. Where a solicitor sought judicial review as the documents seized by the police were subject to legal privilege and the warrant had been issued on the grounds that communication with the solicitors was impracticable, the Divisional Court were critical of the application and issue of a warrant and recommended an *inter partes* application for special procedure material when possible. The suggestion that it were difficult to communicate with a firm of solicitors was not well received by the Divisional Court and they went on to say that judges must consider carefully that all the access conditions had been fulfilled and no application should be treated as routine.

[60] Fraud is an arrestable offence under S 24, power to arrest without warrant, and if the arrested person has just left their office or any other premises, then the police may upon arrest search those premises, as being premises under his control S.18 Art 20 or premises in which he was immediately before his arrest, S.32 (2) (b). and under Art 34 (2) (b) this extends to the search and seizure of any material notwithstanding that it is special procedure material. It is interesting to note that whereas the provisions of the Bankers' Books Evidence Act 1897, BBE Act, S.7. (as amended by the Banking Act 1987) have been largely superseded by the provisions of PACE in respect of applications for special procedure material, the BBE Act remains in force and is useful in those cases where a serious arrestable offence has not been committed.

[61] The Metropolitan police and City Police were the first forces to effectively use the new provisions of PACE under S.9. Art 11 and Schedule 1 applications.

[62] It is of note that there is no requirement under Schedule 1 para 3 that the offence to which the application applies be a 'Serious Arrestable Offence'. 'If on application by a constable a circuit judge is satisfied that one or other of the sets of access conditions is fulfilled...3. The second set of access conditions is fulfilled if-(a) there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application...'
[63] See Section 7. Bankers' Books Evidence Act 1879.
[64] The information in support of application for production order is provided by the police officer concerned. This particular application procedure is covered in the Metropolitan Police Financial Investigators Course during which officers are familiarised with the need to affirm on oath the specific grounds under which the application is made. Failure to do so will invite the circuit judge to dismiss the application.
[65] A notice of application which is usually sent but may be oral, is given to the person or organisation thought to be in possession of the sought after material. There is no obligation on the responding party to inform the owner, to whom a confidence is owed, that an application for production has been made. see *Barclays Bank plc v Taylor.* [1989] 3 All ER 563.
[66] The contents of the application must be such as to satisfy the judge, on the balance of probabilities (The civil standard see 'Standards of Proof' The Crown Prosecution Service. *Post*), see *R v Norwich Crown Court ex parte Chethams*,[1991] COD 271., of the need for the production order or warrant in accordance with the provisions of Sch. 1.
[67] Computer material must be produced in a visible and legible form suitable to be taken away. Sch. 1. para. 5.
[68] Code B. 5.13.
[69] Subject to considerable change with the enactment of the Police Act 1997.
[70] The increasingly common use of video camera surveillance in the centres of cities and towns is governed by s.163 The Criminal Justice and Public Order Act 1994. In London the provisions of the London Local Authorities (No 2) Act 1990 permit the installation of surveillance systems in the street to '...help prevent crime and anti-social behaviour...'
[71] The guidelines issued by the Home Office. (HC Debates 19th December 1994) recommended that when a senior officer is requested to authorise the placement of a listening device or other surveillance equipment they must be satisfied that, (i) the investigation concerns serious crime, (ii) normal methods of investigation have been tried and failed or due to the particular circumstances are likely to fail, (iii) there is good reason to think that use of the equipment will result in an arrest and a conviction and (iv) the use of the equipment is operationally feasible.
[72] Telephone tapping is governed by the Interception of Communications Act 1985 which permit the listening into telephone conversations to prevent malicious or obscene phone calls. A warrant under this act should be obtained prior to the commencement of the 'tap'
[73] The use of binoculars, night sights , telescopes and other non-recording equipment may be authorised by an officer of the rank of Inspector. It is frequently the case that no authority is sought and officers regularly take such equipment with them. Source: Author.
[74] There are two exceptions which will exclude evidence obtained illegally or improperly. (i) Privileged documents, although there is case law (*dictum*) to support the contention that these illegally obtained documents may be produced if copied and tendered as secondary documents. (*R v Mostyn* (1842) 10 M&W 478). (ii) Confessions obtained by oppression. See also, *Lobban v R* [1995] The Times 28 April. Judicial Committee of the Privy Council (Lords Goff, Mustill, Slynn, Nicholls and Steyn).
[75] *R v Leatham*. (1861) 8 Cox CC 498 at p.501.
[76] *Jones v Owens* (1870) 34 JP 759, *Kuruma, Son of Kania v R* (1955) AC 197, PC., *Jeffrey v Black* (1978) QB 490.
[77] [1980] AC 402.2 [1979]All ER 1222.
[78] This decision did not endorse trespass by the police and in fact the contentious evidence was obtained by use of a tape recording of the conspiracy to utter forged bank notes. What this case clarified was that ,with the exception of confessions under S.76. PACE, *post*, improperly obtained evidence is admissible in criminal trials. S.78 PACE states, *inter alia*, 'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'
[79] *R v Sang* [1980] AC 402. dealt with the admissibility of evidence as confined to the common law, i.e. admissions, confessions and evidence obtained from an accused after the commission of an offence.

The statute provisions extend to any evidence on which the prosecution propose to rely irrespective of how or where obtained.
[80] [1992]QB 979, [1992] 4 All ER 559, CA.
[81] [1992] 1 All ER 317.
[82] [1994] 1 All ER 898.
[83] *R v Khan (Sultan)* (1996) 146 NLJ 1024 HL.and also in respect of the use of interception equipment used on a cordless phone, *R v Effick* [1994] 3 WLR 583. HL.
[84] Article 8 ECHR 1950. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
[85] *Supra*. note 83.
[86] Within the workings of the court which operates, *inter alia*, on the principle of proportionality.
[87] Tupman, W. 'East meets West' *Policing Today*. July 1996 pp. 30-36 at p. 32. This refernce is related to the problems of sustaining meaningful police responses to increasing Organised Crime activities acroos the borders of the former USSR and Western European countries.
[88] Lidstone, K. & Palmer, C. *Bevan and Lidstone's The Investigation of Crime A Guide to Police Powers*, London, Butterworths (1996) 2nd Edition. p.238.
[89] *Holgate-Mohammed v Duke* [1984] AC 437, [1984] 1 All ER 1054.
[90] The range of offences committed by the white collar offender will frequently be; Theft, Deception and False Accounting. All of which are contrary to the Theft Act 1968 and attract sentences in excess of 5 years imprisonment on first conviction. This does not imply that the first time offender must be sentenced to a term of imprisonment in excess of 5 years, only that the sentence is available to the courts. The common law offence of conspiracy to defraud is now covered by the provisions of Section 24 (1) (b), Art. 26 (1) (b). Whereby the previous common law offences are now to be considered as 'Arrestable Offences'. The restrictions on sentencing are governed by Sec.1. Criminal Justice Act 1991. which restricts the power of a court to impose a custodial sentence unless, 9(a) The sentence is fixed by law, e.g. Murder is fixed at Life Imprisonment or the offence is only triable on indictment. These restrictions in no way alter the status of the offence or the power to arrest, these provisions relate solely to the power to sentence.
[91] e.g. Persons unlawfully at large or exclusion order provisions under Sec.14 The Prevention of Terrorism Act 1989. Also certain offences relating to the protection of animals and in the fourth category certain offences under the Road Traffic Act 1972 and 1988.
[92] This will normally contain those offences which are not serious enough to become Arrestable Offences but need a summary power of arrest. e.g. Sec.1 and 2 of The Public Order Act 1986 and aggravated trespass under Sec. 68 Criminal Justice and Public Order Act 1994 have both created offences which have a summary power of arrest.
[93] *Dawes v DPP* [1994] Cr App Rep 65, [1994] Crim LR 604. Raised the issue of notification of arrest and alleged unlawful imprisonment. Dawes stole a motor vehicle which was in fact a police 'sting' vehicle fitted with automatically locking doors and an engine cut out device. On taking the vehicle Dawes was, within 200 metres of the theft, stopped by the automatic engine cut out and detained in the vehicle by the automatically locking doors. Dawes alleged that he was not informed of his arrest at the time of arrest or as soon as practicable and that he was unlawfully detained. The Divisional Court, dismissing the appeal, held that Dawes was not arrested at the time the 'sting' vehicle's doors closed and therefore he was informed of his arrest at the moment of arrest, *vis*, when the police arrived.
[94] The amended caution is contained in the provisions of Sec. 34. Criminal Justice and Public Order Act 1994 and contained in Code C 10.4. PACE. Codes of Practice. 'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence'.
[95] [1996] QB 373, [1995] 4 ALL ER 939, [1995] 3 WLR 818.
[96] It is in fact expressly preserved under Sec. 35 (4). CJPOA 1994.
[97] (i) The judge had to tell the jury that the burden of proof remained on the prosecution throughout and had to tell them what the required standard was. (ii) It was necessary for the judge to make it clear to the jury that the defendant was entitled to remain silent-that was his right. (iii) An inference from a failure to give evidence could not on its own prove guilt. (iv) The jury had to be satisfied that the prosecution had established a case to answer before drawing any inferences from silence. (v) If, despite any evidence relied on to explain his silence or in the absence of any such evidence, the jury concluded

the silence could only sensibly be attributed to the defendant having no answer or none that would stand up to cross-examination, they could draw adverse inference.
[98] The role of the Custody Officer, a police officer not below the rank of sergeant. Sec. 36 (3) Art 37 (3) PACE, is crucial at this point as the welfare of the prisoner and authority to detain them is the custody officers responsibility.
[99] Sec. 116. (6) (e) (f). PACE. 1984.
[100] This requires the attendance of the detainee at a magistrates court and the detainee is permitted legal representation. The warrant may be issued for a period of further detention of 36 hours in the first instance which may be extended a further 36 hours. In no case can the overall period of extended detention go beyond 96 hours without charge or release of the suspect.
[101] Sec. 56. Art. 57 and Sec. 58. art. 59. PACE.
[102] During the 36 hour period delay in notification may be authorised by a superintendent if conditions apply, e.g. a serious arrestable offence has occurred and it is believed that the suspect will interfere with the evidence of that offence or communicate with another involved in that offence or impede the recovery of property. The complete provisions are contained in Sec. 56 (2) *et sec.*
[103] Code C 5.6 PACE
[104] Sec. 58 (1). PACE.
[105] Sec. 58 (8) PACE.
[106] This provision only applies to terrorism cases. Sec. 58 (15) PACE.
[107] Code. C. 315. PACE.
[108] *R v Samuel* [1988] QB 615, [1988] 2 All ER 135, [1988] 2 WLR 920.
[109] *ibid.*
[110] Sec. 76-78.
[111] Code. C.
[112] Code. C. 3.15. and see also Sec. 29. PACE (Art 31)
[113] For the provisions of Section 2. Criminal Justice Act 1987 governing the admissibility of evidence obtained in serious fraud investigations conducted by the SFO when a suspect has been charged by the police and is then interviewed by the SFO there is no requirement on the investigating officers from the SFO to caution as the CJ Act clearly indicates an intention of parliament to effect an inquisitorial power to investigations conducted by the SFO. This is clarified in a number of cases commented on *post.*
[114] Sec. 76. (2) (a) (b). See further Keane, A. *The Modern Law of Evidence,* London, Butterworths (1996) 4th edition. pp. 316-363.
[115] In *R v Seelig* [1991] 4 All ER 429, [1991] BCLC 869, [1991] BCC 569..
[116] Sec. 47/3 Art. 48.1.
[117] 'Met-CPS Trial a Success. Lawyers on station duty lend vital help' by Gordon Etherington. Chief Crown Prosecutor. 'Inside Job', *Metropolitan Police* (December 1996), Issue. No. 18.
[118] Author's personal experience when serving for three years on the Criminal Justice Department of the Sussex Police and recently reinforced by interviews within current investigating officers. 10/01/97.
[119] A police officer, who is required under the statute to reveal all information and other material gained to the prosecution. Sec. 23 (1) (e).
[120] This does not negate the responsibility incumbent upon CPS to provide a schedule of 'unused material' for the defence.
[121] There are also 6 overseas departments.
[122] General Charles de Gaulle's 5th republic simplified a number of procedures, including the introduction of police tribunals for minor offences.
[123] e.g. President Mitterand abolished the death penalty in 1981.
[124] *la loi no 93-1013 du 24 août 1993 modifiant la loi no 93-2 du 4 janvier 1993 portant réforme de la procédure penale.* This had the most wide ranging implications for the administration of justice seen in France. This was only the fifth time since 1958 that the Parliament was assembled in Congress by the President in order to amend the Constitution. By 833 votes Congress adopted most of the proposals put forward by President Mitterand. Some of the issues went through a number of changes, particularly the new CPP, *post*, which was introduced in January 1993, amended in August 1993 and finally introduced in January 1994.
[125] *Décrets en Conseil d'Etat, art R1-R250, dérets simples, art D1-D600 and arrêtés, art A1-A57.*
[126] An excellent example of this is provided by Peacock, D. 'France: Fraudulent Misuse of a Document Signed in Blank', *Journal of Financial Crime* (June 1997), Vol. 4. No. 4. pp. 359-360
[127] Notably those of the *Chambre Criminelle.*

[128] The wording of the codes amounts to brief concepts of how the law should be interpreted and rarely specifies the actual wording of the law applicable to each instance.
[129] As formerly occurred in the application of the need to protect the rights of the defence. This has now been subsumed into the modified law, *supra*. note. 124.
[130] Also referred to as the Investigating Magistrate or Examining Magistrate.
[131] The ECHR were restricted to commenting on the lack of safeguards to protect an individual from the invasion of privacy in the telephone tapping case of *Huvig & Kruslin v France*. (1990) ECHR 24 April Series A Vol. 176, (1990) 12 EHRR. 528.
[132] Art. 81 of the CPP.
[133] The equivalent term in English is judge not magistrate. *Magistrat* or *La Magistrature* refers to the professional judges of the courts or public prosecution departments. See detailed discussion on the J.I. *post*. Chap. 3.
[134] Magistrates fall into two categories. The seated, *magistrat assis* and the standing, *magistrat debout*. Seated magistrates administer sentences in all the criminal courts. The standing magistrates are the equivalent of the CPS. They follow up an initial report of a crime and bring the matter to the attention of the *juge d'instruction* who then decides on the appropriate course of action. During the court proceedings the prosecuting judge, *parquet*, stands in the court to address the defendant. They are 'Given the floor'.
[135] Offences where person in authority uses their position to profit. As discussed in Chapter 1.
[136] *Interrogatoire de première comparution.*
[137] This is of course is a stark contrast with the powers of the DTI and SFO in the UK, and the sanctioned right to self incriminate. *post*. Chap 3.
[138] CPP. art 111-1.
[139] There are 471 *Tribunal de Police* throughout France and these courts handle in excess of 10 million cases per year. Source: http://www.justice.gouv.fr/chiffres/penale.htm. Visited 17.09.98
[140] *La contravention qui est la forme la plus bénigne des infractions est sanctionnée par une amende variant de 250 francs (contravention de 1ere classe) à10,000 francs (contravention de 5e classe). Depuis l'entrée en vigueur du Nouveau Code Pénal (1er mars 1994), les tribunaux de police ne peuvent plus prononcer de peines d'emprisonnement.*
[141] *'Ce tribunal juge les délits, c'est-à- dire les infractions graves telles qu'un vol, une escroquerie ou une conduite en état d'ivresses...' A quel tribunal s'adresser. Les Fiches de la Justice.*Paris, Ministère de la Justice.(1996)
[142] The previous maximum had been 5 years imprisonment.
[143] There are 181 such courts throughout France and they deal with approximately 500,000 cases per year. Source: *supra*. note 139.
[144] For an historical and contemporary overview of this court see; *Vernier, D. & Peyrot, M. La Cour D'Assises. 2eme édition, Paris, Presses Universitaires De France* (1996) particularly Chap. 2 at pp.17-32.
[145] This is the only criminal court where a jury sits. The judge is assisted throughout the proceedings by two assessors. All twelve will then sit together to consider the verdict, which is decided by a straight majority of seven from the twelve. Sentences require an eight vote majority.
[146] CPP Art.244.
[147] The total number of criminal offences recorded in France in 1996 was 3,665,250. This represents an average increase of 10%. Contrast with a smaller number of officers in total the police in England & Wales had 5,100,240 recorded. The growth of recorded crime in this country is 31% over the period from 1987-1995. Source. 'Criminal Statistics' *Criminal Justice Matters*. No. 27. Spring 1997. p.14--15.at p.14
[148] The original formation was to control the crimes committed by soldiers en route to camps.
[149] Officially established in 1791.
[150] These *sentinelles* were foot guards who took watch over cities between 8am and 6pm. The countryside was 'policed' by *guet à cheval*, horseguards and *guet à pied*, footpatrols. At nighttime these countryside police were drafted into the cities.
[151] The original edict was passed by Louis XIV in 1667 and transferred to the new office of *lieutenant de police* the tasks formerly performed by the *lieutenant-civil* and the *lieutenant-crimine*. These two officers had been under the control of the *Prévôt de Paris*, the highest municipal authority. There was also a further independent police authority, the *Bureau de Ville*.
[152] 9th July 1966. This saw the merging of the Paris Police and the *Sûreté Nationale*. the Paris Police do retain some distinctive features and the initial posting for new recruits will invariably be to Paris, afterwhich the *Gardiens de la Paix*, constable, may apply for a provincial posting with better working

conditions and housing. It must be said though that the number of applications to work in the provinces is far greater than the number of positions. Source: Personal family member currently working for P.N. in Paris.

[153] I am including all 3 forces here, the PN, Gendarmerie and Police Municipale.

[154] Brodeur, J.P. 'High Policing and Low Policing: Remarks About the Policing of Political Activities', *Social Problems* (1983), Vol.3. pp.507-20.

[155] Monjardet, D & Lévy, R.; *Elements for Description and Analysis Undercover Policing in France*, The Netherlands, Kluwer (1995) p. 42. and Benyon, J *et al. Police Forces in the European Union: A Summary,* The University of Leicester Centre for the Study of Public Order (March 1994) p.3. The *Gendarmerie* absorbs about 40% of the entire financial budget of the Ministries of Defence and the Interior.

[156] There are 2 branches: *Gendarmerie Départmentale* known as *La blanche* after the white facings on the uniform and the *Gendarmerie Mobile, La jaune* which has yellow shoulder flashings.

[157] See 'French Farce' *The Sunday Times.infra.*

[158] During the summer of 1989 discontented officers of the GN wrote anonymous letters to the press complaining about the poor working conditions, long hours of work and unsatisfactory working relationships between the lower ranks and officers. This was the first time the GN had ever voiced an opinion and was effectively in contravention of Art 73. Loi de 20 May 1903 'The Gendarmerie is expressly required not to interfere in political matters in any circumstances'.

[159] Gendarmerie officers are trained at the elite military academy the, *Ecole des Officiers de la Gendarmerie Nationale,* Melun or Saint Cyr, Paris. Non-commissioned ranks between the ages of 40 and 46 may also apply for promotion.

[160] Approximately 53% Source. *supra.* note 139.

[161] Approximately 35%.Source. *supra.* note 139.

[162] In 1987 Gendarmes were for the first time officially authorised to conduct certain operations in civilian dress. Director General Instruction No.11900 of 11 May 1987. 'Gendarmes are not to act in civilian dress without written authorisation bearing the name, dates, places and justification of the need for the recourse to this method. In the event, they must be wearing an armband when making the arrest and carry official identification; in such cases, the right to use firearms is more restricted than when the agents intervene in uniform'.

[163] This designated title allows the officer to exercise certain functions in the investigation of crime. This is a specific rank which at its lowest level within the PN, an *Inspecteur*, would be the equivalent of a Detective Inspector and within the GN a squadron sergeant-major, *Maréchal de Logis-Chef.*

[164] Nevertheless 30% of all new recruits are in possession of the *Baccalauréat* Source. *supra.* note 139

[165] 60% are initially posted to the GM, which is the military equivalent to the *Compagnies Républicaines de Sécurité*, CRS. The actual total deployment is 20,000 GM and 60,000GN with other personnel serving in smaller units and specialist brigades. *ibid.*

[166] The rank structure is: *Gendarme, Maréchal de Logis-Chef, Adjudant* (Warrant Officer, II Class) *Adjudant-Chef* (Warrant Officer, I Class), *Major.*

[167] The officer rank structure is; *Lieutenant, Captain, Chef d'Escadron, Lieutenant-Colonel, Colonel* and *General.*

[168] Since 1974 women have been allowed to join the GN as both non-commissioned and commissioned officers. They currently represent about 2% of the entire workforce. 1,876 non-commissioned and 6 commissioned serve at present. The current chief of the OPJ, *Commissaire* Martine Monteil has offices at 36 Quai des Orfèvres, the fictitious address of Jules Maigrèt. In typical chauvinistic style she has been nicknamed 'Maigret in a Miniskirt'. Her appointment was seen as something of a public relations exercise by the government whose commitment to equality was questioned when last year they sacked 8 women in cabinet re-shuffles.

[169] These Research Sections, *Sections de Recherches*, are based around the 30 *Cour D'Appel* areas.

[170] *Op.cit.* Monjardet. note 155.

[171] Horton, C. *Policing Policy in France*, London, Policy Study Institute (1995) p.113. and Hebenton, B & Thomas, T. *Policing Europe Co-Operation, Conflict and Control,* New York, St. Martin's Press (1995) Ch.1.

[172] Anderson, M. Working Paper 1. The French Police and European Cooperation. Working Paper Series. *'A System of European Cooperation after 1992'.* Project Group European Police Co-Operation. Department of Politics. University of Edinburgh. Unpublished. p.10.

[173] National Service was discontinued at the end of 1997.

[174] *Declaration des Droits de l'Homme et du Citoyen. 26 août 1789 Article XII.*

[175] *La Direction Centrale de la Police Judiciare.*

[176] The OPJ are divided into 18 regions within mainland France and 1 in Ajaccio, Corsica
[177] Which includes *La Sous-Direction des Affaires Economiques et Financieres.*
[178] 20th February 1992.
[179] Funding is allocated by a state budget and voted on by the Paris council. There are currently a total of 21,200 police personnel within the capital. For management purposes the prefecture is divided into specific departments; Public Security, Criminal Investigation, The Security Branch, Technical Services and The Police Monitoring Department.
[180] The sub-directorate of training.
[181] *Institut des Hautes Etudes de la Sécurité Intérieure.*
[182] This Institute provides courses on; Protagonists in the Security Process, Crime and Innovation, Risks and Crisis Management, Demonstrations and Collective Action and Security Management. The Institute also publishes the journal '*Les Cahiers de la Sécurité Intérieure'*, The Internal Security Gazette.
[183] The Higher National Police Academy at Saint-Cyr-au-Mont-d'Or.
[184] The *Ecole Supérieure des Inspecteurs de la Police Nationale* (Higher Academy of National Police Inspectors) is at Cannes-Ecluse, the *Ecole Supérieure des Officiers de la Paix* is in Nice.
[185] *Formation de Institute National de Clermont-Ferrand.*
[186] There are 7 basic training objectives pursued at the National Study and Training Centre, Gif-sur-Yvette. i) To promote new security methods and techniques. ii) To provide the police with the means to contribute actively to the regulation of society. iii) To assist in the implementation of systems to improve efficiency. iv) To help the police maintain their professional equilibrium and to respect standards of professional conduct, despite the stresses inherent in police work. v) To give trainees' superiors a fundamental role in training in the workplace. vi) To prepare the police for the consequences of the Single European Act. vii) To encourage innovation by means of the participation of trainees and experienced instructors.
[187] Objective 6, proposal 33 and 37.
[188] Council of Europe. *Committee of Experts for the Promotion of Education and Information in the Field of Human Rights*. (DH-ED). Proceedings of the Meeting of Directors and of Representatives from Police Academies and Police Training Institutions, Organised by the DH-ED. Strasbourg, 26-28 November 1991. pp. 138-139.
[189] The Police Training Charter of 1982 which, *inter alia*, proposed key training objectives and continuing 'In-Service' training.
[190] *Ecole Nationale Supérieure de la Police, Lyon.*
[191] All higher rank officers are allocated training modules ranging from 10 to 15 days *per annum.*
[192] The enforcement of parking restrictions and municipal regulations. They have no power to conduct a criminal investigation. If they make an arrest then the prisoner must be immediately handed over to the PN or GN.
[193] Between 1984-1993 the number of municipal forces rose from 1,748 to 2,860 with an increase in personnel from 5,641 to 10,000. Source. Horton, C. *Op.cit.* note 171. p.71.
[194] This is also the case in *Cannes*.
[195] Originally formed 30 December 1907 by Georges Clémenceau. The regional JP followed in 1941.
[196] Monjardet, D.*Op.cit.* note. 155.cites the case of , '...the head of the Criminal Brigade at the Paris PJ, the most prestigious of all units in this area, who, when threatened with such a sanction found refuge in a promotion to Inspector General of the National Police...Which, let it be said in passing, says a lot about the reliability of the internal control exercised by this 'Inspectorate''. p.39.
[197] Art. 706-32. CPP.
[198] *ibid.*
[199] see also Art 350 b (1).
[200] Statute of 10th July 1991 amends Arts 100 and 101CPP in respect of phone tapping. It is now permitted with the proviso that it is decided a 'tap' will be used solely on the authority of a JI and that the sentence for the offence being investigated is punishable with imprisonment of at least 2 years, a *délit,*and the 'tap' is limited to 4 months duration.
[201] The *Brigade Financière*. There are 19 divisions nationally and 1 for Paris divided into areas. Unlike the English equivalent which at times seems little more than a token offering, e.g. Lincolnshire Police with 1 officer dealing with all Commercial inquiries. The French equivalent deploys large units, e.g. Versailles 40 officers. Paris, District 8. 37 officers. District 9. 30 officers and District 10. 34 officers. Training is conducted regionally and supplemented by local, 'in-service' training. The current fashion is for fewer senior officers and less central control with the equivalent of Detective Sergeants taking control of cases and staffing allocation. This is true of the structure of all units of the OPJ where during

1996/97 only 5 *inspecteurs* were promoted to *commissaire.* Source. Patrick Drut. ELS. Liaison Officer at NCIS. 24/07/97. This trend is mirrored in the English police where over the past 10 years there has been a considerable streaming down of the most senior ranks.

[202] *Ministère de l'intérieur et de la sécurite publique. Direction générale de la Police Nationale. DCPJ/RL ULIC 1992.*

[203] *Service de la Repression des Fraudes.*

[204] The French Stock Exchange.

[205] This system allows for the delegation of investigation powers to a local judge as well as the more usual request for the local police to carry out an inquiry. Art 151-155 CPP.

[206] Preliminary inquiry.

[207] In reality this means within 36 hours and the term also includes situations whereby the suspect is followed immediately after the commission of an offence and also if an offender is found in recent possession of articles for use in connection with the alleged crime.

[208] This is the process of inquiry which is directed by a juge d'instruction whereas the former category permits the police to immediately pursue evidence gathering and arrest if necessary, this class of inquiry will be stimulated by the specific directions given to the police by the investigating magistrate who has been called into the investigation by the public prosecutor.

[209] Leigh, L. & Zedner, D. *The Royal Commission On Criminal Justice. A Report on the Administration of Justice in the Pre-Trial phase in France and Germany,* London, HMSO (1992) p.10.

[210] Art 311-314. *Code Pénal.*

[211] Art 313-1. CP. 1994. Under these new provisions the maximum sentences for this range of offences has risen to 10 years from the previous 5 years.

[212] With the exception of searches conducted for drugs and in terrorism cases.

[213] Furthermore searches may only be conducted between 6am and 9pm. Art 59, 76. CPP.

[214] These provisions are really very similar to those contained in Section 25. PACE 1984. Once the identity of the suspect is satisfactorily established they are entitled to be released. Also, Art 78.3 CPP. provides that upon arrest the person is entitled to have a member of their family notified as well as the state prosecutor. The detained person is required to submit to having their fingerprints and photograph taken, failure to do so is an offence, Art 78.5. CPP.

[215] Art 54. CPP. 'In cases of a flagrant felony, the Officer of the Judicial Police who is advised of the offence shall immediately inform the prosecuting attorney, take himself without delay to the place of the felony and proceed to all useful determinations...' The immediacy has in fact been subject to amendment and is 'in the shortest possible time'. 24 August 1993.

[216] Art 61. CPP.

[217] Art 62. CPP.

[218] Art 59. CPP. The provisions relating to times, 6am and 9pm do still apply though.

[219] As is the case under PACE, Arrestable Offences, a citizen may arrest any person found committing a *délit* or *crime*. Art 73. CPP.

[220] Art 63 and 77. CPP.

[221] This again follows the procedures under PACE, whereby a suspect must be charged and placed before the Magistrates at the end of a 24 hour period of detention. Both France and England extend this detention period in respect of cases involving terrorism. Since the new Act of January 1st 1994, which reformed the CPP, a suspect may be detained for up to 24 hours before access to a lawyer and in the case of *vol*, theft, which is frequently a charge in serious fraud case, the period may be 36 hours. Once a lawyer has been chosen or appointed for the suspect, the lawyer may only interview their client for a maximum of 30 minutes. Art. 63-4 (4) CPP. (1994).

[222] Art. 68. CPP. This is extended as this judge has the authority to issue a *mandat d'amener*, arrest warrant, also.

[223] As is the case in England it is the severity of the loss/gain which will frequently determine who investigates. Whilst there are specific offences relating to '*abus de biens sociaux'*, fraud by persons in a position of responsibility within a company, the charges will often be theft and/or deception. *vol* and *escroquerie.*

[224] O.C.R.G.D.F. was originally created in 1988, however due to disagreement between the Minister of Finance and Minister of the Interior the unit was not operational until 1989. It is now the case that TRACFIN, *Traitement de Renseigenment et de l'Action Contre les Circuits Financiers Clandestins*, a unit of customs and tax inspectors, deal with criminal intelligence in respect of financial crimes and the O.C.R.G.D.F. deal with the operational policing and evidence.

[225] The new CPP was first introduced on 4th January 1993 but was amended on 13th July 1993 and the revised form, including the right of access to a lawyer, became law on 1st January 1994.

[226] '*Justice Pénale et Droits de l'Homme.*' See further; Trouille, H. 'A Look at the French Criminal Procedure' *Criminal Law Review* (October 1994), p.737.
[227] *Pradel, J. 'Observations Brèves sur une Loi à Refaire.' Recueil Dalloz Sirey* (February 1993). p.39.
[228] Art 63. CPP (1994).
[229] This excludes some 'Serious Offences' e.g. terrorism investigations.
[230] This is not an exact equivalent to the Custody Record as this document is drawn up after questioning.
[231] Longer time limits apply in drug trafficking cases, 48 hours and then a further 24 hours, making 4 days in total. (Art 627-1 *Code de Santé Publique*) and terrorism cases which can also be extended to a total of 4 days. (Art. 706-23 CPP). An *inspecteur* of the PN advised the author that further periods of detention were a simple procedure to secure, particularly where the investigating officers were previously known to the authorising judge.
[232] Art. 41. CPP.
[233] Art. 63-1.CPP.
[234] *supra*. note. 228.
[235] There is a proviso, similar to PACE, that allows for delay or the approval of the *procureur* if it is thought that to inform will hamper the investigation.
[236] This is an amendment to the January 1993 Code as the previous definition was felt too wide and may have led to the possibility of collusion between parties.
[237] In respect of serious offences, e.g. Extortion, conspiracy and organised crime and *proxénétisme aggravé* (procuring sexual acts in the aggravated form), the suspect has no right to legal advice until 36 hours after arrest and initial detention at a police station. Extortion refers to the extortion of funds, which by definition is a *Droit Pénal des Affaires*, or Business Crime.
[238] The *Gendarmerie* deal with approximately 33% of the total number of reported crimes. Source. *Op. cit.* note139.
[239] 1972, 1979 and 1987.
[240] In response to racial terrorism with Algerians a tragic incident occurred in the Autumn of 1993 when undercover police officers, responding to a local disturbance, pursued a fleeing victim and beat him with clubs, mistaking him for a suspect. See further, *Monjardet, D. Revue Internationale d'Action Communautaire* (1993), pp.163-166. A particularly graphic account of the breakdown of assistance between the GN and PN is described by *Léauthier, A. & Ploquin, F. Les Flics, 120,000 Inconnus,* Paris, Flammarion (1990). pp.70-73, which describes the problems that occurred in Marseilles.
[241] Circular of 11th May 1987.
[242] *Le Monde*. 6th June 1987. p.6.
[243] *ibid.*
[244] *Madelin, P. La Guerre des Polices,* Paris, Albin Michel (1989). p.9.
[245] Murder of Caroline Dickinson, 17 July 1996 at Pleine-Fougères, Brittany.
[246] 'French Farce' *The Sunday Times*. 8th June 1997. p.53.
[247] 'It Seems a Crime to Take so Long' *The Sunday Times*. 28th October 1997. p.27.
[248] *ibid.*
[249] £17,000 to £35,000 p.a. with a case load frequently in excess of 100 files. Source. *ibid.*
[250] Between 1990-1995 homicides in France, 8313. England 4891. France, 2370 unsolved. England 540 unsolved.
[251] Murder of Joanna Parrish, 16th May 1990. Auxerre. Burgundy .
[252] *Op.cit.* Sunday Times. note 246..
[253] A particularly disturbing feature of French law is that nobody can be tried for an offence, regardless of the severity, if the case remains permanently closed for a period of 10 years. Irrespective of any proof of guilt. For a discussion on the anomaly that exists, whereby, for murder the statute of limitations in France expires after 10 years yet in white collar crimes the offence is justiciable from the date of discovery not completion of the offence, see: *'Un Abus Pour Quoi Faire ou à Tout Faire'* Dominguez, F.*Gazette du Palais* (Vendredi 22 au Mardi 26 Août 1997) Nos. 234 à 238. pp.30-31.
[254] There have been moves throughout the past 15 years to decentralize the police and this has been partially achieved. There is a move towards senior officers being local police managers and 'efficiency and effectiveness' are now high on the political agenda of both national police forces. See further. Horton, C. *Policing Policy in France,* London, Policy Studies Unit (1995) Chap. 9.
[255] *Bordier, J. 'Police: Le Malaise', La Revue de l'Action Sociale et de la Justice* (1991), No. 26. p.60.
[256] Tupman, W.A. 'Keeping an eye on Europe' *Policing* (1995), Vol 11(4) pp. 249-260 at p.253. For further discussion on the implications of policing intra Europe see also: Tupman, W. (ed) *Policing in Europe: Diversity in uniform*, UK, Intellect Books (1998)

[257] Edward Heath. P.M. referring to the Lonrho affair. 1973. cited in Kirk, D. & Woodcock, A. *Serious Fraud: Investigation and Trial,* London, Butterworths (1992) p.2.
[258] Sir Nicholas Lyell, former Attorney-General. 'The way ahead for the investigation and prosecution of serious and complex fraud' Presented before Parliament. 31 March 1995. Speech papers. p.1.

# Chapter 3

# Prosecuting White Collar Crime

## 3.1 Introduction

'French law is, first and foremost, a cultural phenomenon...the reason why the French have the legislative texts or judicial decisions they have lies somewhere in their history, in their Frenchness, in their identity. And, this is what 'comparartists' do not (want to) see...They forget that law is an indissoluble amalgam of historical, social, economic, political, cultural and psychological data, a compound, a hybrid, a 'monster,...In other words, to borrow Eörsi's metaphor, the comparatist knows that 'the small piece of steel which happens to be built into the Eiffel Tower could also have been built into the Waterloo bridge', but remains aware that '*in the former case it is a component part of a tower and not of a bridge*' [1]

In England and France specific agencies, in addition to the police, investigate serious white collar crimes. In this chapter these agencies are investigated and their powers analysed in the context of the above statement. As a number of commentators, in France and England, consider that the creation of statutory powers to investigate serious white collar crimes has created 'monsters' that are identifiable within their own jurisdiction but could just as easily be operating within the other legal system. In the previous chapter the differences between the police forces were identified within the context of investigating serious white collar offences. In this chapter the similarities that exist are more striking than the differences in the previous chapter. However, the differences are particularly pronounced in respect of attitudes towards the inclusion of the human rights that are fundamental for all suspects. The issue of human rights permeates the discussion in this chapter and leads into the following chapter which focuses on white collar crime cases and the issue of the human rights of suspects from England and France.

## 3.2 The role of the Crown Prosecution Service in investigations and prosecutions

Investigating a criminal offence and conducting the prosecution are separate functions within the English legal system and this remains the case today with the sole exception of the investigation and prosecution of serious frauds conducted by the Serious Fraud Office, post. The Crown Prosecution Service, CPS, is the principal state agency that has authority to conduct criminal prosecutions, it is also, increasingly involved in advising police forces in advance of arrest, supervising the compilation of evidence and vetting proposed charges.

The investigation and prosecution of white collar crime is complex, expensive and time consuming and for a variety of reasons the CPS may not be advised of all serious white collar offences. The victim may not report the offence due to personal embarrassment at having been deceived or professional embarrassment, as it may be suggested that the director of a leading company who cannot avoid being the victim of crime is not a suitable company officer in the eyes of its shareholders. Furthermore the police may decide that the matter is not a crime or may be dealt with by way of caution or that it requires *no further action*.

In complex cases the range of charges, although initially decided by the police, will be agreed by the CPS in consultation with the barrister or solicitor advocate who will be conducting the prosecution. Costs are high in complex white collar frauds and the CPS lawyer is required to not only ensure that the evidence is sufficient to ensure a successful prosecution but also that to continue with a prosecution is in the public interest. This means that only those cases with a substantial likelihood of success will continue to trial.

The final range of charges may, therefore, only be an indication of the actual offences which the defendant is alleged to have committed and the application of this provision is shown in both the cases in France and England, referred to in the following chapter. It is important to keep in mind that the final matters dealt with at trial can appear to be isolated incidents committed by the defendant. The reality may be that the charges are a specimen of the range of offences for which they were originally arrested. This situation can tend to reinforce the confusion which may exist in the mind of victims that the CPS is not dealing with all the issues. This is particularly so in the case of white collar offences where the entire question of criminality is frequently blurred by the narrow divisions between sharp entrepreneurial business practice and criminal behaviour.

### 3.2.1 The Fraud Investigation Group

In both France and England the delegation of complex white collar cases to specialist lawyers is not new. Prior to the formation of the CPS and the SFO this work was undertaken by the Fraud Investigation Group, FIG, a team of lawyers employed by the government under the direction of the Director of Public Prosecutions, DPP.[2] The FIG team of lawyers later became subsumed into the CPS.

FIG was seen as a success and the need for a specialised group to investigate and prosecute serious white collar offences, particularly to take over from the police in those cases where the degree of complexity warranted, is the current model for investigations in England. It will be argued later in this chapter that the institution of J.I. in France is similar in its operation to aspects of the CPS and SFO.

### 3.2.2 The decision to prosecute

The Prosecution of Offences Act 1985[3] removed the authority from the police to decide on whether to prosecute or not and the CPS was designated with the role of

conducting the majority of criminal prosecutions in England. The independence of this authority would, it was felt, ensure impartiality in the future and weak cases would be screened out. Lawyers working for the CPS must adhere to the Code for Crown Prosecutors. There are two stages in the decision to prosecute. First the case must pass the evidential test. Failure to do so will cause the termination of that prosecution file and the case will not proceed to trial. If the case passes the first stage then it must pass stage two, the public interest test. CPS will only proceed with a prosecution when a case has passed both tests.

In France the J.I. is required to investigate an alleged criminal offence and then compile a dossier of evidence, but the decision to proceed with a prosecution lies with the state prosecution department, an agency similar to the CPS. The two stage test in England is conducted by one agency, the CPS, once it has received the file from the police. In France the two stage test is completed by two agencies, the J.I. and the state prosecutor. The J.I. compiles a dossier which must reach the required standard to then be presented before a court but the state prosecutor decides on whether to continue with a prosecution.

For the CPS in England the evidential test is based on the required standard of proof in criminal trials, which is that the prosecution must prove its case 'beyond reasonable doubt'.[4] It is therefore incumbent upon the CPS lawyer to also consider the case for the defence. There are no such provisions in France and the compilation of the dossier of evidence from which a decision to prosecute or not will be made, is based on the requirement on the J.I. to 'seek the truth'. It follows that to obtain the truth the J.I. must speak to everyone concerned, including the defendant. If the truth has been obtained and a suspect appears to have committed a criminal offence then he must then be questioned about this matter by a court, a court conducted along the lines of an inquisition, where the judge asks the defendant questions about the case.

Once the prosecution has assured itself that a conviction is a realistic prospect then consideration is given to the public interest issue. It is a fundamental tenent of English law that whilst a person may have committed a criminal offence it is not an automatic conclusion that he will be prosecuted.[5] The public interest test is dependent on a number of factors which include seriousness of the offence and the circumstances of the offender.[6] The likely decision to prosecute will be increased if the offence is one of considerable public interest or one that has caused particular concern in a region. In the case of serious white collar offences, the prospect of prosecution is always more probable than not, given the large amounts of financial loss which are frequently involved. Against the decision to prosecute will be the possibility of a trial conducted a considerable time after the offence took place. There is no statutory bar to commencing proceedings in respect of indictable offences, regardless of the time difference between commission of the offence and prosecution. As will be shown, *post*, this is not the case in France and the differences have been commented upon by no less of an authority than Markensis[7] who related a comment made to him by a Cambridge colleague, '...each system manages to build absurd obstacles...For example, in England we have the most dreadful and truth-defeating system of criminal evidence which causes justice to fail time and again- a mess the French almost completely avoid by a much more rational approach and less restrictive concept of evidence. But in France they have something which causes them equal trouble and annoyance, namely a set of prescriptive periods, which enable vilely guilty persons to escape justice by delaying it...'[8]

It can be seen that a number of conflicting issues arise for the CPS. It is likely to proceed if the evidence is sufficient and the case is of national importance, conversely they may wish to save public funds if the matter is particularly complex and potentially difficult for the jury to understand.

Amongst the plethora of competing interests outlined above, is the victim. The CPS owe due consideration but no specific duty of care to the victim in any proceedings, regardless of the decision it reaches in respect of the disposal of a case.[9] This is distinctly different from the position in France where although the J.I. is not directly accountable to a victim for his actions, the statutory provisions in France allow the victim an absolute right to join any criminal investigation proceedings as a 'civil party' and to these ends the victim in France is legally represented during a trial by a qualified lawyer. The lack of redress available to the victim under the English system may suit the CPS as it is accountable to the Director and to the government, rather than the victims of serious frauds. Some commentators consider that the CPS uses the guidelines for prosecution as a means of ensuring that prosecutions do not proceed, that is, that the public interest criteria supports disposal by caution or alternative methods rather than proceeding to trial.[10] This is not supported by the provisions of the latest code for crown prosecutors when considering the disposal of serious white collar offences, as a prosecution will normally proceed.

It was shown in the previous chapter that the police in England are entitled to administer a caution if a range of criteria are met. The CPS may also recommend this method of disposal, the offender is still required to admit his guilt and a failure to do so will automatically trigger the case being proceeded with to trial.

The role of the CPS lawyer is not to decide whether to prosecute, as this decision has already been made by the police, it is whether to continue with the prosecution. This is fundamentally different from the role of the public prosecutor in France and goes some way towards explaining the animosity that exists between some CPS branch offices and the police.[11] Ultimately the police have no authority to override the decision of the CPS. In those rare cases where the police have made undertakings to

a suspect which the CPS then override, the courts have held that the subsequent prosecution may be an abuse of process.[12]

As a case proceeds, the CPS has some say in the mode of trial[13]. It has the opportunity to reduce or increase the charges originally presented by the police. However, the most recent developments in the role of the CPS, brought about through the Criminal Procedure & Investigations Act 1996, CPIA, have reformed the entire pre-trial procedure and brought a wide range of offences into line with the procedures already adopted for the prosecution of serious frauds under the Criminal Justice Act 1987.

Under the provisions of Part III of CPIA 1996 a judge may now decide that a preparatory hearing is needed to clarify whether issues are likely to be material to the jury will assist the jury in understanding the facts, and will expedite the proceedings or assist in the trial management. This is a discretionary matter which the trial judge will decide by weighing up the benefits against the possible disadvantages.[14] In respect of white collar prosecutions the advantages should be numerous as a persistent criticism of the English system is that white collar trials last too long and juries do not understand the issues. These matters are discussed further in the cases chapter where it is seen that neither of the points are an issue in France because trials are comparatively short and white collar offences are dealt with before a panel of judges and no jury.

### 3.2.3 Judicial Intervention and increasing inquisitorial powers

Section 31 of the CPIA authorises the judge to make amendments to the prosecution statement and rule on the admissibility of the prosecution evidence.

In this respect the CPIA permits the use of judicial intervention that would previously have been deemed to be unacceptable in English law as by allowing a trial judge to intervene in the pre-trial process, and to comment upon the prosecution case. This marks a wide departure from the accusatorial principles and more closely resembles the inquisitorial model used in France.

The principle of the inquisitorial system in continental Europe is that a professional judge will direct an investigation and be responsible for the compilation of the file of evidence which is then presented before the trial court. It has not been the case, under English law, that the judiciary has taken an active role in evidence gathering.

The implications of the CPIA are that a judge in England could now take a positive role in the scrutiny of the case file before it is presented before a jury. Given that the judge may require the prosecution to prepare its case material in a manner which is palatable to the jury and yet the judge has the authority to amend the case statement, the conclusion to be drawn from this is that the prosecution will not be permitted to comment on the departure from the original prosecution case to the jury. This would seem to allow for the intervention in the presentation of a prosecution case in a manner unknown previously in English law and is a clear indication of the legislature's desire to move closer to the inquisitorial model.

In the conclusion to this chapter it will be argued that in respect of the powers given to the SFO and the manner in which evidence may be obtained and presented at court, the inquisitorial model has already been adopted in the most complex and serious fraud trials.

### 3.2.4 Central Casework Fraud Division

In April 1993 FIG became the Central Casework Fraud Division. The department is divided into 3 regions; London, North and South. This specialist section employs 30 lawyers with a further 6 dedicated to the Confiscation Unit. Work is referred to the Central Casework Division by regional CPS branches, the Police, the Department of Trade and Industry, and the Serious Fraud Office. Annex A of the guideline paper, 'Criteria For Referral Of Fraud Cases To Central Casework', states 'The purpose of these criteria is to provide guidance to Police Officers and CPS lawyers on where, within CPS, to refer cases of fraud; and to assist BCPs[15] and others to ensure that the allocation of fraud cases handled by the CPS between Central Casework and the other areas is carried out on a consistent and rational basis...'[16]

The majority of cases referred to Central Casework have been initially investigated by fraud squad officers and an assessment of the likely destination of the file, whether to the SFO or CPS local branch or Central Casework, will be made by the police. At present the SFO will not generally take over an investigation if the amount of loss is less than £1 million. This is not necessarily a true reflection of the criteria however, as Central Casework will, if they feel it appropriate, retain a file even if the loss is far greater than this sum.[17]

The amount of loss is used in the first instance as an indicator of the suitability for referral from Branch CPS to Central Casework. If a white collar fraud involves a loss greater than £750,000 then the local Branch is required to notify Central Casework in order that the case may be reviewed. In particular Central Casework will evaluate the resourcing potential of the inquiry and if this may necessitate numerous inquiries from outside this jurisdiction, then Central Casework may take over the file.

The second consideration in case file allocation is the 'National Publicity and Widespread Public Concern' criteria. A range of cases will be included under this category which include; corruption; especially those involving public bodies; any case where the independence of the case reviewer is crucial and may be compromised if dealt with locally; all substantial frauds committed against government departments; frauds on the governments of other countries and any case involving widespread public concern where Central Casework may be expected to perform a coordinating or standard setting role. The Fraud Division of Central Casework will also perform a vetting and advisory role in cases arising from reports compiled by liquidators[18] and administrative receivers.

The majority of the work performed by the Fraud Division is of a highly specialised nature including those cases which require knowledge of stock exchange practices; the work of the regulatory bodies[19]; complex banking transactions; currency offences; money laundering and serious and complex frauds[20]. The lawyers within this department are all specialists who have previously served at a local branches or have gained experience from practice with private law firms. Specific training is provided by a range of experts drawn largely from within CPS.[21] Where appropriate training may occasionally be run in conjunction with the police.[22]

In chapter 5 the argument that white collar offenders should be dealt with by means of regulation, rather than criminal sanctions, is addressed. Historically there have been few joint training programmes that have brought together prosecutors and regulators. The new Financial Services Authority, *post*, has recruited former state prosecutors as well as former employees from the Bank of England and central government, and it will be interesting to see whether in the near future there is a move towards greater transparency between the agencies on both sides of the

regulation/prosecution debate. One manifestation of this harmonisation would be joint training programmes.

### 3.2.5 Transfers to the Crown Court

In respect of serious and complex frauds, the CPS has the same powers to apply for a 'transfer' to the Crown Court as are available to the SFO.[23] An application for direct transfer of the CPS case to the Crown Court must be approved and applied for by the Deputy Director of the CPS and the defence has 28 days in which to apply for dismissal. Once a case has been sent to the Crown Court then the statutory 70 day period no longer applies.[24] These provisions can be both advantageous and detrimental to an investigation and case preparation. The advantage is that those matters which ultimately are destined for trial are transferred at the earliest opportunity. Given that each Fraud Division lawyer has a case load of between 15 and 20 at any given time, the transference of a case then reduces the urgency of any inquiries appertaining to that specific case. This of course does not prevent the defence from raising objections, making applications for judicial review and claims of abuse of process.[25]

It may be disadvantageous in that if an 'old fashioned' committal is held, where all the evidence is subject to scrutiny as the defence are seeking to question whether there is a case to answer. This procedure has the effect of confirming the weight of the prosecution evidence and testing the likely weaknesses, if any, prior to trial. Furthermore, if the case is not committed, then the financial and work hours input costs to the CPS are minimal.

There appear to be no such provisions applicable under French law as the seriousness of the offence will always determine the court and the strength of a case is already established by the process of the J.I.'s investigation and the state

prosecutor's decision to proceed. In the previous chapter the categories of offences were outlined and it was seen that all white collar offences fall into the category of a *délit* which is punishable with terms of imprisonment ranging from 6 months to 10 years. This wide band of sentencing reflects the changes that were introduced in the new Penal Code in 1994 and have reduced the severity of numerous white collar offences from the previous category of *crime* and in doing so have brought them within the jurisdiction of the lower courts that have no jury. The effect of this for J.I.'s and state prosecutors is that their ability to increase the severity of an offence is virtually non-existent and conversely to down grade the severity is also equally non-existent.

### 3.3.1 The Joint Vetting Committee

Those cases which are on the cusp of between being suitable for investigation and prosecution by the SFO or further investigation by the police and prosecution by CPS, are discussed at monthly meetings of the Joint Vetting Committee of the SFO and the Fraud Division of Central Casework. The overriding criterion is not the amount of loss but whether the provisions of Section 2 of the Criminal Justice Act 1987, *post* section on the SFO, are required to be used to effect a successful investigation. The Fraud Division has no statutory powers to bridge the Philips Principle,[26] which encapsulates the concept, fundamental to English law, that the investigator and prosecutor are a separate body, and in compliance with this principle the Fraud Division is not permitted to require a suspect to attend its offices to answer questions relating to an allegation. If it is the opinion of the Fraud Division that the use of specific powers are necessary and crucial for the effective investigation of the case then it will request that the SFO take over. The CPS has only been criticised once its handling of a serious white collar offence[27] and it is my opinion that the present statutory framework relating to the powers to investigate and prosecute are

fairly balanced and workable. The CPS does not have the inquisitorial powers of the SFO and I see no need for it to possess them.

### 3.4.1 The Crown Prosecutor and the J.I.

An analogy may be drawn between the role and function of the Crown Prosecutor and the J.I. The Crown Prosecutor is an independent lawyer who is charged with assessing the evidence and evaluating whether a prosecution should proceed or not. The CPS is intentionally authorised to override the decisions of the police to curb any potentially over zealous investigations and evidence gathering, which might subsequently tarnish the standards of procedure in the courts when applying the criminal law. The increasingly burdensome rules of disclosure have made demands on the CPS which are akin to the overall requirement on the J.I. to find the truth by examination of the prosecution and defence evidence. In the previous chapter it was mentioned that in the Metropolitan police district there is a limited return to the system of having CPS working from a police station, rather than separate offices, this could be interpreted as a further indication that the future role of the CPS may include an active, rather than solely passive, role in evidence gathering. In France it is the specific responsibility of the J.I. to control investigations, compile evidence and interview suspects in serious and complex criminal matters. Is it only a matter of time before the CPS conduct interviews, after all the SFO conducts it own interviews.

Like the J.I. in France the CPS has little opportunity to be involved in the sentencing process. The CPS is restricted to commenting upon unduly lenient sentences via the provisions of an Attorney General's Reference,[28] in France the J.I. plays no part in the sentencing process, it is the role of the state prosecutor to request and suggest a suitable sentence which the court may, or may not implement. The CPS lawyer has a discretionary authority not proceed as it would be contrary to the public interest. The J.I. may not do so, but of course does have autonomy which may effectively mean

that they can discontinue an investigation. The Crown Prosecutor, as we have seen, also has the authority to decide on the appropriate charge and comment on the mode of trial, these can be interpreted as a further opportunity for the prosecution to be inadvertently involved in the sentencing process firstly, by determining the severity of matters to be brought to trial reflected in the sentences these offences carry and secondly, by proposing trial at the Crown Court where the sentencing discretion of the trial judge is not restricted. These issues are dealt with by the J.I. and the state prosecutor in France. In the first instance the J.I. is instrumental in proposing charges as he has investigated the allegation and therefore in his dossier of evidence he will suggest case disposal but at trial it is the state prosecutor who will make sentence recommendations.

### 3.5.1 The Serious Fraud Office

The opening words to the report produced by the Roskill Committee[29] were: 'The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right. In relation to such crimes, and to the skillful and determined criminals who commit them, the present legal system is archaic, cumbersome and unreliable. At every stage, during the investigation, preparation, committal, pre-trial review and trial the present arrangements offer an open invitation to blatant delay and abuse.'[30]

The proposal put forward was for the formation of a unified establishment to both investigate and prosecute serious fraud cases. The initial name given was the Unified Fraud Office, UFO. Understandably this was changed to the Serious Fraud Office, SFO. These proposals were drafted into the Criminal Justice Bill 1987, which received Royal Assent in June of the same year. The SFO then became one of the six prosecutors of serious fraud in England[31] and at the same time one of the fifty

investigators.[32] As was shown in the preceding section the CPS has no authority to investigate whereas, the SFO is a body of investigators and prosecutors. The objectives of the SFO are to: develop a coherent approach to the investigation of fraud, develop expertise in specialist areas susceptible to fraud such as stock exchange fraud, establish the efficient use of the powers conferred on the office by the CJA 1987 and to present cases in an accessible way in order that juries can understand the issues. The SFO is accountable to the Attorney-General and Parliament through the Director.[33]

### 3.5.2 Criteria for acceptance of cases

Acceptance of cases is based upon whether the direction of the investigation is best placed in the hands of those who will be responsible for the subsequent prosecution. In reality this means those matters which are either particularly complex or involve large amounts of financial loss or gain, or those offences which have attracted particular public attention. The notional figure of £5 million loss has been subject to revision over the years and at present stands at £1 million.[34] The majority of offences charged by the SFO are those contained within the Theft Acts 1968 and 1978, the Financial Services Act 1986 and the Companies Act 1985.[35] Caseloads vary but has averaged at 60 cases *per annum* over the past 9 years. The vast majority of cases are referred to the SFO by the police and the second largest source of referrals is the DTI. Section 1(3) of the CJA 1987 empowers the Director to 'Investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud'. Once a case has been referred to the SFO, a senior lawyer will decide whether further investigations are necessary and if so whether the SFO are the appropriate body to conduct such inquiries. The joint vetting committee, JVC, of the SFO and CPS was established in July 1994. Its purpose is to decide which cases might be suitable for transfer between the two authorities. Those cases which are referred to the SFO by the police, may be referred back to the police. This will be

after consultation with the relevant police force and CPS will be notified to this effect also.

Once a case is accepted by the SFO, a case team, headed by a case controller, is appointed. This team will comprise of an experienced lawyer, an accountant and police officer. This multi-disciplinary team may consult with outside experts as required.[36] Upon commencement of an investigation, the case controller will set a target date for the transfer of proceedings from the Magistrates Court to the Crown Court. At each regularly held case conference the target date will be reviewed in the light of the progression of the investigation. The decision to proceed with a prosecution is not made by the case controller, but by another senior lawyer who has not been actively involved in the investigation. The CPS's 'Code for Crown Prosecutors' is used when deciding on the appropriateness of continued proceedings. If an arrest is necessary for the purposes of charge the police officer, attached to the team will conduct this part of the procedure.

The J.I. in France who has been appointed by the state prosecutor, to investigate an alleged white collar crime, will have the authority to utilise experts and direct the entire investigation process, however, one of the main differences between the procedures in France and England is in respect of the decision to prosecute. In England the SFO will decide on charges and prosecution, in France the sole function of the J.I. is to gather evidence to establish the truth and having done so the state prosecutor will then authorise charging and prosecution.

In the previous chapter a pattern was established which linked the role and function of the police in England to the role and function of the CPS. The police have considerable scope to investigate white collar offences and then pass their findings to the CPS who will conduct the prosecution. In France the police have limited

autonomy and are required to work under the guidance of a J.I. when investigating serious and complex criminal offences. The J.I. then compiles a file of evidence and this is then passed to the state prosecutor. The work of the CPS and now SFO has shown that in fact the model that was indicated in the previous chapter may not be as clear cut as it first appears. In respect of serious and complex frauds the pattern begins to more closely resemble the French model. The police are in reality relegated to the role of evidence gathering at the request of either the specialist CPS units or if the police are working on secondment with the SFO, then the role of the police is directly controlled by the SFO. In fact the police officer who is working for the SFO fulfills a role very similar to that of the police in France and it is the SFO which directs and controls case inquiries, very much like the J.I. Whereas in the previous chapter I established that the role and function of mainstream policing in England and France was very different, it is now becoming clear that this is not true when talking about the investigation of white collar crime.

### 3.5.3 SFO powers

The power to investigate and demand answers from suspects has attracted considerable criticism over the period of time during which the SFO has existed. These powers are contained under Section 2 of the CJA 1987[37] and are based on the powers conferred on inspectors of the DTI. These Section 2 powers authorise the Director to require a person to attend at a specified time and place and answer questions or give information with respect to any matter relevant to the investigation. The person notified has no right to refuse to answer the questions, even though to do so might cause that person to incriminate himself and there is no right on behalf of the person notified to obtain particulars of the investigation. The alleged safeguard is that any statements made are not suitable as evidence except as a prior inconsistent statement.[38] The Director also has the power to demand the production of documents, to take copies of them and to demand explanations. Save for material

which is subject to legal privilege, there is no protection for information which is otherwise confidential.[39] While a person cannot be compelled to disclose legally privileged information' a lawyer can be required to disclose the name and address of a client and this overrides the duty not to do so except on the order of a court.[40] It is an offence to knowingly or recklessly make a false or misleading statement[41] and any statement obtained[42] can be used as evidence of this offence.[43]

In respect of requests for the production of documents, the Director[44] may require both an explanation as to the contents and take copies. The term documents includes information recorded in any form,[45] then a requirement can be made for a print-out of computer held information and transcripts of recorded conversations may also be made. In respect of all other material sought to progress an investigation, the provisions of PACE apply. However, it is of note that whereas under PACE the evidence obtained must be likely to be of substantial use to an investigation, under the provisions of the CJA[46] no such requirement is made out. The wide ranging powers of the Director under Section 2 have been the subject of discussion in the context of Human Rights and the provisions of the European Convention on Human Rights. In the case of Saunders v United Kingdom[47], the ECtHR held that the applicants human rights had been abrogated. It can be seen that the power to demand a suspect attend the SFO offices and answer questions, the power to require the production of documents and the power to search for and seize material, all give the Director an extremely wide scope on which to base the continuation of an investigation. It should be remembered that these powers are not restricted to an investigation into the suspect alone but extent to aspects of the affairs of any person.[48]

Statements made by a suspect may not be used against him in subsequent criminal proceedings except in two circumstances. 1) On a prosecution for an offence under

S.2 (14) of deliberately or recklessly making a false or misleading statement or 2) On a prosecution for another offence where, in giving evidence, he makes a statement which is inconsistent with the statement made under S 2. In reality the SFO can frequently locate alternative evidence if it would appear that the evidence obtained under S.2 will not be admissible.[49]

### 3.5.4 Challenges to the powers of the SFO

The SFO has repeatedly found that legal challenges to its authority to use evidence obtained in civil proceedings in subsequent SFO investigations, have exonerated the SFO. In situations when the defendant has already been charged with a criminal offence and is then interviewed by the SFO, the courts have held that the particular nature of serious fraud investigations means that the SFO should be allowed to question after charge.[50]

It was shown in the previous chapter that under English law once the police have decided to charge a suspect then no further questions may be put to that person. In comparison with the position in France, the freedom given to the SFO is on a par with the powers given to the J.I. who must interview a suspect after he has been interviewed by the police. The right to remain silent before, during and after questioning has been the cause of much litigation and appeals in England and provides the theme for the basis of the analysis of the cases referred to in chapters 4 and 5. The right not to convict oneself by answering questions, has also been removed on those occasions when evidence has been obtained in insolvency disclosures which is then made available to the SFO.[51] It was held in *Re Arrows Ltd. (No 4)* [52] that '...the court had no power to exercise that discretion by imposing a condition on the SFO preventing the use of the transcripts in the criminal proceedings as a precondition to the SFO obtaining the documents at all. It was for the judge at the criminal trial alone to decide, in the exercise of his discretion under section 78 of

the Police and Criminal Evidence Act 1984...'[53] This decision confirmed the case of *Bishopsgate Investment Management Ltd. v Maxwell*[54] where the Court of Appeal held that when a person had been compelled to answer questions, under the provisions of s 236 Insolvency Act 1986, answers to questions put by administrators or receivers were admissible in other civil or criminal proceedings. The Court had no difficulty in deducing that the SFO was permitted to require receivers or liquidators to provide transcripts of private examinations conducted under the Insolvency Act provisions.[55] The former Director endorsed these findings and denied that they provided a means by which the SFO could secure information through the 'backdoor'.[56] Levi[57] found no evidence of manipulation of the provisions by either the SFO or investigations conducted by the DTI which resulted in information being given by them to the SFO.[58] Interviews are normally conducted at the SFO[59] and a notice to attend will be accompanied by a 'Guidance for persons being interviewed at Elm House under section 2 of the Criminal Justice Act 1987' notice.

The request that a person attend for an interview is rather similar to the situation in France when the J.I. will order the defendant and witnesses to attend his office for the purposes of conducting interviews. Of course the defendant has a limited right to refuse attendance as in reality he is either in custody or on bail, whereas in England a person responding to an SFO notice may have been previously charged by the police but normally would be attending with their solicitor as a suspect.

The SFO interview is not a PACE interview and therefore not subject to the provisions of the Codes of Practice[60]. The reason for this is that interview is not to obtain 'evidence'. This is a fairly elastic interpretation of the reality of the circumstances and is similar to saying that when attending the offices of the J.I. you are free not to speak. You are free not to answer questions put by the J.I. however, it is inconceivable that a suspect would not take the opportunity to explain himself, and

persons attending the J.I.'s offices are well aware of this. In England the cases reported in the press that have focused on the investigations conducted by the SFO have frequently commented on the powers that the SFO has to interview, and if the SFO is not gathering evidence then why has it requested that a suspect attend for an interview at all. Interviews are tape recorded and the person being interviewed is reminded that it is an offence, without reasonable excuse, to fail to answer questions or produce any required documents.

The case of *Smith*[61] made it clear that the SFO may conduct an interview after a suspect has been charged. This would be contrary to paragraph 16.5 of the Code[62] in any criminal proceedings. However, the nature of serious fraud investigations is such that the superior courts have consistently endorsed the use of methods of obtaining evidence which ordinarily would be excluded. The House of Lords have held that, 'If the investigation has ceased for the purposes of enabling the Director to question the suspect, then they must have equally have ceased so as to terminate all her other powers. This means that even as regards third parties who neither have nor need the protection of Code C, and who have never had such protection in the past, the police officer[63] cannot demand the production of a document relevant to the suspected offence. Nor can he demand of such persons answers to the kind of questions to which...he could have demanded answers before the suspect was charged. Such a result would be illogical, and...out of tune with the extensive inquisitorial powers which are undeniably created by the Act...'[64]

The power to require evidence after charge is not restricted to interviews and the Director may require that documents are produced even though those documents may have already been produced in civil proceedings[65]. Failing to comply with a Section 2 notice is an offence[66]. This will not be committed if the suspect has a 'reasonable excuse'. What is a reasonable excuse may be interpreted in a variety of

ways, and this in itself creates a dichotomy. If the recipient of the SFO notice refuses to comply then question of whether the failure to comply is reasonable will not be resolved before the failure. In essence, a suspect has to decide whether or not to comply before they know whether or not their actions will be deemed reasonable or not.[67]

### 3.5.5 The SFO and the ECHR

The powers conferred on the SFO have been the subject of challenges before the English courts and also the European Courts of Human Rights. In this section the case against *Ernest Saunders*[68] is briefly introduced, it is also referred to again in chapter 4, as a case that has really set the scene for the future actions of not only the SFO, but also for the agencies who are charged with the regulation of financial services. Saunders challenged the powers of the SFO at Strasbourg[69] where the European Court had previously held, in the case of *Funke*,[70] that the imposition of a fine for failing to produce documents to customs officers, was an abrogation of the appellant's future right to a fair trial and, that the special features of customs law were not such that they could justify the right of anyone charged with a criminal offence being required to contribute to his own incrimination. Under the provisions of the applicable French law[71] a customs inspector may require the production of documents. Refusal renders the party liable to imprisonment, which of course is not dissimilar to the provisions under Section 2 of the CJA 1987. The period of imprisonment may range from 10 days to 1 month and a fine may also be imposed which ranges from 600 Fr. francs to 3,000 Fr. francs. Funke was fined for failing to produce documents. The Court also held, by eight votes to one, that the provisions of French law permitting his house to be searched were, disproportionate to the legal aims pursued and that the law had failed to provide sufficient safeguards against potential abuse by the authorities. On the same day as the *Funke* judgment, the European Court of Human Rights ruled on two similar applications in respect of

Article. 8. ECHR. In *Cremieux*[72] and *Miaille*[73] the premises entered by customs were business premises. By eight votes to one, in each instance, the Court found that the authorities had abused their powers and Art. 8. of the Convention had been breached.

The implications of this decision are that agencies which have either a criminal or regulatory responsibility must pay due attention to the rights of the suspect throughout the entire evidence gathering process and furthermore, that the imposition of sanctions for failing to provide information or answer questions is a criminal penalty. There are serious implications in these findings, domestically and transnationally, for the SFO and Financial Services Authority. These matters will be analysed in chapter 5 which deals with the potentail conflict between ECtHR rulings and the powers of the new Financial Services Authority.

In the case of *Saunders*[74] the European Court recalled that, '...although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6...'[75] When referring to the use of transcripts, the European Court stated, ' In sum, the evidence available to the Court supports the claim that the transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant'.[76] The European Court could not accept that the investigation of serious white collar frauds could justify such a marked departure, as had occurred in the Saunders case, away from the general provisions of Article 6.

### 3.5.6 New developments and the ECHR

The European Convention on Human Rights has now been incorporated into UK legislation as the Human Rights Act, but will not be in force until October 2000. The findings of the European Court support the assertion that as a member state of the European Union the United Kingdom is obliged to interpret legislation in a manner that is compatible with our treaty obligations, under the Treaty of Rome. To this effect, a failure to pay due regard to the findings of the European Court effectively notify mainland Europe that the United Kingdom government is operating legislative provisions outside of the spirit of our obligations. As Judge Morenilla held, in his concurring opinion,

> 'The majority refer at paragraph 67[77] to the Court's earlier judgment in *Fayed v The United Kingdom* where it is stated that the purpose of investigations such as the one at issue "was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities-prosecuting, regulatory, disciplinary or even legislative". I should like to stress that this conclusion must be treated with particular caution, especially as regards prosecutions. While agreeing with the majority that statements made under compulsion by an individual during such investigations may be used for the basis for action by, *inter alia,* the prosecution, I would emphasise that this does not mean that they may be admitted as evidence against the individual in any subsequent criminal proceedings'.[78]

### 3.5.7 Preparatory hearings

Prior to commencement of the trial the prosecution, defence or trial judge can apply for, or order, a preparatory hearing. As was shown in the previous section the power to request or order a preparatory hearing is not limited to SFO prosecutions and is regularly used by the CPS. Under the CJA[79] the statement from the defence must set

out the nature of the defence and the matters which the defence take issue with. The purpose of such a statutory requirement is twofold. Firstly this provision will go some way towards preventing an 'ambush' defence, where a defendant does not disclose the line of defence he will raise until the last minute and in doing so presents material which the prosecution has little opportunity to refute, and secondly, will shorten the length of serious white collar fraud trials.

This statutory provision is a clear move away from the accusatorial model, which has always been based on the premise that it is the prosecution that bring a case and it is the prosecution that must prove every element of the matter alleged. Also, enshrined in English law, and referred to previously in this chapter and previous chapters, is the concept that no suspect is required to incriminate himself. It can be argued that any move away from these two fundamental tenents is a move away from the accusatorial model. Furthermore, in respect of the speed of trial, trials conducted under the accusatorial system tend to be lengthy as the adversaries who are representing the prosecution and the defence will examine and then cross-examine all of the witnesses. Any reduction in the opportunity to examine witnesses will of course save time spent in court which can be directly equated with a saving to the taxpayer.

On the face of it these statutory provisions appear practical and financially attractive, but as stated in the introduction, '...one touch is misleading, two better, and a multitude of tactile experiences from as many varying angles as possible is necessary if one is to get any clear impression of the nature of the object...'[80] This reference was originally used to exemplify the need to approach comparative studies from a number of angles, in doing so a picture develops, rather like a jigsaw puzzle, one piece on its own means little but added together the complete picture becomes clear. As the section which deals with cases in France and England shows, even

highly complex white collar fraud cases which involve more than one defendant are dealt with a matter of a few weeks in France. Taken alone, Section 9 of the CJA is not particularly significant, but added to the other pieces of the jigsaw puzzle, it becomes clear that a pattern is developing; the processes of investigation and prosecution of white collar crimes in England and France are becoming increasingly similar.

The Criminal Procedure and Investigations Act 1996[81], CPIA, amended the CJA 1987 and made the system of preparatory hearings consistent for all long and complex cases. These provisions apply to all cases transferred to the Crown Court and those matters which are preferred by a voluntary bill of indictment.[82] Transfer for trial in serious fraud cases has been retained notwithstanding the abandonment of the procedure for other criminal offences.[83] This is justified on the basis that the very complexity of a serious fraud trial will in itself require management by a judge.

These comments would be endorsed in France where the J.I. has the same training, rank and status as a trial judge. On the basis of the evidence contained in this section, so far, it is increasingly difficult to sustain the position that the police in England, should be empowered to investigate white collar crimes at all. The CPIA, the CJA and the powers vested in the SFO all point towards the view that white collar crimes are so difficult to investigate and prosecute that it should only be done by professionally qualified lawyers and accountants, as is the case in France. The current director of the SFO is of the view that the future structure of the SFO should be based on a national fraud squad which would comprise of police officers permanently attached to the SFO, lawyers and accountants[84]

### 3.5.8 Criticisms of the SFO

At 11am on 31 March 1995, Sir Nicholas Lyell[85] presented before Parliament the 'Way ahead for the investigation and prosecution of serious and complex fraud'. In his address he referred to the Graham report[86] and the Davie report[87] he stated, 'For the heaviest cases, the Davie report endorses the regime based upon Lord Roskill's report in 1986, which brings together the investigation and prosecution of fraud by a multi-disciplinary team of lawyers, accountants, both in-house and from the private sector, and the police, working at all stages under the aegis of a specialist prosecuting authority- the Serious Fraud Office...'[88].

In the past the SFO has been criticised for its handling of cases some of which have been hampered by politically motivated involvement in white collar crime procedures, the result has been '...the immeasurable complication of the fraud trial process.'[89] This criticism cannot be solely directed at the SFO as there has been an increasing use of regulatory, rather than criminal sanctions and the recent formation of the Financial Services Authority can be viewed as further evidence of undermining the effect of the criminal process. White collar offenders are dealt with ineffectively, not due to poor investigative methods, by the police or SFO but by a legal system which frequently fails to convict and when it does convict, results in sentences which the public perceive as derisory or which fail to cause the offender to be stigmatised as a criminal. The perception that society holds for this type of criminality also has a part to play in this category, where as was discussed previously, victims of white collar crime often fail to report cases. In France the victim of a crime can demand that action be taken by the J.I. In this country we have experienced the formation of victim support groups, such as in the matter of the Maxwell pensions group and the Lloyds names group and this could be a reflection of the lack of redress that the victim has, or believes that he has available to him. Also, it has been suggested[90] that fraud committed against companies is so commonplace that it is now accepted as part of

commercial life. This myriad of variables all add to a pattern of offending that is difficult to understand, investigate and prosecute. In the following section a selection of some of the most celebrated cases investigated and prosecuted by the SFO are analysed for the purposes of evaluating the criticisms.

In the first *Guinness* trial[91] all four defendants were convicted. At the second *Guinness* trial[92] one defendant, Roger Seelig was unable to continue his own defence due to poor health. In view of this the SFO was unable to continue with the prosecution of the second defendant, Lord Spens. In *Guinness 3*, one of the defendants' solicitors submitted new evidence to the SFO which caused the SFO to reconsider. The Director decided to withdraw the case. It seems unlikely given that the second defendant in this matter was Roger Seelig, who had not been able to continue in *Guinness 2*, that this defendant would have stood trial. In France the first Guinness trial would have been prosecuted, the only major difference would be that in terms of trial time the matter would most likely have been resolved within a few weeks. The issue of Seelig's health is a constant in any jurisdiction, it would not have been viewed differently by a French court. A French court would be free to continue against Lord Spens as the inquisitorial process would permit the presiding judges to question Spens, irrespective of the evidence of Seelig. Also, since suspects in France are interviewed by the J.I. there is a file of evidence that the court wishes to discuss with the defendant, if the defendant chooses not to answer the questions put by the court then he is liable to be convicted on the evidence contained within the J.I.'s file. Any new evidence put forward, by either the prosecution or the defence, can be accepted by the trial judges and on the basis of this evidence a French court may have found the Guinness 3 defendant innocent of the charges.

In the case against Roger Levitt,[93] a Community Service Order was imposed, this cannot be viewed as a reflection on the abilities of the SFO as it, currently, has no

part to play in the sentencing process. The same can be said of the racehorse owner Terence Ramsden, who having pleaded guilty to four charges preferred by the SFO, received a suspended prison sentence.

In France the state prosecutor does have a role to play in sentencing as he asks the court, on behalf of the state and also the victim, to impose a particular sentence. The J.I. whose has had responsibility for the preparation of the evidence has no active role to play at this point. It is of note that whereas in England the SFO are judge and jury of their own work, they compile files of evidence and prosecute, this is never the case in France where the separation between investigation and prosecution is absolute.

When likening the role of the SFO to that of the J.I. it is worth reflecting at this point on the following comments, '...the objective of comparative work about law must not be the commingling of the descriptive cognitive processes that characterize the civil law and common law worlds. On the contrary, the comparatist must learn to detect, to understand, to value, indeed, to cherish differences...what is the point of comparison if all the comparitists see are the similarities'[94]

The Polly Peck International inquiry resulted in the company Chairman and Chief Executive, Asil Nadir, being interviewed and charged by the SFO. He was, contrary to the wishes of the SFO, given bail. Nadir has subsequently absconded to Cyprus. In France the J.I. has a key role to play in deciding whether or not a suspect should be remanded into custody or released on bail. This power is seen as both a strength and weakness and forms the basis of much of the contemporary debate which is analysed in the following section.

In the case against George Walker of Brent Walker, the building industry magnate, he was acquitted by a jury. Walker commented 'Thank God for jurors'. This may be a reflection on the viability of jury trials in serious white collar offences, but this cannot legitimately be held to be a reflection on the ability of the SFO to secure a conviction. All white collar crimes are designated as a *délit* in France and can only be tried before a panel of judges who sit without a jury.

The case against the SFO is conversely, equally convincing. In *Guinness 4*, the defendant, Thomas Ward, consistently denied any criminal conduct. At a preparatory hearing two of the four charges against him were dropped. Ultimately the trial judge directed an acquittal on one issue and the jury acquitted on the remaining charge. Since the SFO are responsible for investigation and prosecution they cannot blame any other agency for the decision to charge and proceed to trial. This is a convincing argument for a continuation of the separation of roles that exists in England with the police and CPS and in France with the police, the J.I. and the state prosecutor.

The *Blue Arrow*[95] trial was a catalogue of disasters for the SFO. Prior to the trial there were applications to dismiss which themselves lasted 50 days. The trial itself resulted in Mr. Justice McKinnon saying, 'What is beyond doubt is that all involved in this case have had to endure what no one in our courts should be called upon to cope with. That includes the defendants, their families and the jury and me. I can certainly speak for myself. No jury should be asked to cope with what this jury has had to endure. No defendant or his family should have to suffer through month after month after month after month all that these defendants have had to suffer. There must be some other way.'[96]

There were simply, too many defendants and too much documentary evidence. Whether the provisions of the CPIA, which encourage trial judges to hold preparatory

hearings and in doing so reduce the length of trials, will be successful in preventing a reoccurrence of the Blue Arrow fiasco remain to be seen. Endurance is not a feature of the French legal system as trials are conducted with considerable brevity.

As a final example, the case of Barlow Clowes resulted in two of the defendants being convicted of theft, all four defendants were acquitted of the conspiracy charges[97].This further demonstrates that in many instances it is difficult for the SFO to establish fraudulent conduct.

The above examples support the definition developed in the first chapter that, **white collar crime incorporates those acts committed by means of a fraud or theft by members of the business community who have used their position of trust or responsibility to achieve the criminal objective.** However, it is not a convincing argument for continuing to endorse the use of powers which are repeatedly an effrontery to human rights. The need to balance the interests of effective control with legality is problematical.

There are two consequences of the CJA Section 2 powers[98]. Firstly the SFO is able to ascertain, at an early stage in their investigation, what explanation the suspect will give for his actions. This allows the SFO to tailor its inquiries to suit the probable outcomes and also allows it to consider the likely charges prior to interview. Some might argue that it is repugnant to compel a person to assist those who seek to prosecute him, under the inquisitorial model it is expected that a suspect will want to give his version of the events to a J.I. but also it is expected that the suspect may need to lie or embellish his version to support alleged innocence.

The second consequence of Section 2 powers is that the suspect is restricted in his freedom of choice. That is, he is restricted as to whether or not to give evidence in

his own defence, as in his mind any answers he gives may result in those answers being used in evidence against him later. Although it is a sustainable argument that a guilty party should not be allowed to ambush the prosecution or change his story to suit his own defence, conversely it could be argued that a nervous and confused suspect may genuinely say something which he later cannot adequately justify.

The prosecution of white collar offenders remains largely within the sphere of mainstream criminal law. Ordinary jury trial continues to apply to serious fraud prosecutions and the entire process, whether it be a police investigation or SFO, appears to remain inefficient and a compromise of the rights to equality of treatment for defendants.

In England the courts have repeatedly interpreted the abrogation of the right to silence in favour of the investigating authorities, they have also, repeatedly, referred to the investigation of serious white collar crimes as being of an inquisitorial nature[99]. It may be said that, 'Despite arguments to the effect that it is necessary to treat those accused of serious fraud as special cases and undeserving of the usual protections, the prevailing approach in domestic law, perhaps arrived at by default, appears to be unsustainable'[100].

There is no justifiable reason as to why white collar criminals should be treated any differently by the criminal justice system, unless that is, that white collar offences are fundamentally different from mainstream criminal acts, under English law it would appear that this is the case. In France the investigation of white collar offences does not hold a unique position within the criminal justice system. The following section will analyse how these matters are proceeded against within that jurisdiction and then

compare and contrast the differences and similarities that exist in France and England.

### 3.6.1 The juge d'instruction in France

This section explains the authority and specific roles of the *juge d'instruction,* J.I. The J.I. holds a unique position within the French legal system as he has the sole authority to investigate all complex and serious criminal offences which includes all white collar crime. The J.I. is a qualified judge who has the mandate to issue judicial orders and remand a suspect into custody. This second function has attracted severe criticism for many years. Recently, a series of high profile white collar investigations has resulted in suspects, who are heads of international and state owned companies, being held in custody. These remands have inflamed the government and united the voice for reform of the role of the investigating magistrate.

Throughout this chapter the similarities and differences that exist in approaches towards the investigation and prosecution of white collar crimes in England and France have been evaluated. The role of the CPS, the SFO and then the J.I. have been compared and contrasted. The patterns that link the CPS to the J.I. have demonstrated that whilst there are similarities there remain significant differences. In respect of the SFO it has been argued that it is a quasi-inquisitorial agency and in this section it will be seen that there are substantial similarities between the work of the J.I. and that of the SFO and yet each agency is unique and significant differences between them remain.

### 3.6.2 The juge d'instruction

'French law is one of the most important that the world has known. With more or less change it has spread over half of the western part of continental Europe...'[101] Central to this development has been the *juge d'instruction*, J.I., who is frequently referred to as the examining magistrate or investigating magistrate. The term magistrate is limited in its usage to judges of the Ordinary Courts and lawyers from the State Counsels Office.

The J.I.[102] is charged with conducting judicial investigations. Having discharged this duty he may not participate in the trial of those matters that he has investigated.[103] The J.I. is chosen from judges of the *Tribunal de Grande Instance*[104] and is appointed as a J.I. for an initial term of three years.[105] All judicial appointments in France are for life after graduation from the *Ecole National de la Magistrature*, ENM, in Bordeaux. Entry to the ENM is by competitive examination. Candidates will normally already posses a masters degree in law, *Maitrise en Droit*, and the entry examination will be marked by judges and academics. There is no formal age limit for entry to the ENM and judges tend to younger, of both sexes and from a wider variety of social origins than English judges. The ENM course lasts for 31 months and includes courses on procedure, the organisation of the courts, legal ethics and penology.

The examining magistrate may only commence an investigation when he has received an *instruction*.[106] The initial stages in the pre-trial procedure are conducted in private and it is a function of the J.I. to collect all the available evidence and then prepare a detailed written file, the *dossier*[107]. The file of evidence should more accurately be referred to as a file of 'findings' as it is not a prosecution file as the J.I. does not have the authority to decide that a suspect will be prosecuted for the

alleged offence. The *instruction* will be generated the public prosecution department who will appoint a J.I. to conduct an investigation. The jurisdiction to investigate is, '...of the place of the offence, of the residence of one of the persons suspected of having participated in the offence and the place of arrest of one of those persons, even when that arrest was made for another reason'.[108] The J.I. may attend the scene of the crime personally or he may direct the police to attend on his behalf. If the J.I. decides to attend the scene of a *délit,* major offence, or *crime,* the most serious category of criminal offence, the J.I. may relieve the public prosecutor and the Officers of the Judicial Police, OPJ, of their authority and assume full responsibility for the conduct of the investigation.[109]

The role of the J.I. is clearly central to the investigation of serious crime. However, in respect of those offences which do not normally require the intervention of a specialist department of the OPJ then the police will frequently only have initial contact with the public prosecutor and not the *juge d'instruction*. The arrival of the public prosecutor at the scene of a crime is commonplace and this office will direct the initial police response and authorise immediate inquiries.

There is no direct equivalent with this in England as it is the police who initially attend all crime scenes irrespective of the severity of the matter. In chapter 2 reference was made to the current trials that are being conducted in the Metropolitan Police, where lawyers from the CPS are working directly from some police stations. If this procedure was adopted nationally then this would be the closest analogy that could be made with the system that exists in France. It follows that if the CPS were to take a more active role in initial investigations then this would have two direct consequences, firstly the police would perceive this as a dilution of their authority and secondly the SFO, in the cases of serious white collar offences, would be required to

take instructions from professional lawyers, the CPS rather than take over an investigation from the police. The effect of such a move in England would mean a substantial increase in the power of the CPS and a reduction in authority for the police and perhaps a perceived reduction in authority for the SFO. In the light of this I think it extremely unlikely that the trials in London will be implemented as policy. Furthermore, it might also be very unattractive to the lawyers working for the CPS. If they are to be available to assist the police in deciding on what inquiries to conduct and what charges to prefer then the CPS lawyers may have to work shifts.

The J.I. will only be notified if the police feel they have insufficient powers to deal with the particular investigation or the complexity of the matter justifies his attendance. J.I.'s do not usually attend crime scenes as non-attendance allows them to maintain judicial independence and it does not undermine the role of the OPJ. It is further the case that there are simply insufficient numbers of *juge d'instruction* available to attend all investigations.[110]

In the case of investigations into allegations of serious white collar offences the inquiry will frequently be stimulated through a report passed from the police, or directly from the public prosecutor. In England matters are never reported directly to the CPS as they have no investigatory function. In France the public prosecutor has the authority to cause an investigation to be conducted and as we have seen, the authority to decide who investigates, the police or a J.I. Therefore it is not unusual for a victim to report a crime to the public prosecutor rather than the police.

Any allegation of a serious nature must be presented, immediately, to the J.I. who will orchestrate the entire investigation, *enquête*. The absolute authority to decide on the

direction that an investigation takes is one of the issues that has been subject to recent proposals to change the role and powers of the J.I. Some of the suggestions have come from the current President of France. However, criminal procedure falls into a category of law, *loi*, that cannot be reformed by Presidential decree, *décrets.* All reforms must be made by *Parlement.* The reforms that have been introduced in the past three years which have a direct influence on criminal procedure and offences are; the *Code of Criminal Procedure*, *Code de Procédure Pénale,* and the *Act of January 1993* as amended by the *Act of January 1994*, and the *Code Pénal*, *Criminal Offences Code, 4th March 1994*.

These reforms have addressed issues relating to procedure and law, they have not however, changed the role and function of the J.I. The attempts to achieve this were proposed by the Delmas-Marty report[111] it was published on 28th June 1990. 'The main principle was a desire to increase the rights of the defence and to avoid the unnecessary suffering of innocent people mistakenly accused, at the same time maintaining an efficient and effective penal system. A first step in the process was the suggestion to do away with the examining magistrate...transferring his powers to other authorities, and thus surmounting the ambiguity of his position, which combined the powers of both investigator and judge'.[112]

The elimination of the role of the J.I. was rejected as the government felt that this office was popular and independent of the judiciary, not an extension of it. This was in part also, in response to several J.I.'s handing in their resignations and others 'clogging up' the system by remanding more suspects into custody than the prisons service could cope with.[113] Further recent attempts to modify and restrict the powers of the *juge d'instruction* have met with renewed resistance. It would seem, for the present[114], the J.I. is secure.

### 3.6.3 Judicial orders

The J.I. has two distinct functions; to issue judicial orders and submit a dossier of evidence to the indictment court, *Chambre d'Accusation,* via the public prosecutor's office. The range of orders that may be issued includes; bail orders, issuing an order permitting the police to phone tap[115]; ordering the police to carry out inquiries into an offence; deciding on whether a suspect should be remanded in custody and ordering a suspect or witnesses to appear at the office of the J.I. to assist with the investigation.

The wide range of powers vested in the J.I. are distributed more diffusely in England. The police can remand a suspect in custody after charge but only until the next available sitting of the local magistrates. The police may now also impose a limited range of bail conditions as well as request specific bail conditions when the suspect is brought before the local magistrates. The police in England do not have the power to authorise a phone tap, this can only be authorised by the Home Secretary or a High Court judge. The SFO can demand that a suspect and witnesses attend its offices but it has no authority to demand that particular inquires are conducted by any other agency. If the SFO felt it necessary to request a phone tap then, like the police, it must make a judicial application. Remand applications made by the SFO are subject to the same scrutiny and procedures as apply to the police, and as has been seen earlier in this chapter in respect of the chairman of Polly Peck, the SFO is not always successful.

When opening an instruction the investigating magistrate is lawfully charged with *manifestation de la vérité*, establishing the truth. Firstly to ensure that there is a case to answer and secondly, that the *dossier* is sufficiently complete that the *Chambre d'Accusation* can place the matter before the trial courts with sufficient evidence from which that tribunal can establish culpability and then deliver an appropriate

sentence.[116] In order to compile the file, the J.I. will use his powers under the category of judicial orders above. In fraud cases the J.I. is permitted to instruct one expert witness, while in other matters this is two. The fraud suspect also has the right to nominate an expert, this may cause conflicting opinion but this is not seen to detract from the principle of obtaining the truth. Nominated experts are allowed to hear from any of the witnesses and the accused. In the case of the latter this is only with the specific consent of the J.I.[117].

It should be stressed that under the procedure in France far greater emphasis is placed on oral evidence. The parties are asked questions by the police, the J.I. and the trial court. Documentary evidence is supporting evidence. This is particularly relevant in white collar cases where the documentary evidence will not form the basis of the case but will supplement the facts which will be proven by questioning. The record of this questioning, the *procès verbal*, is evidence in itself.

### 3.6.4 Judicial investigations

*Instruction* is the formal process of establishing the truth. This is achieved, in part, by formal examination in the offices of the J.I. Once a suspect has ceased to be a witness, if he ever was, he is liable to be charged with a criminal offence. After charge he will be interrogated. The rules controlling the conduct of interrogations is stricter than that controlling the interviewing of suspects, and at the first interrogation meeting between the J.I. and the suspect, or party 'placed under judicial investigation' the *personne mise en examen*, will be told their full rights.[118]

There is no direct equivalent of these processes in England as a procedural difficulty arises in England that does not occur in France. In England once a witness has

become a suspect he must be informed of that he is a suspect and be cautioned. He will then interviewed by the police or the SFO, and as a result of the interview a decision will be made about charging the suspect. The decision to charge will be based on all the evidence obtained, including any statement the suspect may have made whilst being interviewed. In France the procedural stages are different and once the first discussion with a witness has identified him as a suspect he is charged, then after this he is formally interrogated by the J.I. In England this would equate with interviewing a suspect after charge, and, as has been seen in the previous chapter, the police are not permitted to interview after charge. In respect of white collar offences investigated by the SFO when defendants have challenged the power of the SFO to interview after charge, the English courts have continually found in favour of the SFO.

The interrogation proceedings conducted by the J.I. are written, non-adversarial and secret. This is not wholly different from the situation in England where police interviews are private in the sense that only the suspect, police and suspect's solicitor are present. All interviews, except terrorism cases, are tape recorded and the adversarial aspects of the common law are reserved for the courtroom. In police interviews allegations are put and suspects may either answer the point or exercise their right to remain silent. Interviews conducted by the SFO are not subject to the same statutory provisions as those regulating police interviews however, as a matter of good practice the same procedures are adopted.

The J.I. must consider the case for the prosecution and the defence because his role is to establish the truth, not to prosecute. To these ends both exculpatory and inculpatory factors must be considered. It is frequently the case that the J.I. will revisit the explanations given by a suspect during the police detention, *garde à vue,* to

confirm their authenticity. Conversely, this is an opportunity for a suspect to retract a statement he has made to the police or to make a confession. The '*Instruction*' permits the attendance of a suspect's lawyer and while direct questions are put, this process is an examination of the facts to establish the truth, it is not a final stage in the investigation procedure. The suspect's lawyer is not entitled to make comment or argue his client's case. The proceedings are summarised by the *magistrate* and recorded by his clerk, *greffier*. If the suspect makes a confession during the proceedings then this confession will form part of the evidence and may be read out in court during any subsequent trial. All parties present must then sign the record of the meeting, the *procès verbal,* as an accurate record of the instruction.[119]

All evidence obtained during the investigation of a crime must be examined for its authenticity by the police and also the J.I. before submission to a trial court. The seizure of any items as exhibits is designated to the OPJ by the J.I. The J.I. may also show exhibits to witnesses and the suspect and all parties may be required to attend the crime scene with the J.I. In the case of the suspect they may be interrogated at the scene and the J.I. may order a full reconstruction of the events at this time.

There are three issues here that differ from the procedure in England. Firstly the suspect will not visit the crime scene with either the police or the SFO and therefore there is no likelihood of a suspect being away from a police station or the offices of the SFO. Secondly, witnesses may attend the crime scene with the investigating officers. However, this is extremely rare as this would open the door for the defence to say that the scene had been contaminated. In respect of a re-construction of the events, this is used by the police to stimulate witness involvement. A crime scene may be visited by the trial court, this is usually at the request of the jury and it is extremely rare occurrence. Thirdly the only time that there will ever be a

confrontation between a witness and the suspect is when all the alternative methods of identification, such as ID parade and street ID, have been exhausted. Confrontation ID is used as a final resort by the police. I is conducted at a police station. The door to the cell in which the suspect is held is opened and the witness is asked whether the occupant of the cell is the offender. This method of identification is considered to be of the poorest quality as the likelihood is that a witness, on seeing a person held in a police cell, will invariably make a positive identification, more due to environmental factors than quality of identification.

As is indicated above, the suspected person in France is liable to a number of interviews. Firstly by the police, followed by an initial interview conducted by the J.I. This is followed by a second, more formal interview between the J.I. and the suspect. As a result of this the J.I. may order further interviews until a point is reached when in the opinion of the J.I. he has arrived at the truth.

The repeated interrogations are also seen as beneficial for the defendant, as this gives him a number of opportunities to establish his innocence. At the *première comparution*[120] the suspect must be informed of his right 'to make no declaration'[121] however, this is only applicable to this first meeting, and at this meeting the defendant will not have his lawyer present. The subsequent meetings are those at which the J.I. will put specific allegations and any refusal to answer questions at these stages will be recorded on the *procès verbal* and may be commented upon at trial. In reality this really does not occur, and suspects will answer questions as the J.I. may interview the suspect as many times and for as long as they deem necessary to establish the truth.

The examination of the suspect by the J.I. is to ascertain whether a suspect has committed a specific offence, it will not resolve all disputed facts before trial. What it does facilitate is the forecasting that certain issues will be disputed at trial. In this way the outcomes are similar to those achieved by the police during interviews held in England as the interview contents help indicate to the CPS those matters that are to be disputed. It is also similar to the provisions now adopted under section 5 of the Criminal Procedure and Investigations Act 1996, where the trial judge can order that certain matters are dealt with before trial and also that the defence tells the court which matters it disputes.

While in England the defendant does have a right to silence, it could be argued that this has been diluted by the provisions of the CJPOA which, as has been shown previously, allow the trial court to comment on the fact that a defendant had the opportunity to offer an explanation to the investigation team, but had failed to do so, and therefore the jury was free to draw what inferences it saw as appropriate.

In respect of inquiries conducted by the SFO, the provisions of the CJA 1987 apply and it is here that there is closer symmetry with the position in France. Nevertheless, it must be remembered that under section 2 of the CJA 1987 the SFO can demand, on penalty of a fine or imprisonment, answers to questions that it puts. The J.I. can cause the suspect to repeatedly attend his offices to answer questions, but if ultimately the suspect refuses to answer then this an end to the matter and the silence is recorded in the dossier. To say that in France a suspect is unlikely to remain silent is of course true given that if a suspect remains silent then being charged and having to answer to a trial court is virtually inevitable. In England there are no guarantees, and remaining silent could never, in itself, be sufficient to cause a suspect to be charged or convicted. For the suspect in England remaining silent is a

gamble. If the police have sufficient evidence with which to charge then they should have charged before interview as the provisions of PACE require the police to charge at the earliest opportunity. The police would argue that they need to interview to allow the suspect the opportunity to give his version of the events. It could also be argued though that if the police will charge irrespective of whether or not a suspect makes a statement in interview, then they should proceed to charge immediately and any subsequent interview should not be included in the evidence presented before the jury. As has been seen in this chapter, this particular interpretation has not been accepted by the appeal courts.

In France the defendant has no right to prevent continual interrogation and since answering questions is perceived as an inevitability, the suspect is not condemned by the trial court, for lying. This right to lie, *le droit de mentir*, is seen as natural, although it might tarnish the credibility of a confession. The inquisitorial nature of the trial proceedings means that the trial court will question the defendant anyway and therefore, the version of events given to the J.I. is subject to further scrutiny. In France the evidential value of a confession is like any other element of proof and it is left to the free evaluation of the court[122]. The free evaluation of the probative value of evidence extends to the admissibility of all evidence as '...criminal courts may not disregard evidence produced by the parties on the sole ground that it has been obtained unlawfully or disloyally. They must only consider its value as evidence[123].

The position in England is much the same, where it is the function of the trial court to establish whether or not, the probative value of the evidence outweighs the prejudicial value. The relevant law is contained within the provisions of PACE. Section 76 deals specifically with the issue of interviews and Section 78 permits the trial judge include or reject any evidence tendered by the prosecution.

The nature and complexity of investigations into allegations of white collar crime necessitate a particularly close working relationship between the OPJ and the designated J.I. The French Judicial Police do not train in forensic accountancy even when seconded to the *section financière*. Experience is gained by practice and the guidance of a J.I. who himself may well be a specialist in the field of serious white collar crime investigations. Detectives in England gain experience of investigating complex white collar offences by experience and they have the opportunity to discuss case developments with specialists from the CPS. Police officers attached to the SFO may have the chance to gain considerable expertise but this is not guaranteed as police officers working at the SFO do not conduct interviews with suspects and their role can be limited to executing warrants and obtaining witness statements.

In Paris there are 12 J.I.'s [124] who are white collar crime specialists and those matters to be prosecuted will be brought before specialist courts. In the capital, where most serious frauds are prosecuted, this will be before the *11ème Chambre du Tribunal Correctionnel*.

> 'Without prejudice to the provisions of Articles 43, 52 and 382, in the district of each Court of Appeal one or several courts of general jurisdiction shall be competent under the conditions provided for by articles 706 and 706-1 for the investigation and, if it concerns *delicts*, the trial, of offences fitting into the categories mentioned in Article 705. [2]. The assignment of trial judges specialising in economic and financial matters shall be made after advice of the general assembly of the tribunals ...'.[125]

The offences referred to in the above Articles include; fraud, false advertising, tax and customs matters, fraud involving foreign financial matters and offenses concerning banks, credit, the Bourse and financial establishments.[126] The offences referred to in Chapter 1, *le crime en col blanc* and *abuse de bien sociaux*, both

incorporate criminal behaviour committed within the business environment and therefore the public prosecutor will invariably request that an expert judge be assigned to the investigation, and if the matter proceeds to trial, that a specialist court will be designated.[127]

Allegations of white collar crimes may come from the victim or one of the financial services regulatory authorities, such as the *Commission Des Opérations de Bourse*. Either source may complain direct to a J.I., to the state prosecutor, or the police. It is the case in France that the J.I. will rely heavily on the expertise of the fraud police to assist the investigation. This is achieved through a series of case meetings which will involve all interested parties; the police, public prosecutions department and J.I.. This is particularly useful for the public prosecutor, *parquet,* as it is his responsibility to present any subsequent prosecution at court.

The above procedures are mirrored in England where the CPS will rely heavily on the police to assist in the gathering of any further evidence that it deems is necessary for completion of a file of evidence. The joint vetting committee, JVC, is the forum in England for the discussion of complex white collar case developments and all the interested parties, CPS, the police, the SFO and prosecution counsel will attend.

### 3.6.5 A unique authority in France

The one exceptional power which establishes the unique role of the J.I. in the criminal process is the ability to remand a suspect into custody. No such power is vested in any investigating authority in England. Pre-trial detention, *détention provisoire,* allows the J.I. to order the detention, *mandat de dépôt,* of the suspect to a prison.[128] This authority has been the subject of a number of reforms since the early

1980's. The J.I.'s themselves consider the right to impose a remand into custody as a fundamental preserve of the functions of the J.I. and have accordingly resisted any attempts to remove this power.

At one stage in 1993,[129] it was proposed that the J.I. would retain the authority to impose an initial remand in custody but that the power to order a further remand in custody would be subject to review by panel of judges from the *Tribunal de Grande Instance*. This proposal was endorsed by the French legislature and briefly became law. The response to this, from the J.I.s, was a work to rule, which seriously reduced the flow of cases going through the courts and the threat of an all out strike.[130] The full, previously held, powers of the *juge d'instruction* were restored by the government on 24th August 1993.

On completion of the investigation, the J.I. will inform the victim, the defendant and his lawyer that inquiries are complete. There is then a twenty day period during which requests may be made that further evidence be obtained. The *dossier* contents and the orders issued by the J.I. during the investigation may be also be challenged at this time. Challenges are made to the indictment court, *Chambre d'Accusation,* by either the prosecution or defence.[131] The defence is not, however, entitled to make an application by its own motion and requires the authority of the J.I. to do so. This is clearly a serious limitation on the effectiveness of this provision and the law is weighted strongly in favour of the prosecution who has an unfettered right to request for a direction from the indictment court.

The actions of the J.I. are open to scrutiny by the *Chambre d'Accusation* which may annul all or part of the actions of the J.I.[132]. In the first instance the issue is not the

lawfulness of the obtaining of the evidence but whether the legal procedures required of the J.I. have been complied with. In France the annulment imposed by the indictment court is referred to as the *nullité textuelle* and is limited to ensuring that compliance formalities have been adhered to, such as whether the defendant was informed of his rights. There is also the *nullité substantielle* which will ascertain whether the procedural requirements have been carried out. This may include a review of the actions of the police in obtaining information by means of an illegal search or using covert methods to obtain evidence, as well as reviewing the actions of the J.I.

While the actions of the police are subject to comment by the CPS and exclusion by the trial court, the specific provisions in France would be rather similar to the trial judge in England indicating to the prosecution, during the pre-trial hearing, that there is likely to be a successful application by the defence that the provisions of section 76 or section 78 of PACE have been breached. The same criteria would also apply in respect of the SFO, where pre-trial hearings are a regular occurrence. But, as has been seen in this chapter, the SFO is not obliged to conform with the conditions of PACE, and they do so as a matter of good practice rather than law.

It can be seen from the nullity provision, that the defence in France could request an annulment from the indictment court purely as a means of delaying the proceedings. Bearing in mind the comments made by Professor Markensis, earlier in this chapter, relating to prescription periods in France, where if ten years lapses between the commission of the offence and prosecution then the case is not proceeded with, the nullity provision could potentially create a further prosecution lacuna. To circumvent this potential tactic Article 802. *Code de Procédure Pénale*, CPP, requires proof of an

'actual prejudice' against one of the parties to the proceedings before the Indictment Division will declare a nullity.[133]

In addition to the above powers, the *Chambre d'Accusation* can; authorise the release of the accused[134], order a new investigation or request that specific issues not yet investigated by the *juge d'instruction* now be looked at.[135] The Court may also reverse an order of the J.I. against which an appeal lies.[136] The *juge d'instruction* has no authority to commit a suspect for trial, only the Indictment Court has the power to discharge, *arrêt de non-lieu,* or commit for trial, *arrêt de renvoi.* Committal, in respect of serious crimes, *délits*, is to the *Tribunal Correctionnel* and to the *Cour d'Assises* by *arrêt de mise en accusation* for the most grave offences. The Indictment Division also has the authority to issue appearance warrants and arrest warrants. Appeals against their decisions lie to the *Cour de Cassation*.

If there has been no challenge to the actions of the *juge d'instruction* then the file is lodged, *Ordonnance de soit-communiqué,* with the public prosecutor. The *parquet* has one month in the case of suspects remanded in custody, and three months otherwise, in which to reply to the J.I. and make observations about the file content. In the case of serious white collar crime investigations, the *parquet* will be familiar with the content and progress of the file throughout the investigation and this procedure will amount to little more than a technicality. The fact that the state prosecutor can return a file to the J.I. does not reflect the reality of the division of powers. The J.I. investigates and the state prosecutor accepts a file for prosecution. If the J.I. decides not to implement the changes proposed by the state prosecutor then he will not do what is requested. The J.I. is answerable to the indictment court not the state prosecutor. It is important to remember that the J.I. is a judge of the same rank as those sitting in the indictment court. The J.I. is selected from those within the indictment court and the J.I. may return to the indictment court after a

period of time spent working as a J.I. So it is true that the state prosecutor can request that a J.I. conducts certain further inquiries but there is no sense of any real authority in this.

If this situation is compared with that in England it can be seen that the police investigate and submit the file to the CPS. The CPS will frequently, request that further evidence should be obtained. The CPS has no statutory authority to request that the police gather further evidence, but if the police refuse to comply with the request from the CPS, then the CPS may decide that there is insufficient evidence to proceed with a prosecution. For the SFO no such dilemma presents itself as it combines the roles of investigator and prosecutor

### 3.6.6 Charge reduction

In many cases the file will have been submitted prior to the official *ordonnance* on an informal basis. This is the time in the proceedings when the French system allows for what in England is termed 'reducing' the charge. This is a well practiced way of reducing the severity of a charge and thereby either reducing the options for trial venue or inducing the defendant to plead guilty. The Royal Commission on Criminal Justice[137] reported that the cost of a contested trial at the Magistrates Court was £1,500 and by comparison £13,500 at the Crown Court. Clearly the CPS, as a government agency, is under pressure to keep as many matters in the lower courts as possible. The same can be said of the state prosecutor in France in respect of venue but there is a major difference relating to plea bargaining. There is no merit in the latter course in France as there is no facility for a guilty plea, all trials are full trials.

The *parquet* and the J.I. do, however, commonly redefine an offence. This is a process of reducing the severity of the charge and is approached in much the same way as in England where the CPS will confer with defence solicitors prior to court to determine whether or not a defendant is likely to plead guilty to a lesser charge. In the case of a *crime* this may be reduced to a *délit*, in the absence of any aggravating features. This can only be achieved with the consent of all the parties and this procedure has no statutory authority. There has been a recent increase in the sentencing tariff for a *délit*, from 5 years to 10 years, and this is the closest the state has come to any form of pre-trial bargaining. The outcome of this procedural device is an increase in the workload of the *Tribunal Correctionnel*. Even those cases involving considerable amounts of financial loss, that would be heard in the Crown Court in England, will, as they are a *délit*, be heard in the *Tribunal Correctionnel*, a court comprising of professional judges and no jury. Any request that further inquiries are made or that supplementary action is taken, are not binding on the J.I. and after the time limit has expired the J.I. will issue a closing order on the file, *Ordonnance de Règlement*.[138]

There is no provision for plea bargaining as we have seen, although there are 3 circumstances under which a settlement may be reached. Firstly in tax matters a '*transaction*' may be offered before or during proceedings. This facilitates the agreement by the accused to pay a sum of money to the tax authorities in return for the case being dropped. The second set of circumstances which facilitate a form of plea bargaining relate to drug addicts who may accept the public prosecutor's recommendation of medical treatment in place of prosecution and thirdly, the previously mentioned material '*correction*'. It is only in respect of this third category that collusion between the *parquet* and J.I. is effective and necessary.

The J.I. has the potential to alter the entire emphasis of an investigation and if the neutrality of the J.I. is questionable this poses serious concerns regarding impartiality.[139] The contents of a *dossier* are the sole responsibility of the J.I. and any irregularities over the authorisation to sanction, for example, covert gathering of evidence, may be deliberately or inadvertently excluded from the file. In effect the file may or may not contain all the relevant evidence.

This is unlikely to occur in investigations conducted by the police in England as it is the CPS who will scrutinize the police file. In the past the police in England have been criticised for failing to include all relevant material in a file and these errors have caused some of the more celebrated appeals, the result of which has been the implementation of PACE, the CJPOA and the CPIA. The SFO can of course control the entire contents of a serious white collar crime file and any criticisms can be correctly directed at the SFO in much the same way as any criticisms in this respect can be directed at the J.I.

The subjective selection of what evidence to exclude may temper the quality and impartiality of the *dossier*. If the J.I. has pre-conceived ideas as to the guilt of the suspect then the defendant's case may be severely prejudiced by that presumption, as the *Chambre d'Accusation* and the trial court may assume that the file contents are correct.[140] This may be further reinforced if the suspect has been remanded in custody, either as a result of the police requesting a remand in the first instance or on the orders of the J.I.[141]

It is the potential to compromise the fairness of the proceedings that places the presumption of innocence in jeopardy through a number of variables largely

controlled by the J.I. This conflicts with fundamental human rights. It is still the case in France that a suspect is not entitled to have a lawyer present throughout the entire interview process. That the transcript of any interviews held in the office of the J.I. is not a verbatim version but a synopsis compiled by the J.I. The J.I. can order a confrontation between witnesses and the suspect. Abuses arising from the covert compilation of evidence will not render the evidence inadmissible *per se* unless it is shown that the inquiry into the determination of the truth, as a result of that obtained evidence, would have been fundamentally compromised.[142] All these factors add to the possibility that the suspect will not receive a fair trial and finally to this list must then be added the fact that in France all the parties to an investigation may comment, on the accuracy of the evidence, to the press.[143]

### 3.6.7 The 'sick man'

The J.I. has been referred to as a 'Janus like figure'[144] who has the power to investigate and be arbiter of his own decisions. Professor Pradel[145] a former J.I. himself, has referred to the office as a 'sick man', *'...l'homme malade de la procédure criminelle'.*[146] This sickness, according to Pradel, stems from a number of factors which can be traced through the historical development of the office.[147] Pradel believes judicial appointees are too young and lack any real power, and the progress of the completed *dossier* is unnecessarily slow. Furthermore, while the number of judges appointed as J.I.s has increased during this century, their productivity has declined. This is in contrast to the rising numbers of persons remanded into custody and the periods of time spent awaiting trial. In Pradel's study this peaked at 3.3 months, with an output of completed files having declined from a high point of 60% completed within one month, in 1910, to a low point of 5.94% completion in 1968.

The complexity of some investigations, such as white collar crime cases, means that a specialist judge will be required to take control of the investigation, inquiries of this nature are frequently lengthy and often involve evidence gathering from other jurisdictions. To appoint one J.I. to investigate a single complex white collar crime will detract substantially from the pool of J.I.'s available for the regular work of serious crime investigations. Although the J.I. will delegate to the police, ultimately the compilation of the dossier is the responsibility of one person. it can be argued that this is the reality of the position in England where detectives and lawyers at the SFO will appoint one person to have responsibility for the court file, but throughout the entire procedure in England, in respect of white collar crimes, the approach is one of teamwork and no single person inn the eyes of the public has the responsibility for the success or failure of an investigation.

As with the police services of France and England, the degree of specialisation required of the serious fraud investigator is such that it is only beneficial to the judicial process if those charged with investigating white collar crime are allowed sufficient time to develop real expertise. The complexity of the entire range of matters that the J.I. is called upon to investigate has been referred to as an 'obstacle run'[148], as a J.I. can be ordered to investigate a wide range of highly complex criminal offences which may span broad geographical areas. The situation is further aggravated by the fact that the J.I.s are frequently moved from one area of the country to another and there is therefore little continuity in the inquiries that are conducted into a particular crime. This compounds two problems; duplication of *dossier* preparation and the assimilation of enormous caseload contents. The negative effect is that J.I.s take on another judge's partially completed investigation or at times re-investigate an entire case.

The problems outlined above have been likened to a sickness by Pradel and it can be argued that this malady is further inflamed by the ease with which the *Chambre d'Accusation* can return a *dossier* and insist on new evidence. This will simply generate further work for the J.I. who, either due to existing pressure of work or because he genuinely believes the investigation is complete, is unlikely to respond favourably to the return of his file from a panel of judges who hold exactly the same rank as the J.I. himself. In addition, the power of the J.I. can be undermined by the police who can resist rather than assist in inquiries and this is particularly the case in respect of the attitude the police hold towards their ability to obtain a confession compared with the ability of the J.I. to obtain a confession. For if the police cannot solve a crime within the first 24 hours of a suspect's detention why should the J.I. be any more successful[149]? Pradel agrees, '...in serious cases the police obtain a confession from 90% of the suspects they hold in custody and the J.I. is normally so busy that to do anything with the other 10% of suspects, where the police do not obtain a confession, is impractical and really not worth it [150].

The police may wish to maintain the view that they are specialists at interviewing but the reality is that a confession being forced during police custody, the *garde à vue,* though technically possible, as no lawyer is present, is highly unlikely as the suspect is interrogated again by the J.I. and at this time may retract any previous statement. Whether the OPJ consider the interrogation stages in advance of their questioning is a moot point as the recent, disgraceful, behaviour of the *gendarmerie* in questioning a murder suspect has indicated.[151]

Further ingredients in the 'sick man's malaise' are the procedural difficulties encountered in the compilation of the *dossier.* There may be difficulty in obtaining witness evidence in circumstances where the facts have been forgotten, where

witnesses are unavailable, have moved or are deceased, and these must be viewed in addition to those matters outlined above, which together will contribute towards frustrating the quality of the evidence gathering. As a result file may be less meticulously compiled than is desirable for the administration of justice and the seeking of the truth. The decision that a matter should be investigated by the J.I. rests with the state prosecutor. There has been an increase in the number of appointments to the role of J.I. in the past 30 years and yet the number of cases referred to the J.I. has reduced. Two conclusions may be drawn from this, either the public prosecutor is becoming less confident in the ability of the J.I. or there is a general trend towards de-criminalising and reducing the severity of all offences. The truth may lie somewhere between the two. The increase in the range of offences that can be dealt at the lower courts, has meant in increase in work for this tier of the legal system and if the severity of the offence is regarded as less serious then the need to appoint a J.I. is diminished. Also, as the nature of crime becomes more complex and international then the need to develop specialisms increases and it is far more cost effective to have a few J.I.s investigate complex white collar cases than it is to have dozens of police officers trained, only to find that there authority in another jurisdiction is so undermined that it needs a qualified lawyer to control the investigation anyway.

In England the Royal Commission Report[152] found that procedures conducted under the French model are thorough and that supervised investigations conducted by the *juge d'instruction*, were effective in filtering out weak cases and in collecting evidence and preparing for trial the serious matters. The Report also found that the status of the *juge d'instruction*, as a professional judge, ensured independence and resistance to extraneous pressures. This second point is questionable as the history of the *juge d'instruction* to resist publicity and remain impartial is not convincing. The *Affaire*

*Grégory*, is a glaring example, involving the murder of a child and subsequent family dispute spanning ten years. During this time two J.I.s were suspended, and one was stripped of office. The defence counsel for a former defendant instigated charges against the counsel of another former defendant, for encouraging him to publicise his story. One defence *avocat* said, 'There needs to be some critique of what has happened. At the moment, there is a conspiracy of silence. Neither judges nor the legal profession want to question this inquisitorial and archaic system of ours.'[153] *Avocat* Garaud added,

> 'I see a need for a fundamental review of the powers and controls over investigating magistrates. we must never again have a situation where a magistrate is holding a press conference outside the court and telling his life story to a woman's magazine'.[154]

### 3.6.8 Suggestions for reform

Jean Pradel, the former J.I. who is now Professor of Law at Poitiers University, supports a review of the role and functions of the J.I. Pradel does not wish to see the customs and traditions that have developed alongside the office of J.I. being abandoned and he does not support the abolition of the office of J.I. This he believes would create its own difficulties and further de-stabilise the French judicial process. Pradel advocates a reduction in the powers of the J.I. with greater investigative authority being vested in the OPJ. This should be combined with a re-distribution of roles with the public prosecutor having control of the investigation and the J.I. retaining their judicial function. This proposal would create its own dilemma as the *parquet* is not trained in investigative techniques and any move towards further Americanisation[155] of the French judicial process would meet strong resistance from the J.I. who stand to lose power and status from such a move.

The Delmas-Marty report[156] contained a number of realistic and workable principles. It suggested that the role of the J.I. in investigating uncomplicated crimes overlapped with, and was an effrontery to, the ability of the police. There was a clear overlap in competence which was time-consuming, expensive and potentially detrimental to the interests of the defendant [157].

The primary concern of Delmas-Marty was however not the waste of time, but the power of the J.I., particularly in determining remands in custody. This is the feature of the role of the J.I. which has been rightly criticised as it is not possible for the *juge* to control the period of time a suspect will spend on remand. Unlike the system in England which demands that remand prisoners are dealt with speedily, in France it is quite possible for a delay to mean that an unconvicted person spends in excess of twelve months in prison awaiting trial. In extreme cases this has extended to more than five years.[158]

It cannot be in the interests of justice that a suspect should wait for years to have his case heard. Over this time witnesses will forget details and the press may have commented on the issues which could effect the neutrality of the trial court. If the case is a serious white collar matter then it will involve defendants from the business community and the period of delay pending trial may have an adverse effect on the company's employees and shareholders. If the company is of international status then delayed proceedings may have implications for the status of the financial markets in the country where the trial is to be held and also the status of the legal system itself may be brought into disrepute due to excessive delays.

### 3.6.9 Confrontation and the suspect's rights

The authority to remand a suspect in custody is a very powerful tool at the disposal of the J.I. Equally powerful is the ability he has to order a confrontation during investigation. In refuting the criticisms of this function, as being similar to the 'star chamber', Abraham[159] considers the procedures are fully justified as, 'In the absence of cross-examination, the data procured by the *enquête* is characterised by a patient, painstaking discovery procedure, one that presumably solved mysteries and eliminated discrepancies in testimony'.[160] This is really rather similar to the line taken by Joly[161] but it does not justify a cure for a patient by saying another system is more unwell and therefore the powers of the J.I. are acceptable.

### 3.6.10 'Sensitive' investigations

Recent attempts to curb the powers of the J.I. may be a reflection on their ability to cause political embarrassment, particularly when investigating sensitive white collar frauds, rather than a need to '...examine how one can ensure respect for the principles of the independence of the judiciary and the dignity of the defendant'.[162] A series of recent investigations have exemplified this suggestion.

In July 1995 Eric Halphen, a *juge d'instruction* from Paris, lead a team of police officers of the OPJ to search the premises of the Gaullist *Rassemblement pour la République*, RPR, political party's headquarters. This action was in response to an allegation that the party was involved in a system of false accounting the allocation of building contracts for the development of council housing in Paris, and that part of the funds obtained had been used to bolster the campaign funds of RPR. The Interior Minister, Charles Pasqua, who was believed to be directly involved in the scandal, authorised the bugging of the investigating magistrates phone in an effort to discredit

the judge and cause the investigation to collapse. Pasqua had a record of ignoring democratic practices in the interests of the state,[163] and his method of dealing with the J.I., who considered the '*pot-de-vin*' [164] illegal and highly improper, was to get his father-in-law, Jean-Pierre Maréchal a councillor in one of the regions being investigated, to attempt to bribe Halphen to cease his inquiry. Pasqua promised Maréchal one million Fr. francs if successful and then proceeded to order the OPJ to target Maréchal. The sting that Pasqua attempted backfired when the Paris Court of Appeal threw out the evidence obtained by the OPJ against Maréchal. At the same time the Presidential candidate, who was Prime Minister at the time, Edouard Baladur, dismissed the head of the Paris OPJ when it was alleged that he, Baladur had in fact known of the proposed sting and authorised the phone tap on Maréchal. The investigating magistrate, Halphen, having executed the search and seized documents has now submitted his *dossier*, which recommends that a total of thirty people stand trial including Michel Roussin and Robert Pandruad, both former ministers, the former director of the councils housing department and MP, Georges Perol and Charles Mery a member of RPR's central committee.

In a similar incident involving the allocation of flats and reducing the rents paid on council owned apartments for members of his family, Alan Juppé, whilst the French Prime Minister, was investigated by the judiciary for abuse of power. Jacques Toubon, a close friend and the Justice Minister required the resignation of the head of the anti-corruption unit of the OPJ, Bernard Challe. Commenting on the incident the Magistrates' Union stated, 'This confirms the true role of M. Toubon who, behind soothing declarations...perpetuates the intolerable interference of the executive power in this domain'.[165] In June 1996 Eric Halphen, having failed to secure charges for abuse of power and corruption against the former mayor of Paris, and now President, Jacques Chirac, for the unlawful allocation of a council flat to members of

the Chirac family, has now turned the focus of this investigation towards the deputy to Chirac and current Mayor of Paris, Jean Tiberi. Halphen seeks the charging of Jean and his son Dominique Tiberi, for 'illegal acquisition of interests' as 2.2 million Fr. francs' worth of work was completed on a flat occupied by Dominique. The official record shows receipts for 430,000 Fr. francs only.[166] At the same time Mme Xavière Tiberi was investigated for being grossly overpaid for a short report[167] that she had been asked to produce for the local authority. The government was so incensed with the allegations by the investigating magistrate that the Justice Minister, Jacques Toubon, ordered French diplomats in Nepal to charter a helicopter to search for Laurent Davenas. Davenas is the senior state prosecutor for Paris and was ordered to return to France immediately and block the investigation. Ironically when Davenas finally heard of the urgent request for him to return to Paris, he thought it so extravagant that he treated the matter as a joke and continued on his mountain trekking holiday.[168]

The above examples indicate that there is often a link between white collar crimes and politics. This is the case in England also, as those criminals in positions of authority in major companies are, by the nature of the wealth and power associated with their positions, attracted to and are attractive to politicians. Comparative law is about more than just the law as it also reflects the structure and culture of the countries that are compared and contrasted. The law cannot be viewed in isolation but as part of the fabric of the compared societies. In France there would be no political advantage or press interest in reporting that a politician had engaged in a particular heterosexual or homosexual relationship. In France if you want to 'score' political points then corruption is a key issue and this goes some way to explaining why it appears that in France many more politicians are involved in white collar crime

than in England. Conversely in England if you wish to out-manoeuvre a political opponent then uncovering a sexual scandal is the chosen *modus operandi*.

The involvement of politicians in white collar crime investigations indicates that the examining magistrate can be manipulated by the government. If this is so then the opportunity for a compromise in the fairness and accuracy of the *dossier* content is a real threat to the judicial system in France. Conversely if the J.I. is truly independent and acts as an impartial arbitrator of evidence and fact, then the possibility of corruption from extraneous sources is extremely remote.

### 3.7.1 Conclusion

In this chapter the similarities and differences that exist between the CPS, the SFO, the J.I. have been compared and contrasted. The methods sanctioned to investigate and prosecute white collar criminals, in each jurisdiction, has advocates and critics. France has designated that white collar crime should be investigated by one agency, the J.I. who, as we have seen, has considerable powers to demand explanations and determine the liberty of a suspect, it has been argued that these amount to, '... some constraining methods which perhaps carry less respect for individual liberties, but which favour the search for truth and get results'[169].

In response to the criticism that judges should not have retained the authority to remand in custody[170] Judge Eva Joly has stated, 'The issue of preventive detention is an important debate in France but there is no philosophical reason why such detention in cases involving millions of francs is any more absurd than in cases involving stealers of motorbikes'[171].

In this chapter references have been made to the work of Professor Jean Pradel who is a leading authority on the J.I. In his criticisms of the J.I. he likens the role to that of a 'sick man', and throughout the section on France the 'patient', the sick man of the French judicial system, has been subjected to a number of examinations. Opinions as to his health vary substantially. The J.I.'s believe he is in good health and an example to others, their supporters agree.[172] Ardent critics find the J.I. in poor health which is rapidly declining due to terminal illness.[173]

Pradel[174] finds the J.I. unwell but not incurable. The importance of the J.I. has declined, fewer cases are investigated through instruction[175] and the proposed changes to the law made the public focus on the J.I., and question whether there is a place for the J.I. in contemporary criminal procedure in France. Currently the defence has no right to challenge what the J.I. decides to include in the dossier of evidence. A change in this respect is overdue and, if introduced, would go a long way towards convincing the public that the J.I. is genuinely impartial.

The ability of the J.I. to temper an inquiry with his own opinion, publicly and to his peers, seriously hampers the credibility of this office. This is particularly so when the J.I. is called upon to investigate serious and complex frauds which involve high profile suspects. In England the SFO was criticised for its handling of the arrest of Kevin Maxwell and the potential jeopardy to a fair trail. Maxwell was arrested early in the morning from his home address. An unknown source had 'tipped off' the press in advance and at trial Maxwell claimed that he could never receive a fair trial as, due to all the publicity surrounding his arrest, it was impossible for any jury member to remain impartial. The white collar offender in France will not be tried before a jury, however, the frequency with which J.I.s publicise their opinion before completion of the *dossier,* remains a real threat to the presumption of innocence.

The role of the J.I. is both similar and different from that of the CPS and the SFO. It is like the CPS, as the J.I. will act as a conduit through which evidence is assessed, further inquiries are stimulated and the file is compiled. In England this authority appears to rest with the police, but in reality, in complex frauds, this is largely a combination of efforts by the police and CPS. It is the CPS who has responsibility for presenting the case at trial, and the CPS will have the ultimate control over file contents. The CPS has the authority to decide that it is not in the public interest to proceed with an investigation. The J.I. has no statutory authority to do this, but given that it is the J.I. who decides on who to interview and what the dossier contains, the J.I. does effectively have the same power. It has been seen above that the state prosecutor has the power to request that the J.I. conduct further inquiries, very much like the CPS will do with the police. However, the J.I. does not really have to comply if he decides that the request is spurious, as there are strict time limits working against the state prosecutor. The decision to charge appears to rest with the police in England, but this is not really the case, as the CPS can amend or reduce charges. The J.I. suggests charges to the state prosecutor who then passes this on, in the form of the dossier, to the indictment court. Only the indictment court can bring about charges, but by the process of agreement between the J.I. and the state prosecutor they can together ensure that the severity of the allegation is reduced to reflect a less serious charge. The J.I. has the power to remand a suspect in custody. The CPS have no such authority but have a major role to play in assisting the court in deciding whether or not that it is appropriate for a suspect to be released pending trial. Nevertheless, there is a substantial difference here in that the opinion of the CPS may be accepted or rejected by the court. The J.I. holds the unique position in France of being authorised to investigate and then detain a suspect pending trial.

The J.I. is similar to the SFO in that it has wide ranging powers to conduct and control the investigation of serious white collar crimes. During the various stages of evidence compilation the J.I. can demand that witnesses and suspects attend his offices and answer the allegations. The J.I. therefore plays a double role, one of controlling the over zealous or diffuse police investigation and a second role as compiler of facts and file, for presentation before a judicial tribunal. As with the SFO it is the very duplicity of functions which makes this office unique and causes such concern amongst its critics.

No authority charged with investigating serious and complex crimes, whether in England or France, can remain outside of the public eye and public criticism. The J.I. in France, like the SFO in England has managed to retain draconian powers to investigate and prepare files of evidence when investigating sensitive, high profile cases.[176] The J.I. has one defence for this extraordinary authority, at least it does not discriminate against the white collar suspect. All defendants in France are subject to these archaic and oppressive techniques. In England they are, at present,[177] reserved for the serious white collar offender.

Reports into alternative legal systems have been conducted in France and England, France has decided not to sacrifice the interrogation stage for a quasi common law system. This delights some commentators who believe that, 'One may well contend that a criminal trial in a French court is truly a *bona fide* investigation rather than a "sporting theory" battle'.[178] In England the adversarial battle continues to dominate the legal system but, as has been seen in this chapter, the desire for efficiency and reducing costs has meant that a quasi inquisitorial system is recognisable in the field of white collar investigations and prosecutions.

The principles of fair trial are undoubtedly of primary importance in Euope today. In this chapter examples have been given which show that the white collar suspect in England is liable to investigation by an agency which has repeatedly failed to enshrine these principles. The suspect in France is no better off as he will be subject to procedures that are antiquated and biased against him. The Secretary General of the Higher Institute of Justice Studies, Paris, stated, 'It's not enough to have good laws. You also need good judges'.[179] In the following chapter the laws and the judges are evaluated by analysing a number of white collar cases from England and France.

## Endnotes:

[1] John Law 'Introduction: Monsters, Machines and Sociotechnical Relations' in *Id* (ed.) A Sociology of Monsters [:] Essays on Power, Technology and Domination (London, 1991) p.18 and Gyula Eörsi Comparative Civil (Private) Law (Budapest, 1979) p.54 both cited in, and emphasis added, Legrand, P. 'How to Compare Now' *International Comparative Law Quarterly* (1998) pp. 232-242 at. p. 236.
[2] FIG was formed in 1981. Its first prosecution, Miller Carnegie, was dismissed as 'No Case to Answer' at the close of the prosecution case. Source: Kirk, D. & Woodcock, A. *Serious Fraud: Investigation and Trial,* London, Butterworths (1992) p.4.
[3] Promulgated in response to the 'Philips Report'. *The Report of the Royal Commission on Criminal Procedure 1979,* London, HMSO (1981) (Established 23 June 1977, chaired by Sir Cecil Henry Philips).
[4] *Woolmington v DPP.* [1935] A.C.462.
[5] Lord Shawcross. Att. Gen. 'House of Commons Debates' *Hansard* (29 January 1951)Vol. 483. Column. 681.
[6] The policy considerations are set out in detail in the Code. para. 6. (There have been a number of Codes issued since 1986, the latest being published in July 1994.
[7] Basil Markensis is Professor of Comparative Law at Queen Mary and Westfield College, University of London.
[8] Markensis, B. 'Comparative Law- A Subject in Search of an Audience', *The Modern Law Review* (January 1990) Vol. 53. No. 1. pp.1-21 at p.20. Footnote 105.
[9] Established in *Elguzouli-Daf v Commissioner of Police of the Metropolis.* (1994) *The Times.* 23 November.
[10] Fionda, J. *Public Prosecutors and Discretion. A Comparative Study,* Oxford, Clarendon Press (1995) p.23.
[11] The degree of resentment expressed by police officers to the author varied extensively. Equally some branch offices of the CPS had little good to say about the ability of the police to compile files of evidence. This is a long standing problem which the Metropolitan Police have sought to address recently by the introduction of CPS lawyers based at local police stations. The problem this has caused is who will pay for the lawyer.
[12] *R v Croydon Justices, ex parte Dean.* [1993] 3 All ER 129.
[13] Barbara Mills. QC. Head of CPS and the current DPP has argued that the CPS should have absolute authority to select on mode of trial and not as at present the defendant and the magistrates with the opinion of the CPS. See further: MacLeod, J. 'CPS Pushes for New Trial Powers' *Law Society Gazette* (04/11/92) No.40. p.5
[14] The provisions of Part III Sec. 29. do not permit the judge to order such a hearing if the case falls into the category of Serious Fraud under the heading of Sec. 7. (1). Criminal Justice Act 1987. *Post.* But of course this may be a white collar crime of a serious nature that has not reached the threshold limit of seriousness or financial loss or gain to warrant being dealt with by the SFO.
[15] Branch Crown Prosecutors. This is the most senior lawyer at the regional office.
[16] Annex A. *CPS Criteria For Referral Of Fraud Cases To Central Casework,* London, HMSO (1996) p1.
[17] Source. Author interview at London Division of Central Casework. CPS Headquarters. Friday 7th March 1997. One current case involves a loss of £21 million.
[18] Relating to delinquent company officers and members of a company in pursuance of S.218(4) Insolvency Act 1986.
[19] e.g. DTI, SFO, SIB,PIA and subsidiary bodies.
[20] This division also deals with Shipping Law offences, Fine Art matters, Onshore and Offshore trusts and a growth area, Offences under ss 1,2,3. Computer Misuse Act 1990.
[21] Typically an experienced and senior lawyer. e.g. James Cousey, the Branch Crown Prosecutor of the London Fraud Division, is extensively involved in the provision of training.
[22] Combined training took place in London for CPS and police officers in respect of the provisions of the Criminal Procedure & Investigations Act 1996 relating to the role of the Disclosure Officer.
[23] Sections 4 & 5 Criminal Justice Act 1987 which applies to the SFO, DPP, Inland Revenue, Customs & Excise and the Secretary of State for Trade & Industry. These sections allow for avoidance of the established Magistrates Court committals when a person is charged with an indictable offence of fraud which is of sufficient seriousness and complexity that management of the case should be taken over by the Crown Court, without delay. Notices of transfer must be forwarded to one of the six specified

Crown Court Centres (Practice Direction: Crown Court Centres: Serious and Complex Fraud. 16 December 1992. [1993] All ER 41).

[24] Suspects held on remand in custody must be committed to the Crown Court within 70 days. This provision contrasts starkly with France where it is not uncommon for a suspect to be held on remand for 5 years. *infra*.

[25] As have been frequently leveled at the SFO resulting in the applications to the ECHR by Ernest Saunders, *post* and further in chapter 4. and it would seem may now be followed by Wallace Duncan Smith. See: 'Wallace_Duncan Smith Conman or Victim?' by Parry, H. & Johnstone, P. *The FT Fraud Report* (February 1997), p.10.

[26] The Philips Principle, from the Report of the Royal Commission on Criminal Procedure 1981. The SFO is unique in that the statutory powers given to the SFO under the Criminal Justice Act, CJA, 1987, specifically allows the SFO to investigate and prosecute in matters of serious and complex fraud, and in doing so have statutory authority to violate the principle that those investigating crime should not be responsible for prosecution. (As contained in The Prosecution of Offenders Act 1985).

[27] There has only been one major newspaper criticism of the Fraud Division. This case involved the collapse of a trial at Newport where the case against seven defendants was withdrawn by the judge as it was 'too complex' to put before a jury. 'Storm as £2m Trial Crashes', *Daily Mail*. Thursday. March 23rd. 1995.

[28] Sec. 36. Criminal Justice Act 1988.

[29] *The Fraud Trials Committee Report*. Chairman: The Right Honorable The Lord Roskill, PC. London, HMSO (1986).

[30] *ibid.* p.5.

[31] The SFO, CPS, Department of Trade and Industry, Customs and Excise, Inland Revenue and the Department of Social Security. The Stock Exchange does cause criminal prosecutions to be brought but it does not present the case at court.

[32] This figure includes the 43 Police Forces and the Ministry of Defence Police and British Transport Police.

[33] Current Director of the SFO, Rosalind Wright. (22/04/97 ).

[34] As at 14th April 1997. Source. 'A note on the investigation and prosecution of serious fraud, and the allocation of cases between the CPS and the SFO'. see New Criteria 3 (I) cases where the monies at risk or lost are at least £1 million (This is simply an objective and recognisable signpost of seriousness and likely public concern, rather than the main indicator of suitability.).

[35] Theft, deception, false accounting and specific offences relating to the provision of financial services as well as fraudulent trading.

[36] Specialists may be seconded to the SFO, e.g. Stockbrokers, Financial Asset Tracing Experts, Computer Specialists.

[37] As amended 3.2.95. S.164(2) Criminal Justice and Public Order Act 1994. This insertion removed the restriction on the exercise of Section 2 powers when an inquiry was being conducted in another jurisdiction. the Director may now authorise the obtaining of information in respect of a suspected serious fraud conducted from outside England.

[38] S.2 (8) CJA 1987.

[39] A banker can only be required to breach confidentiality if the request is made by the Director, or her delegate, personally.

[40] S.2 (9) CJA 1987 and see *Professional Conduct of Solicitors,* London, The Law Society (1993) para 16.04.

[41] S.2 (14).CJA 1987.

[42] Under S.2 (2). CJA 1987.

[43] There have been three prosecutions under these provisions. In one the trial judge indicated that he would not consider it appropriate to impose a further sentence on the defendant in respect of the non-compliance of the Section 2 matters in the event of a conviction for the substantive offences. In the second prosecution the defendant was sentenced to 3 months imprisonment consecutive to the matters charged. In a third trial the defendant was sentenced to 9 months imprisonment, suspended for 2 years and fined £30,000. See *Wright and Raisey* (Unreported 29/09/92), *Townsend* (Unreported 07/11/91) and *Quested* (Unreported 24/10/94) Source. 'Serious Fraud Office Case History' *The Serious Fraud Office* (1997)

[44] All references to the Director apply to her delegate also.

[45] s. 2 (18).CJA 1987.

[46] ss. 2(2) (3) (4). CJA 1987.

[47] *Saunders v United Kingdom*. ECHR. No 19187/91

[48] There were 420 S.2(2), 500 S.2.(3) and 1,477 combined S.2.(2) (3) notices served between 1991-1994. In the following year a total of 547 S.2 notices were served.
[49] e.g. *R v Seelig* [1991] 4 ALL ER 429, [1991] BCLC 869, [1991] BCC 569, *sub nomine R v Seelig, R v Spens* [1992] 1 WLR 148, 94 Cr. App. Rep. 17, [1991] NLJR 638, CA. *Re Bishopsgate Investment Ltd.* [1992] 2 All ER 856. *Re Headington Investments Ltd.* [1993] 2 All ER 801. This range of cases which span the issue of the SFO's right to access to civil disclosures which are subsequently used in criminal proceedings has consistently re-enforced the position of the S.2 powers and endorsed the Director's powers.
[50] *SFO v Smith* [1993] AC 1.
[51] *Re Arrows Ltd. (No 4)* The Times 26 July 1994. HL.
[52] *supra*. See also. 'Right of SFO to Use Liquidator's Transcripts in Criminal Proceedings', *Business Law Review* (November 1994), p.319.
[53] *Op.cit.* note 51
[54] [1993] Ch 1.
[55] This in itself confirmed the position already decided in *R v Director of the Serious Fraud Office ex parte Smith* [1993] AC 1.
[56] See Lyons, J. 'Draconian Powers?' *Solicitors Journal*. 14th May 1993. p. 446.
[57] Levi, M. The Royal Commission On Criminal Justice. *The Investigation, Prosecution, and Trial of Serious Fraud* , London, HMSO (1993)
[58] *ibid*. Levi. pp.162-163.
[59] Serious Fraud Office. Elm House, 10-16 Elm Street. London. WC1X OBJ.
[60] Which accompany the Police & Criminal Evidence Act 1984.
[61] *R v Director of the Serious Fraud Office ex parte Smith* [1993] AC 1
[62] Codes of Practice. Code C. PACE 1984.
[63] The reference here by Lord Mustill to police officer should perhaps more correctly have referred to the investigating officer.
[64] *Supra* R v Director of SFO. note 61. Lord Mustill at 39-40. [1993] AC. 1. It is of note also, that whilst the SFO are not permitted to disclose information they obtain to third parties, *per se*, there are certain categories under S.3 CJA who are permitted access and outside of this, as in the instance of *Morris and others v Director of Serious Fraud Office and others*. [1993] Ch 372, [1993] All ER 788, [1993] 3 WLR 1, [1993] BCLC 580. Liquidators may apply for access to such information and the court will '...weigh the advantages and disadvantages of making the order (for disclosure) sought...'.
[65] In *R v Director of the SFO ex parte Saunders* [1988] Crim L.R. 837, [1988] NLJR 243. The Director had served S.2 (3) notices on Guinness plc and Saunders sought an injunction to restrain the Director of the SFO from taking steps to enforce the production requirement. The court held that the charging of a suspect did not bring to an end the power of the SFO to conduct an investigation.
[66] S.2 (13) CJA 1987.
[67] Section 436 Companies Act 1985 and S. 178 Financial Services Act 1986 create offences of failing to comply with an Inspector. The Companies Court if having found such a contravention will then give the recipient of the request time to comply and if they then fail to do so that party will be liable to sanctions.
[68] *Saunders v United Kingdom*. ECHR Judgment of 17/12/96. Case 43/1994/490/572.
[69] The European Court of Human Rights.
[70] *Funke v France*. (1993) ECHR. Judgment of 25/02/93. Case 82/1991. 334/407 Series A Vol. 256-A (1993) 16 EHRR 297. For comment see Liberty Seminar.15th June 1995. Westminster. 'Compulsory Powers of Investigation and the ECHR' Peter Duffy, who cited *Funke v France* paras 53-59.
[71] French Customs Code: Article 65. the imposition of fines is dealt with under (Art 413 (1). He and after his death, his wife, appealed to the ECHR as he alleged that his criminal conviction, for refusing to produce documents, had breached Article 6 (1) and 6 (2) of the European Convention on Human Rights.
(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
Funke further alleged that a search of his house by customs officers had breached Article 8 (1) 'Everyone has the right to respect for his private and family life, his home and his correspondence...'
[72] *Cremieux v France*. (1993) ECHR. Judgment of 25/02/93. Series A. Vol. 256-B, (1993) 16 EHRR 357.

[73] *Miailhe v France.* (1993) ECHR. Judgment of 25/02/93. Series A. Vol. 256-C, (1993) 16 EHRR 322.
[74] *supra.* Saunders. note. 68. In deference to the decision of the ECHR, in February 1997 HM Government announced its refusal to refer the Saunders case back to the Court of Appeal. Baroness Blatch, the Home Office Minister (at the time) made a statement to parliament saying that ministers had decided the ruling did not 'constitute grounds for a referral'. The SFO have announced that they will resist any attempts by Saunders to quash his conviction or award him compensation. See further. 'Saunders compensation claim to be resisted', *The FT Fraud Report* (February 1997) p.2.
[75] *Op.cit.* Saunders. note 68. p.20. para. 68.
[76] *ibid.* p.21. para. 72.
[77] Paragraph 67 of the Saunders judgment, *supra.*
[78] *ibid.* p.31.
[79] S. 9 (5) (I). CJA 1987.
[80] Cited in the introduction to this thesis. Note 2. Mawby, R.I. *Comparative Policing Issues: The British and American Experience in International Perspective.* The reference was to comparative law studies and paraphrased the analogy introducing a blind person to an elephant where one touch is misleading....
[81] Sched 3. S. 72. CPIA 1996.
[82] A voluntary bill of indictment is where a consent to prefer a bill of indictment is made to a judge of the High Court. every application must be in writing and include a supporting affidavit confirming the truthfulness of the statements made which are to be tended in evidence. This method may be used where there has been a committal proceeding before the Magistrates Court or where not. In respect of the latter the application must state why the prosecution seek such a bill without committal. The application is *ex parte*, the defendant has no right to attend or be heard. See further Practice Note (Voluntary Bills) 11 December 1990. [1991] 1 All ER 288, [1990] 1 WLR 1633. Lord Lane CJ. 'A voluntary bill should only be granted where good reason to depart from the normal procedure is clearly shown and only where the interests of justice, rather than considerations of administrative convenience, require it...' Effective from 1 Jan 1991.
[83] Part V. CPIA 1996.
[84] Comments made by Director at Selwyn College, Cambridge. May 1998.
[85] Attorney-General at that time.
[86] The Graham Report, published in 1994 considered the merging of the Central Casework Division of CPS with the SFO.
[87] Chaired by Sir Rex Davie, this report considered further the proposed merger of CPS Central casework and the SFO. Davie, reporting in July 1994, concluded that a merger was not necessary. All his recommendations were implemented and particularly he focused on the need to restructure the role performed by the police for the SFO.
[88] Source: Davie. *ibid.* p.1.
[89] 'Breaking the Mould', Editorial comment. Rowan Bosworth-Davies. *The FT Fraud Report* (February 1997)
[90] See comments by David Sherwin from Ernst and Young. cited by Bosworth-Davies, *supra.*
[91] Ernest Saunders, Anthony Parnes, Gerald Ronson and (then Sir) Jack Lyons. *R v Saunders, Parnes, Ronson and Lyons* [1996] 1 Cr. App. Rep. 463, [1996] Crim. LR 420, [1995] 45 LS Gaz R 31, (1996) 140 SJLB 22, CA. Referred to as Guinness 1. Guinness II was the case against Seelig and Spens, *R v Seelig , R v Spens* [1992] 1 WLR 148, 94 Cr. App. Rep. 17, [1991] NLJR 638, CA. Guinness III was Seelig and David Mayhew, *nolle prosequi* entered in this case by the Attorney General and Guinness IV was the case against Stephen Ward, *R v Ward* [1993] 2 All ER 577, [1993] 1 WLR 619, 96 Cr. App. Rep. 1, [1993] Crim. LR. 312, [1992] 27 LS Gaz R 34, [1992] NLJR 859, 136 SJLB 191.
[92] *R v Seelig* [1991] 4 All ER. 76.
[93] 'Cowboy Advisors Escape the Net' *The Sunday Times.* 2 March 1997. Money Section. p.7.
[94] Legrand, P. *Op. cit.* note 1. at p. 240
[95] For a discussion on the fiasco see: Levi, M. Research Study No 14. The Royal Commission on Criminal Justice. *The Investigation, Prosecution and Trial of Serious Fraud,* London, HMSO (1993). pp.217-219.
[96] cited by Kirk, D. & Woodcock A. *Serious Fraud: Investigation and Trial* London, Butterworths (1992) at p.8. note.7.
[97] *R v Barlow Clowes Investment Ltd.* [1992] 3 All ER 440, [1992] BCLC 1158, 95 Cr. App. Rep. 440.
[98] S.2. Criminal Justice Act 1987.
[99] As referred to by Henry. J in *R v Seelig* [1991] 4 ALL ER 429. at 441-442. para f-h.

[100] Stallworthy, M. 'Company Investigations and the Prosecution of Fraud in the United Kingdom: Conflicting Interests', *International Company Law And Commercial Law Review* (April 1997) Vol. 4. p.118.
[101] Lawson, F.H. *The Comparison: Selected Essays*, Amsterdam, North-Holland (1977) p. 283
[102] Until 17th July 1856 the investigating judge was a police officer. They are now a court in their own right from which decisions can be appealed against before the *Chambre d'Accusation* , a division of the *Cour d'Appel.*
[103] Art 49 (1) (2) CPP.
[104] When sitting as a court this has a bench of three. In the larger cities the court may comprise of 5 judges or more and the court will then be divided into chambers. e.g. Paris 165, Marseilles 28.
[105] Art 50 (1) CPP. Also contained within this article are provisions for temporary appointments and replacements if the appointed J.I. is unable to continue in post. Initial appointment is as an *Auditeur de Justice*. This period is followed by 12 months of practical experience, upon completion the judge is appointed to an ordinary court of the *Première Groupe, Second Grade*.
[106] The examining magistrate may investigate only after having received the case, under the conditions provided in Art. 80 & 86, by an application of the state prosecutor or by a complaint contained within a civil claim. Art 51. CPP.
[107] *Mise en état*. Preparing the case in a suitable state for trial.
[108] Art. 52. CPP.
[109] Art. 72. CPP.
[110] In 1985 there were 550 examining magistrates, this amounted to approximately 10% of the private and criminal law judges. In real terms this meant 79 J.I.'s in Paris, 16 in Marseilles and an average of 100 cases *per annum per* judge. There are currently a total of 4, 463 judges attached to the *Tribunaux de Grande Instance*, of which less than 25% will at any one time, be appointed investigating magistrates. Source: *Annuaire Statistique de la Justice, Paris, La Documentation Française* (1992) p. 49.
[111] *'Justice Pénale et Droit de l'Homme'* which is summarised in the article by Trouille, H. 'A Look at the French Criminal Procedure' *Criminal Law Review* (October 1994) p.735-744
[112] *ibid*. Trouille. p. 738.
[113] *ibid.* Trouille.
[114] *'La Révolte des Juges d'Instruction' Le Figaro Samedi 12. 1996.* p.7. and *'La Fronde des Juges d'Instruction' Le Figaro Magazine. Samedi 12 - Dimanche 13. Octobre 1996.*and see *Le Monde* 9th *Janvier*, 13th and 26th *Janvier* 1993.
[115] The most recently reported decision on this contentious area of law stated that, 'In accordance with s.100 of the Code of Criminal Procedure, only the investigating magistrate is entitled to order, where the inquiry demands it, the tapping, recording and transcribing of communications made by telephone and any such operation must be carried out under his [her]control. The tapping and recording of telephone conversations carried out by the police in the course of preliminary investigations even with the consent of one of the parties to the conversations are unlawful and any resulting proceedings will be null and void'. *C.A. 3e Ch. Acc. 8 February. 1995. [1995] Dalloz. Jur. 221.*
[116] The J.I. is obliged to return statistics, *états trimestriels*, and an overview of all the current cases they are investigating to the *Chambre d'Accusation*.
[117] Arts. 156-167. CPP.
[118] Arts. 80-2. CPP.
[119] Arts. 106,107 and 121. CPP.
[120] This is the first time that the suspect will be required to attend the offices of the J.I. This meeting is little more than a formality to establish identity and the likely points to be discussed at a future interrogation.
[121] Art. 114. CPP.
[122] Art. 428. CPP.
[123] *Cour de Cassation . Chambre Criminelle. 15 June 1993. [1994] Dalloz Jur. 613.*
[124] Eva Joly is perhaps the most famous J.I. She conducted the investigation into the affairs of Bernard Tapie. Judge Joly is particularly well placed to investigate serious white collar offences as she started her career in France as a *parquet* prosecuting a number of high profile white collar offenders, before moving into the role of judicial investigator.
[125] Art. 704. CPP.
[126] Art. 705. CPP.
[127] Art. 706. CPP.
[128] Art. 122 (4). CPP.

[129] Art. 57 CPP of January 1993.
[130] Commented on *ante*.
[131] The civil party who is a victim also has the right to question the file contents compiled by the J.I. In most serious criminal cases the prosecution will be continued by the state albeit there is the right to demand an investigation. An appeal against the decision not to investigate lies to the Indictment Division. Art. 186. CPP..
[132] Art. 206. CPP.
[133] This provision is void if the acts referred to are that there was a breach of the defendants rights during the period of interrogation.
[134] Art. 201(2). CPP.
[135] Art. 202. CPP.
[136] Art. 207 CPP stipulates that the *Chambre d'Accusation* may remit the case back to the original J.I. for further investigation or keep the file for further investigation or place the file with another J.I.
[137] *The Royal Commission on Criminal Justice 1993. Cmnd 2263*, London, HMSO (1993) p.5
[138] Also referred to as *De Clôture.*
[139] For a particularly disturbing account of this see: The Affaire Gregory. 'Injustice most Foul' Alex Duval-Smith. *The Guardian*. Tuesday March 21st. 1995. Law Section. p.15.
[140] After all the J.I. is a professional judge of the *Tribunal de Grande Instance*, on secondment as a J.I. This colleague may return in the near future to sit again as a trial judge. It would be extraordinary if the judges who determine the quality and probative value of the *dossier* were not swayed towards believing the contents to be, *ipso facto*, a true and accurate record.
[141] The ease with which the OPJ may secure a further period of detention or remand in custody is commented upon in Chap. 2 at note. 221.
[142] For a comment on this see: Bell, J. (1993) 'The French Pre-Trial System' in Walker, C. & Starmer, K. (eds) *Justice in Error,* London, Blackstone (1993) p.233.
[143] Title V of the Law of 4th January 1993 allows the J.I. to publish a correction to any adverse or incorrect information supplied to the press by any parties to the case.
[144] Van Den Wyngaert, C. *Criminal Procedure Systems In The European Community*, London Butterworths (1993) p.110.
[145] Pradel, J. *'La mise en état des affaires pénales. Propos sceptiques sur le rapport de la Commission Justice pénale et droits de l'homme'*, Paris, Dalloz. Chroniques, Sirey (Juin 1990).
[146] *ibid*. Pradel. p.301.
[147] Pradel, J. *De la réforme de l'instruction préparatoire,* Paris, Dalloz. Chroniques Sirey (1989) p.1.
[148] See further: *The Economist*. Vol 340. Issue 7974. 13 July 1996. 'Who's Next? France's Corruption Plague' p.40
[149] For further comments on the attitudes of the police towards the J.I. see: Levy, R. 'Police and the Judiciary in France since the Nineteenth Century: The Decline of the Examining Magistrate,' *British Journal of Criminology*. (Spring 1993). Vol. 33. No.2. p.177.
[150] Chartier, J. *'Discours de rentrée solennelle prononcé le 3 janv. 1979 devant la cour d'appel de Versailles'*, *'Comme on l'a dit, en quarante-huit heures, pour des affaires graves et complexes, la police judiciaire établit les faits à 90 pour 100. Le juge d'instruction, déborde, écrase par le formalisme, va mettre plusieurs mois, parfois bien d'avantage, à établir les 10 pour 100 qui restent pour que la procédure soit complète'* cited in Pradel, J. *De la réforme de l'instruction préparatoire*, Paris, Dalloz Chroniques Sirey (1989) p. 4
[151] See: 'French Farce' The Sunday Times. 8th June 1997. p.53. Where the OPJ of the *Gendarmerie* forced a confession from the alcoholic vagrant, Patrice Padé. He later reported, once it was established that he could not have committed the offence, that the investigating police officers had physically and verbally abused him during his 48 hours detention. Recently the account of malpractice by the police in Lyon has resulted in the 3 deaths, a Commissaire committing suicide and 5 police officers being tried for committing armed robbery. *Le Nouvel Observateur. 10 Janvier 1996. No.1626. pp48-49.*
[152] Leigh, L. & Zedner, D. *The Royal Commission on Criminal Justice. A Report on the Administration of Justice in the Pre-Trial phase in France and Germany,* London, HMSO (1992)
[153] *Op.cit.* Note. 139. Alex Duval-Smith. p.15.
[154] *ibid.*
[155] In the sense of the *parquet* performing a role which resembles the District Attorney in the USA who takes an active role in the investigation, interviewing, charging and prosecution of suspects.
[156] *Op.cit.* Note. 111. Trouille, H. 'A Look at French Criminal Procedure', *Criminal Law Review* (1994)

[157] Leigh, L. & Zedner, D. *The Royal Commission on Criminal Justice: A Report on the Administration of Justice in the Pre-Trial phase in France and Germany*, London, HMSO (1992) p.22.
[158] *Tomasi v France*. App. No. 12850/87. series A No. 241-1A. (1993) 15 EHRR.1. who spent 5 years 7 months in custody pending trial.
[159] Abraham, H. The Judicial Process. 6th Edition, Oxford, Oxford University Press(1993)
[160] *ibid*. Abraham. p.99.
[161] See further: Buchan, D. & Jack, A. 'Business Crime Buster Defends Her Patch' *The Financial Times*. 17/01/97. International Edition. 1. p.3
[162] Buchan, D. *The Financial Times*. 18/12.96. p.3.
[163] Pasqua was responsible for the expulsion of 20 Algerian fundamentalists and in December 1994 the storming of a hijacked Airbus in Algiers. Both actions being contrary to the established immigration procedures in France and International Law in respect of the actions on foreign soil.
[164] 'Under-the-table payments' or 'backhanders'
[165] Sage, A. 'Sang-Froid Flows from France's Wounded PM', *The Observer*. 24 /09/95. p.20.
[166] Nundy, J. 'Paris Mayor Faces Charges', *The Financial Times*. 19/06/96. p. 2.
[167] She was allegedly paid 200,000 Fr francs for a misspelled and plagiarised 36 page report. Macintyre, B. 'Minister Tried to Block Paris Sleaze Inquiry', *The Times*. 14/11/96. Overseas Section. p.17.
[168] *ibid*. The Times.
[169] *Op.cit.* Note. 161. Buchan, D. & Jack, A.
[170] For the period 1996/97. 58,000 persons were held in French prisons of which 22,040 are on remand awaiting trial. This contrasts with UK total prison population of 62,000 inmates. Which is 6,000 over maximum, of which 15,000 are on remand. Source: HM Inspector of Prisons John Tilt. 27/08/97.
[171] *Op.cit* Note. 161. Buchan, D. & Jack, A.
[172] *Op.cit*. Abraham, H. note. 159. and see Cooper, J. 'Criminal Investigations in France', *New Law Journal*. March 22, 1991. pp. 381-382 and Platto, C. (ed) *Pre-Trial and Pre-Hearing Procedures Worldwide*, London, Graham & Trolman and The International Bar Association (1990).
[173] Monahan, J. 'Sanctioning Injustice', *New Law Journal,* May 17, 1991. pp. 679-680. Vogler, R. *CPS Journal,* September 1992. p.11. and Bell, J. (1993) 'The French Pre-Trial System, in Walker, C. & Starmer, K. (eds) *Justice in Error,* London, Blackstone (1993) p.244
[174] *Op.cit.* Pradel, J. note 147. *De la réforme de l'instruction préparatoire*, Paris, Dalloz. Chroniques Sirey (1989).
[175] *Op. cit*. Monahan, J. note. 173. p.679 quotes half the number of 30 years ago and Bell, J. p.244 *Op. cit*. note. 142. cites 8% of total of all cases in 1990 were investigated by J.I. e.g. 53,652 out of 703,831 reported.
[176] Commenting on the perceived quality of the system in England, Renaud Van Ruymbeke, *conseiller à la Cour d'Appel de Rennes*, states, '*On mystifie beaucoup l'Angleterre. La justice anglaise a une forte tradition respectabilité que n'a pas la justice française. Cela dit, dans le fonctionnement judiciaire anglais, il ya a des carences très importantes. La police a les mains très libres. le procès Maxwell a coûte une fortune et s'est dèroulé devant des jurés qui n'etaient peut-être pas tout à fait compétents pour apprécier les subtilités d'une affaire financière complexe. En matière d'affaires financières, le système anglais apparaît tout à fait inadapté. D'aaleurs, les Anglais envisagent d'adopter un système comprenant un juge d'instruction et un parquet*. Robert, D *(ed). La Justice ou Le Chaos,* Paris, Stock (1996) pp.64-65.
[177] *ibid* .
[178] Abraham, H. *The Judicial Process*. 6th Edition, Oxford, Oxford University Press (1993). p.99.
[179] Antoine Garapon. in 'Morals and Morality.' Sage, A. *The Times,* 18/04/95. p.33.

# Chapter 4

# Enforcement in Practice

## 4.1 Introduction

'Comparative law is, I believe still searching for an audience...I think a major reason for the blame lies on those who profess a primary interest in the subject. For in their endeavours to promote interest in foreign laws and the comparative method they have (a) undervalued and understressed the importance of case law and (b) ignored the practice of the courts in every day cases which do not make the Law Reports...'[1]

In this chapter a number of decided cases and investigations that are pending trial, France and England, are analysed. Not all the cases have been appealed, and the convictions that stand represent what the SFO regards as successful prosecutions. There are very few appeals in France, which is a reflection on the inquisitorial process, and consequently the comparisons that are made relate to cases dealt with in the lower courts.

## 4.2 The SFO - successes or an abrogation of suspect's rights?

Police fraud squads in England have generally avoided public condemnation, largely due to the division between investigation and prosecution. The cases that have attracted criticism are the high profile matters that have been handled by the Serious Fraud Office. This agency has, throughout its brief history, maintained a conviction rate higher than the Crown Prosecution Service and yet spiraling court costs, acquittals and lenient sentences have all been blamed on the SFO. Much of this opprobrium is misplaced and is frequently a comment about the entire criminal justice system. On the other hand there are some criticisms which can be made of the SFO specifically.

The principal aim of the SFO is to, 'Deter fraud and maintain confidence in the UK's financial systems by the appropriate and effective prosecution of serious and complex fraud in England, Wales and Northern Ireland'.[2] To support this assertion the former Director, George Staple, cites 215 convictions in 151 trials involving 343 defendants during the eight years since the inception of the SFO.[3] 'If I have a regret about my time here, it is that our respectable record of hard work and dedication has not been more widely recognised'.[4]

The list of successful prosecutions, that have required extensive investigations, invariably of a multi-jurisdictional nature, includes those matters in which the Court of Appeal have either quashed or subsequently reduced the sentences.[5] This is wholly appropriate as the success of an investigation is governed by two ingredients; firstly establishing whether a criminal offence has been committed and secondly identifying the culprit and presenting the evidence before a court. At that point the investigators in England, play no further part in the criminal procedure.

The successful prosecution of Wallace Duncan Smith, for fraudulent trading resulting in him being sentenced to 6 years imprisonment [6]. Muhammed Naviede, the main financier in Arrows plc was sentenced to 9 years imprisonment.[7] In this matter the House of Lords firmly endorsed the method of evidence gathering employed by the investigators.[8] In the European Leisure case against Michael Ward and Jeffrey Howarth[9] their sentences were increased from Community Service Orders to 20 months and 2 years imprisonment respectively. Ward was also convicted for giving false information under Section 2(2) of the Criminal justice Act 1987 and for causing a document to be falsified, an offence contrary to Section 2 (16) of the same Act.

The recent prosecution of Abbas Gokal and Abdul Chiragh, both former employees of the collapsed Bank of Credit and Commerce International, BCCI, resulted in

convictions[10] and adds to the already successful prosecution of Syed Ziauddin Ali Akbar, the former Treasurer of BCCI, who recently completed 3 years of the 6 year sentence he received for false accounting.[11] The prosecution of a former manager of a branch of Barclays Bank plc, for advanced fee fraud, resulted in Victor Boulter receiving a 5 year sentence of imprisonment and his accomplices; Oke, Oluyitan and Khaliq were sentenced to a total of 15 years imprisonment and were recommended for deportation back to Nigeria on completion of their sentences.[12]

In 1995 the SFO successfully prosecuted four solicitors for advanced fee fraud and manipulation of client accounts. In the case against Charles Deacon and James Fuller,[13] the solicitors obtained £12 m for promised loans against non-existent funds. The solicitors then raided their clients' accounts to part pay victims who demanded payment. To add credibility to the scheme the solicitors fabricated letters of authenticity and academic qualifications. Both were sentenced to 10 years imprisonment. The case against Ford and Brew,[14] who had replaced 'missing' funds by taking money from client accounts, resulted in the solicitors pleading guilty to 5 counts each and again receiving sentences of 10 years imprisonment.

Perhaps one of the most celebrated prosecutions of a white collar defendant was the case against Peter Clowes. Clowes induced victims to invest money in British Government securities or gilts. Clowes was originally investigated by the DTI in 1987, which of course was prior to the setting up of the SFO. The irregularities uncovered resulted in Barlow Clowes Gilt Managers Ltd., being wound up. This action caused investors in the sister company, Barlow Clowes International to seek early recovery of their investments. BCI was unable to meet these requests and the company was placed into compulsory liquidation. The liability to investors stood at a total of £138 million. Less than £2 million was found to have been invested in gilt's. The remainder had been stolen by Clowes to sustain his lavish lifestyle.[15]

The SFO took over the investigation into the affairs of Peter Clowes during 1988. The matter was brought to trial in 1990. The trial itself lasted 122 days, there were 7,000 witness statements and 68,00 pages of documentary evidence. Clowes was charged with 20 offences, 11 of which were theft. The co-defendants who eventually appeared with Clowes were, Peter Naylor, Guy von Cramer and Christopher Newman,[16] all business associates. Peter Clowes was sentenced to 10 years imprisonment.[17]

### 4.3 Misplaced criticism

The condemnation of the SFO in failing to secure convictions against white collar criminals is largely misplaced. The press seek sensationalism, and massive failures by quasi-governmental bodies is far more entertaining than reporting on another conviction. There are, after all, thousands of convictions in the courts every day. White collar crime will only reach the headlines when the issue is exceptional. The SFO and the police deal with exceptional amounts of financial loss every day. In order for the matter to attract media coverage the facts must be truly outstanding. Consequently, once a case has attracted attention then a 'result' such as the conviction of the defendant is required. The imprisonment of a fraudster is frequently heralded in the press by stories of an extravagant lifestyle maintained at the expense of investors.[18] If a Community Service Order is imposed,[19] or if the trial collapses for any range of reasons, the interpretation put on the justice system is that, prosecutors and investigators have failed to do their job.[20]

The perceived failures have at times been successfully prosecuted and then overturned on appeal, not because of the handling of the investigation or the presentation of the facts at trial, but due to the directions given by the trial judge to the jury. This cannot be appropriately termed a failure on behalf of the prosecution.[21] After the acquittal of both the Maxwell brothers for their alleged involvement in the

appropriation of pension funds by their father Robert Maxwell resulting in loses amounting to £2.5 billion, the trial judge, Mr.Justice Buckley, refused to allow Kevin Maxwell to stand trial to answer further fraud allegations as this would be 'unfair' and 'oppressive'.[22] George Staple was clearly disappointed by this decision as it was contrary to the direction given in the Blue Arrow trial where the SFO had been criticised for overloading the indictment. To circumvent this, the matters against Kevin Maxwell were severed. If this course of action leads to 'oppressive' treatment of defendants then how is the SFO to prosecute? The clear contradiction caused Staple to claim, just prior to his departure from the SFO, that the system was 'emasculated'.[23] Frank Field, MP, chair of the Commons Social Security Select Committee commented, '£400 million is stolen from a pension fund and no one is punished. Either we have a miracle on ours hands or we urgently need to review the judicial process for trying serious criminal fraud'.[24] The trial judge listened to Pandora Maxwell giving evidence of how distraught the family now were and that the children of Kevin Maxwell were taunted about their father at school. Mr. Justice Buckley commented, 'Her obvious distress was, I am convinced, entirely genuine. I cannot be over-influenced by such matters, but no one could have been entirely unmoved by her evidence'.[25] These admirable comments by a socially aware member of the judiciary have absolutely no relevance as to finding of guilt. To criticise the investigators, in the light of these highly emotive observations, which have no evidential value whatsoever, is entirely misplaced.

A current and unique criticism of the SFO exists in the case of Asil Nadir, who as the former chief executive of Polly Peck International, is currently wanted on warrant to appear in England to answer charges of theft and false accounting. The investigation by the SFO has been heralded a success by some, as the inquiry is complete and awaits trial. Effectively the involvement of the investigation agencies is now complete. The Nadir case has also be referred to as a failure by the authorities due to the fact

that Nadir is outside of this jurisdiction and is able to conduct a campaign against the SFO from his own country, the Turkish Republic of Northern Cyprus, TRNC, which is seriously damaging to the credibility of the investigators.[26]

### 4.4 Blue Arrow

'Apart from the Nadir case, the worst failure by the SFO was the investigation and prosecution of County NatWest Bank for its role in the takeover of a company called Manpower by a much smaller British business, Blue Arrow'.[27] The prosecution case was based on an alleged conspiracy between four defendants, Brimelow, Brown, Smallwood and Villiers[28] to rig the market. This situation arose as the take up of shares for Manpower were substantially less than anticipated .To offset this it was agreed that the outstanding shares would be purchased by the defendants to show confidence in the business. By doing so the defendants had failed to disclose the true 'take-up', which was 38.04%, and had accordingly misled investors about the true shares potential.

All four were charged with conspiring to '...fraudulently induce persons to enter into agreements for acquiring or subscribing for securities, namely shares in Blue Arrow plc' and secondly for, 'Conspiring together and with other persons to defraud such persons who had or might have had an interest in dealing in shares in Blue Arrow plc, or National Westminster Bank plc, or in dealing on the Financial Times Stock Exchange 100 Share Index'. There was no stealing involved and the offences proved, as suspected, hard to establish for the jury.

The trial judge, Mr. Justice Stuart McKinnon, had little experience of criminal matters himself[29] and was relatively new to the bench[30]. Attempts by the judge to persuade the prosecution to reduce the number of charges were rejected. He commented, '...It is true that the Prosecution has been most reluctant to cut down the case because it

has seen, and still sees, its case as an indivisible unity which cannot be chalked up or cut down...The Court has had to play the role of dentist, extracting teeth...'.[31] The case against the corporate defendants, 'As it was, it went the distance. Forty million pounds' worth of distance...double the cost of the Guinness trials. And everyone got off. From arrests to acquittals, the wretched affair took nearly three years, and from the share issue, five'.[32]

Complex frauds do take a considerable amount of time to investigate. There is frequently considerable press and public interest, the amount of loss involved can be hundreds of millions, the nature of the offences means that there are often international inquiries to be conducted, complicated financial trading systems may have to demonstrated to a jury who have no previous knowledge of financial markets and audit trials will be long and well hidden. In England it often appears that the trial is inefficient compared with France, this is not a true comparison. In France the delay is pre-trial where, as was seen in the previous chapter a defendant can wait years, often in custody, for a trial to commence. In England the matters must be brought to trial within a fixed time limit and before a jury. These two issues combined mean that the trial itself will be substantially lengthier than in France and when you combine this with the methods used in trials under the accusatorial system it is far easier to see why it is that the result of trials against white collar offenders is so different in France and England.

The provisions of the CJPOA, which have been introduced to encourage dialogue between the prosecution and defence pre-trial, should prevent some of the problems that occurred in Blue Arrow, but the thrust of the CJPOA is applicable to mainstream complex criminal cases. In the case of complex frauds there has always been the facility for the trial judge to order pre-trial directions. In the words of the current Director of the SFO, 'Preparatory hearings, designed to streamline the issues and

reach accord on could be agreed by both sides before trial, are not working as well as they should.[33]

One reason for the failure of the Blue Arrow trial was the number of charges brought by the SFO against each defendant. The issue for the SFO is to find the balance between reducing the charges in order that the trial is manageable and palatable for the jury and yet still retaining a sufficient number of charges to reflect the severity of the allegations. In France trial proceedings are remarkably fast compared with a case of similar complexity tried in England. There are two issues here. The inquisitorial process which as has been shown, is lengthier pre-trial and conversely shorter at trial, but also, the fact that white collar offences are tried before a panel of judges who sit without a jury. All the personnel involved in the trial proceedings, the defendant, the state prosecutor, defence counsel, the bench and counsel representing the victim, are all professionals who specialise in the field of complex white collar offending. There are no lay persons to explain the allegation to.

### 4.5 Ernest Saunders and the Guinness saga

'Ernest Saunder's dealings in the City while in charge of Guinness may have made him a crook in the eyes of the world, but it would be beyond the ability of the most gifted and subtle actor to simulate dementia...'[34] Dr.Stutterford may have convinced the medical community but the legal profession views the conviction of Ernest Saunders entirely differently.

For the SFO this was a successful prosecution and conviction, while for Saunders and his supporters, this was a prosecution that was flawed from the outset and an effrontery to his rights to privacy and a fair trial. Perhaps more than any other investigation into white collar crime in England, this case questioned the role of the

SFO and the potential conflict with the European Convention on Human Rights, rather than the trial procedures. The alleged defeats that have beset the SFO; Brent Walker, Roger Levitt, The Maxwell's[35] are all attributable to the proceedings during the trial, not specifically the investigation. The Saunders case questions the entire investigation procedure.

> 'It could all so easily have unraveled. A successful appeal in the Guinness case, setting aside for the moment minor questions of guilt, justice and fair play, would have been another disaster for big fraud prosecutions, one which the Serious Fraud Office would itself have been unlikely to survive'.[36]

These comments were prompted as a result of the unsuccessful appeal by three of the four convicted defendants in the Guinness saga. Whether the Guinness trial is a success or failure for the investigation and prosecution of white collar crime remains open to debate.

The case arose out of the takeover battle between Guinness plc and Argyll Group plc, both of whom wanted to take over the Distillers Company plc, both offers included a substantial share exchange element. Accordingly, the value of the shares of Guinness and Argyll, quoted on the stock exchange, was crucial. During the bid the value of Guinness shares rose dramatically and subsequent to the bid fell. This rise in share prices during the bid was achieved through an unlawful share support operation. These inducements contravene the *City Code on Take Overs and Mergers* and breach Section 151 of the Companies Act 1985, as they were paid out of Guinness' own money.[37] The Guinness bid was accepted. The allegations of malpractice resulted in the Secretary of State for Trade and Industry appointing Inspectors.[38] It was established that payments had been made to persons who had encouraged investors and purchasers of Guinness shares. The payment of these

monies was unlawful and in order to conceal this false invoices were fabricated. Payment against these false invoices was approved and authorised by the chief executive, Ernest Saunders.

As a result of the DTI inquiry, the police were requested to investigate by the DPP. John Wood, at this time head of legal services at the CPS, was appointed the first Director of the SFO, and the Guinness affair followed him to Elm Street.[39] Subsequently a number of suspects were charged and the first trial against Saunders, Gerald Ronson, the chief executive of the Heron Group, Sir Jack Lyons, a financier and Anthony Parnes, stockbroker, resulted in all four being convicted.[40] Saunders was sentenced to five years imprisonment.[41] The following trials, Guinness 2, 3 and 4 did not involve the former chief executive of Guinness as it was felt '...that it would be oppressive to prosecute Saunders again'.[42] The ensuing trials were not a success for the SFO. The Attorney General entered a *nolle prosequi*[43] against Roger Seelig,[44] the prosecution offered no evidence against another defendant Lord Spens and the Director of the SFO withdrew the charges against David Mayhew[45] and Roger Seelig, in Guinness 3.[46] The final trial, Guinness 4, involved an American lawyer, Thomas Ward, who was indicted for receiving £5.2 million from Guinness through false invoices. The case rested on proving whether Ward was dishonest for the purposes of the Theft Act 1968. He was acquitted by direction of the trial judge on one count and acquitted by the jury on the second.

Saunders appealed against his conviction, firstly to the Court of Appeal[47] which failed and then to the European Court of Human Rights, ECHR. The co-defendants convicted with Saunders also appealed, all three were also unsuccessful before the Court of Appeal. In delivering their judgment the former Lord Chief Justice[48] with approval of Mr. Justice Potter and Mr. Justice Macpherson stated, 'The jury clearly disbelieved Saunders' evidence that he knew nothing of the indemnities and success

fees. None of the appellants gave evidence. In our view, the jury were well justified in finding them all to have acted dishonestly'[49]. Lord Gosforth said, '...we are satisfied that the procedural irregularity which occurred as a result of non-disclosure in fact occasioned no prejudice to them. The verdicts of the jury would inevitably have been the same...'[50].

So was Guinness a victory for the investigation of a serious white collar offence or not? In the first trial all four accused were convicted. The following trial collapsed due to the health of one defendant and the prosecution offering no evidence against the second defendant. This appears to be attributable to the prosecution. In fact a formal acquittal was refused at this trial and it was the Divisional Court which acquitted Lord Spens. It is also of note that no costs were awarded to Spens. Guinness 3 was unfortunate. The health problems of Seelig were unavoidable and cannot reflect on the investigation or prosecution. The decision by the Director of the SFO to withdraw the matters against Mayhew is a clear reflection on the investigation. The withdrawal of charges at this stage clearly reflects that new evidence may have indicated that a prosecution against Mayhew was illfounded. This does tend to indicate an incomplete investigation. Finally, Thomas Ward was acquitted.

The case before the ECHR was that at his trial statements made by Saunders to the DTI had been used as part of the evidence which formed the basis of the criminal prosecution. This, he alleged, had deprived him of the opportunity of a fair hearing, thereby contravening his rights under Article 6, Section 1 of the Convention.[51] The Commission declared the application admissible on 7th December 1993.[52] In response to this allegation HM government contended that '...the mere fact of compulsion could not and did not render the proceedings unfair. Further, that if it was concluded that any of Mr. Saunders' answers could properly be described as self-incriminating, it would still be necessary to assess whether the extremely limited use

in fact made any of those answers rendered to criminal proceedings unfair. In their submission it did not'.[53] The Court found in Saunders' favour and reiterated the provisional findings of the Commission.

This ruling whilst treated as a victory by Saunders, does not provide the platform for a further appeal against conviction before the courts of England. Saunders' trial was flawed, his human rights were abrogated, but the ECHR did not suggest that the outcome of his trial would have been any different. A further appeal cannot be pursued by means of an 'out of time' plea direct to the Court of Appeal on the basis of the ECHR ruling as this is not new evidence. Saunders may apply to the Criminal Cases Review Board for a further appeal before the Court of Appeal, in view of the comments by the Lord Chief Justice in the previous, second appeal, this is unlikely to succeed either.

It would appear that whilst the procedures adopted for the inclusion of the statements made by Saunders to the DTI may have tarnished the trial, the outcome, may not have been any different, Saunders was found guilty of a criminal offence. On this point the trial court, the Court of appeal and the ECHR are all in agreement. If this follows, then the investigation which proved this was a success for the SFO, not a failure.

**4.6 The decision in Morrisey and Staines**

The Court of Appeal have considered the status of the ECHR since the decision in Saunders[54] in the case of *R v Morrisey* and *R v Staines.*[55] In this case the defendants had been convicted of counseling or procuring another to deal in securities.[56] They appealed against conviction and sought to rely on the decision of the European Court of Human Rights in Saunders[57] as the defendants in this case had been investigated by the DTI and required to produce documents and attend and give all assistance to

the investigators. Under the provisions of Section 177 of the Financial Services Act 1986 '(3)...it shall be the duty of that person to comply with that requirement. (6)...A statement made by a person in compliance with a requirement imposed by virtue of this section may be used in evidence against him'.

Lord Chief Justice Bingham reviewed the facts and the decision in Saunders held that, 'If their Lordships were to exclude the evidence in the present appeals, the court would be obliged to exclude such evidence in all such cases. That would amount to a repeal at least partially of an English statute in deference to a ruling in the European Court of Human Rights which, as a matter of strict law, was irrelevant'.[58] In respect of the provisions of Section 177 of the Financial Services Act 1986 it was held that this Act, '...expressly authorised the use of evidence and that amounted to a statutory presumption that it was to be treated as fair, at any rate in the absence of special features making the admission of the answers unfair'.[59]

There was agreement by their Lordships that the situation was at present unsatisfactory and that the appellants might have grounds for complaining before the European Court at Strasbourg. If this course of action was pursued and then the costs incurred on seeking relief and a claim against the UK government for compensation might well be successful. However, 'The United Kingdom remained subject to the treaty obligations to give effect to the European Convention on Human Rights as interpreted by the Court of Human Rights, which their Lordships' court could not enforce'.[60] There was no choice but to dismiss the appeals.

### 4.7 R v Elizabeth Forsyth[61].

The prosecution and conviction of Elizabeth Forsyth can be viewed as success and also as a failure. Just as with Saunders, Smith, Levitt and others, if the criterion is conviction, then this also ranks as a successful investigation. Forsyth was employed

by Asil Nadir[62] to run South Audley Management, SAM. Nadir had built up a clothing and textiles empire, based in the UK with extensive international links, particularly with his native Turkish Republic of Northern Cyprus, TRNC. As the business prospered he diversified into the fruits industry, and at its zenith the company purchased the entire Del Monte group. Like most entrepreneurs, Nadir had his friends and enemies. Of particular concern to the UK government was the fact that TRNC was not recognised as a legitimate country and the Greek Cypriot Government expressed these concerns to the BBC.[63] 'After the acquisition of Del Monte he [Nadir] could not be stopped. We knew he would get a knighthood through his charitable contributions...We knew he was going to No. 10 Downing Street. He suddenly had enormous political leverage and had started to influence the British Government on its policy towards Cyprus, especially Northern Cyprus- the occupied lands. There was no such Greek Cypriot wielding such influence. This concerned us...'[64]. Forsyth had previously worked for Citibank and was employed to organise the Nadir families finances through SAM.

In July 1989 SAM was notified of an investigation that was being conducted into the company by the Inland Revenue.[65] The allegation was that Asil Nadir had made numerous transfers of funds between various company accounts and that these transactions had never been disclosed. The result being that Nadir had, allegedly, obtained almost £500,000 personally from these transactions and a further £151 million had been transferred to other end users. The Inland Revenue could establish no legitimate reason for these transfers.

On the 19th September 1990 the SFO executed a search warrant at SAM. Forsyth, the chairman, was in Scotland at the time. She was aware, however, that this event was only a culmination of recent inquiries into the entire business empire run by Nadir. It has been Forsyth's contention, both before and post conviction, that the

investigation by the SFO was poorly handled, fundamentally flawed and resulted in the collapse of a FTSE 100 company, Polly Peck International, PPI. She claims that without the intervention of the SFO the Polly Peck empire would still be trading. One effect of an SFO raid is that it may well suggest that speculation about the fortunes of a company are justified. In the case of Polly Peck the share price plummeted. Nadir himself lost £160 million of his own private wealth. In one days trading[66] the price of shares dropped from an opening of 243p to 108p.

The intervention of the SFO had been prompted by the Inland Revenue, Forsyth felt this was unjustified, as ultimately the matters settled with the IR had no bearing on the companies investigated by the SFO. It was, she felt, a 'fishing expedition' by the SFO, when they executed the warrant on SAM. Michael Allcock, when still employed as a tax inspector stated, 'The regulatory bodies had been looking at Polly Peck for years, but could find nothing substantial. But there were lots of rumours about insider trading and share ramping. It was a volatile share, ripe for that sort of thing. Lots of people were skeptical about the profits...'[67] Forsyth says these suspicions were unfounded and that none of the companies under suspicion, which amounted to alleged 'front companies' run from PO Box numbers at Geneva Airport, Switzerland were shown to belong to Asil Nadir. The agreement with the IR to pay a 'modest'[68] £5 million '...undermined the whole justification for the raid on SAM that collapsed Polly Peck.'[69] This version of events was not accepted by the SFO and Forsyth was requested to attend for interview at Elm Street. At the same time the police had arrested Nadir as he returned to the UK on his company jet. Nadir was interviewed by officers from the Metropolitan Police Fraud Squad, the matters discussed were largely similar to those matters he had already discussed with the SFO during a Section 2 interview the day after the initial execution of the warrant at SAM. Nadir was kept in custody overnight at Holborn Police Station and charged with offences of

theft from PPI. He appeared before Bow Street magistrates the following morning and was granted bail in the sum of £3.5 million.

Nadir was charged with a total of 76 theft offences amounting to losses of £130 million. Nadir faced a remand in custody pending trial. Forsyth met the former Lord Willis, who commented at a Friends of Northern Cyprus cross-party parliamentary group, 'The best thing he could do would be to take the next ferry to France...He won't get any justice here'.[70] At transfer stage[71] a number of the charges against Nadir were dropped. 16 remained on the indictment.[72] On the 4th may 1993 Asil Nadir jumped bail and flew to TRNC. He remains there today and a warrant for his arrest is outstanding.

If you believe Forsyth, the matters against Nadir are a fabrication and are untenable. If she is right and the SFO knows this, they are, no doubt, delighted that he remains in Northern Cyprus for should he return and the trial collapse, the media would delight in telling the SFO of its failure. Conversely if the investigation is correct and the charges are sustainable, then should Nadir return to the UK, his successful prosecution would amount to a major victory for the investigation of white collar crime.

The chairman of Nadir's family finance company, Elizabeth Forsyth, returned to the UK in 1994[73], her reasons being that, 'The Serious Fraud Office had raided South Audley Management and brought about the collapse of the company- they had been justifying that error ever since. Unless I went back to England and challenged the authorities, it would all be swept under the carpet'.[74] Forsyth's anticipation of an early arrest upon return, was more astute than her observations about successfully challenging the authorities it transpired. She was arrested and charged with two counts of handling stolen goods.[75]

Forsyth was found guilty and sentenced to five years imprisonment. She appealed. In advance of this appeal she was given bail as Lord Justice Beldam, Mrs. Justice Bracewell and Mr. Justice Mance said that the five year sentence could not stand for it was disproportionate in relation to the offence for which she was convicted. On the 17th March 1997 the Court of Appeal ruled that the conviction be quashed as the trial judge, Mr. Justice Tucker, had misdirected the jury on, '..the crucial issue of whether Miss Forsyth had actually known or actually believed the money she handled was stolen'.[76] Immediately after her successful appeal Forsyth told the press that she was considering applying for compensation for 10 months of wrongful imprisonment brought about by the actions of the SFO.

It is perhaps understandable that in the aftermath of a much publicised case Forsyth would make unsolicited comments. The fact is that the SFO was not responsible for her sentence and the quashing of the conviction related entirely to the directions given by the trial judge, not the evidence introduced by the investigators. This is another example of how the actions of the investigators, whether in England or France are misrepresented by the media.

It is apparent that whilst Forsyth and Nadir seek to blame the SFO they are aware that the reason for the quashing of the conviction is solely due to the trial procedure and not the investigation.[77] To date there is only one party to this inquiry who remains largely unscathed, Asil Nadir. He may have lost part of his vast family fortune, but not enough to prevent him from purchasing two hotels in TRNC. He is now free to mount attacks on the English justice system from the comfort of TRNC. A state that this government does not recognise. His extradition is not even a remote possibility. During the investigation into PPI the former Minister of State, Michael Mates, MP gave Nadir a wristwatch to replace one taken by the liquidators. Mates had the watch inscribed, 'Don't let the buggers get you down.' This ultimately caused Mates much

embarrassment and his resignation. Widlake[78] suggests that Nadir, '...ought to send watches to all the members of the SFO in gratitude'.[79]

The responsibility of the investigators in England and France concludes at the time when the file of evidence is submitted to the prosecuting agency. In England any further inquiries are directed by the CPS in the case of the police, and by the SFO itself in the cases it handles. The difficulty for the SFO is that there is no division between its roles, and whereas for the police, once the investigation is over the CPS take responsibility, for the SFO this is not the case. In this respect the opportunity for criticism of the SFO is greater than it is for the CPS in England or the J.I. in France who have a singular function of investigator or prosecutor.

In this section 13 prosecutions brought by the SFO have been evaluated. 38 defendants stood trial, 22 were convicted and 12 were acquitted, and the SFO discontinued the prosecution against 4. 21 defendants received immediate custodial sentences ranging from 20 months to 10 years. Most offences were charged under the Theft Act 1968; theft, deception, false accounting and handling stolen goods. 4 defendants were charged with advanced fee fraud, 1 with fraudulent trading and 1 with supplying false information to the SFO. There have been 8 appeals, 3 against sentence, and 5 against conviction. All 5 appeals against conviction have called into question the validity of the powers vested in the SFO which permits it to use oral and documentary evidence obtained prior to the SFO investigation. All 5 appeals have failed before the English courts and as a result of the decision by the ECHR in the case of Saunders, none of the other 4 have made applications to have the matter heard in Strasbourg.

Of the 12 acquittals the decision in the Brent Walker case can be considered on its own. The comment by the defendant George Walker, 'Thank God for juries' can be

taken in two ways, does it mean thank god because without a jury I would have been found guilty or does it mean thank god because the jury has seen the true picture from the point of view of a layman and realised that I had no criminal intention? The answer to this will probably never be known. The remaining 11 acquittals all reflect on the SFO. In Blue Arrow the evidence put to the jury was too complex. The same can be said of the Barlow Clowes trial where 5 defendants were acquitted. In the case against Kevin and Robert Maxwell the complexity of the issues combined with the criticism that the pre-trial publicity meant that a fair trial was jeopardised, led the trial judge to direct the jury to acquit.

The cases discussed in this section have identified instances where it is appropriate to criticise the SFO for the way in which it has investigated and prosecuted a number of white collar defendants, particularly when the suspect's human rights have been compromised by the inclusion of evidence at trial which should have been properly excluded if the spirit of the ECHR had been implemented by the trial courts.

The following section deals with a variety of white collar investigations and prosecutions conducted in France, where it will be seen that the abrogation of a suspect's human rights is still no bar to a successful prosecution, only that the criticisms then leveled at the French legal system are directed towards the investigation process alone.

**4.8 Succès et Echecs. White collar crimes investigated and prosecuted in France.**

In France a number of the recent financial scandals that have been investigated and prosecuted have involved white collar offenders who have achieved their criminal objectives with the assistance of politicians. The ability of the J.I. to effectively investigate these cases has been subject to considerable criticism and there have

been renewed calls for reform or abolition of this post. As was shown in the previous chapter, the present government has promised reforms to the criminal justice system. In this section several major white collar crime cases, such as Crédit Lyonnais, Elf-Aquitaine, Groupe Bouygues and Alcatel Alsthom are compared and contrasted with the cases prosecuted in England, that were subject to analysis in the first part of this chapter. It should be noted that in assessing the scale of the problem in France you return to the problem encountered in England, there are few official statistics kept which identify white collar crime prosecutions, in addition, there is no systematic and reliable method of recording those white collar cases which do not proceed to prosecution.[80]

The analysis of the French cases leads to the conclusion that the *juge d'instruction* is a unique figure in legal procedures and the fight against white collar crime and when he is successful in getting a suspect into court, the subsequent trial frequently results in a conviction.

The present government in France is keen to dilute the powers of the J.I. It has been argued that the J.I. has too much control over the contents of a file of evidence and also that the power to remand a suspect into custody should not be taken by the same person who is conducting the investigation. In respect of white collar crimes the reality is that the J.I. still faces enormous barriers to effective investigation. In a recently published book, *Pendant les Affaires, les Affaires Continuent,*[81] the author describes how institutionalised fraud is widespread pointing out that, 'One of my informers told me that 99 per cent of national and local government contracts...depend on commissions or backhanders...Despite Mr. Chirac's campaign promise to ensure an independent judicial system, this is impossible when the public prosecutors act as political commissars'.[82]

The implications of this statement are clear, white collar crime is invariably linked to politicians, and when the prosecution results in a conviction the protection afforded to politicians means that the system appears to protect those who have failed to protect the citizens. Politicians, as has been seen recently in the case of Bernard Tapie, are permitted to remain in office pending an appeal. Tapie, while no longer an MP, is still an MEP. Alain Carignon still represents the Rhône-Alpes region, albeit he is currently in jail awaiting the outcome of his appeal[83] against a sentence imposed for receiving 20 million Fr. francs in exchange for guaranteed public works contracts. Carignon was also minister for communications during the period of this corruption.

In September 1993, seven defendants in the Pecheney-Triangle Affair were convicted for fraudulent share dealing,[84] each defendant received a 2 year suspended prison sentence for, amongst other matters, purchasing shares to fund the French Socialist Party. The J.I, Jean-Pierre Thierry, included the finance minister, Beregovoy, in his list of suspects. During the course of his investigation J.I. Thierry was personally visited by police officers who, '...advised him quietly to drop his inquiry into Socialist Party financing. Later, he received an anonymous threat that, 'A doctored photo of him, in a morally compromising position, might appear in newspapers'[85]. In response to the intimidation, which included the justice minister removing the file from Jean-Pierre's office, the J.I. reported his allegations to the press, in advance of the trial.[86] During the prosecution the state prosecutor referred to the defendants as, 'Members of a sectarian conspiracy'.[87] Commenting on the links between white collar crime and politicians one J.I. said, 'Cities such as Nice, Marseilles, Bordeaux and Cannes are to be regarded as mini-states, where the representatives of the national state are impotent...'[88]

## 4.9 'An organised delinquency which got more arrogant by the day'[89]

The misappropriation of customer funds at Crédit Lyonnais, has been referred to as, '...the financial scandal of the century.'[90] The *Consortium de Realisation*, CDR, which has been established to take control of the selling off, of the debts incurred by the failing bank, estimate that the bank's management have defrauded the bank of 5.5 billion Fr. francs.[91]

In 1988 Jean-Yves Harberer was appointed chairman of Crédit Lyonnais. Over the next 5 years he promoted a series of high risk ventures on behalf of the bank which included the financing of Giancarlo Parretti to take over the film studio Metro-Goldwin Mayer, MGM. Parretti defaulted on these loans leaving the bank with MGM. This transaction, as was the case with all the loss making ventures involving Crédit Lyonnais, was completed through one of the seven subsidiaries of the bank.[92] Bernard Tapie[93] was a former customer of one of these subsidiaries, SDBO, and contributed to the estimated losses of 32 billion Fr. francs. Robert Maxwell and Florio Fiorini[94] both contributed to the portfolio of loans which subsequently were not paid. In order to avoid the massive job losses that closure of Crédit Lyonnais would have required, the government supported the losses with state funds.[95] The first support loan of taxpayer's money was 4.9 billion Fr. francs, in 1994. This was followed by the appointment of the CDR who themselves are now viewed with suspicion. Patrick Devedjian, a member of the parliamentary finance committee has commented, '...everything is to fear. I'm not sure there won't be a CDR scandal after the Crédit Lyonnais scandal'.[96]

In 1997 J.I. Eva Joly was appointed to investigate. Jean-Maxime Leveque, former chairman of International Banque SA, has been detained for questioning and three former IBSA executives have been charged with *abus de biens sociaux*. One of the suspects, Giancarlo Parretti is wanted for questioning in France and has recently

been convicted of forgery in the USA.[97] It is alleged that executives of the subsidiary banks made loans to Parretti, for the purchase of MGM, knowing that he had a previous criminal history. Parretti has now jumped bail in the USA and his pearance in France to answer charges is, at present, unlikely.[98]

In England there is an arrest warrant outstanding for Asil Nadir, he, like Parretti, is unlikely to voluntarily return to answer the allegations made against him. In England the SFO will not comment on the situation as to do so might jeopardise the prospect of a conviction if Nadir ever stands trial. In France, as has been seen in the previous chapter and again in this chapter, the J.I. may comment, before trial, on matters that relate directly to the case. It would appear that these provisions are in conflict with the concept of a defendant being innocent until proven guilty. This is not the case for in France once a person has been charged, the press may disclose that a case has been brought against that person, but it is on the condition that only the current charges are mentioned and no mention may be made of any previous offences. Furthermore, when reporting that charges have been brought, the press must restrict the article contents to factual information. The basis of the law in France is twofold, firstly to preserve the human rights of the defendant under Article 6 of the ECHR and secondly to, '...protect the person facing trial against the journalist's temptation to put pressure on the magistrate after the preliminary investigation has been completed'[99]. The basis of the law in France is that the investigation conducted by the J.I. is secret. This is true. The questioning of the suspect is done in private and the record of the interview that is compiled by the J.I. is his version of the events. The compilation of the dossier of evidence is secret also and its contents are the sole discretion of the J.I. In allowing the press to report on charges and comment on the investigation, the press is acting as a balance for the public to the very confidential nature of the J.I.'s investigation.

### 4.10 Elf-Aquitaine

On 5th July 1996 J.I.'s commenced the inquiry into the former chief executive of Elf Aquitaine, Löik Le Floch-Prigent. The allegations were; false accounting, misuse of corporate assets and breach of trust. It is alleged that whilst at Elf the PDG authorised the transfer of more than 100 million pounds sterling to bolster a friend, Maurice Biddermann's, failing textile firm. Floch-Prigent was placed into custody by investigating judges pending their full investigation. Given the status of these offenders, one can fully appreciate why it is that the examining magistrates of France do not wish to lose the authority to order a remand in custody, as this may be one of the last bastions of real power they possess. To relinquish this authority might genuinely reduce the J.I. to the status of the SFO investigator, that is a lawyer rather than a judge.

The Elf investigation has so far centered around the support that Floch-Prigent gave Biddermann, a 'gift' of 787 million Fr. francs. This was censured by stock market regulators, the *Commission des Operations en Bourse*, COB,[100] as the action was not sanctioned by the shareholders of the publicly listed company. It was the COB which initially reported the matter to the investigating magistrate. Elf-Aquitaine's André Tarello, PDG of a subsidiary in the Gabon, was also indicted as the payments to Biddermann went through Elf Gabon via a Canadian bank.[101] As is usual with complex white collar investigations, loan transactions are rarely straightforward. In this case it is complicated by the fact that some of the loans were arranged through Crédit Lyonnais. The investigation is also questioning why the former wife of Floch-Prigent, Fatima Belaid, received 30,000 Fr. francs per month from Maurice Biddermann. The appointment of 'Rose Floch'[102] was made by personal authority of the President and if he is convicted this may prove to be a major embarrassment to the government and add further weight to the belief that politics and white collar crime are linked in France.

The Elf-Aquitaine case is set to be multi-jurisdictional and far reaching. It is alleged that not only did the chairman authorise the payment of money to support the fashion business of Maurice Biddermann but the company, Elf, also made unlawful payments into the party funds of the Christian Democratic Party, CDU, in exchange for the guaranteed provision of Elf sites in Germany.[103]

Floch-Prigent made a second bail application on 18th July 1996, this was refused. He has now resigned as chief executive of SNCF.[104] The power to detain Floch-Prigent in custody is granted to the J.I. Subsequent bail applications are made before the indictment court. In this case the court supported J.I. Joly's opinion that Floch-Prigent could exert undue influence on witnesses if released.[105] The suspect has been returned to the La Santé prison in Paris where he awaits trial.[106]

J.I. Joly continues the formal process of investigating this matter whilst also working on a number of other high profile and politically sensitive cases. This creates, not only a potential conflict of interests, as so many of these investigations overlap, but also a real and personal danger for a J.I. Although the phenomenon of physical intimidation of the judiciary is regrettably common in Italy, it is a feature of investigative work which was not apparent in France and remains absent in England, particularly within the sphere of white collar crime. J.I. Joly has herself received death threats and has a personal police bodyguard.[107]

**4.11 Links between politicians and white collar criminals**

During the second half of the 1990's investigations into white collar crime have continued to link politicians with respected business executives who have been found guilty of fraud. Maurice Biddermann, head of the Biddermann fashion house has now been imprisoned for false accounting and Jean-Michael Boucheron, a former socialist minister has been sentenced to 4 years imprisonment[108]. Jacques

Crozemarie, head of France's largest cancer research charity, ARC, is currently at La Santé[109] prison and under investigation for forgery. Nicholas Bouygues, chief executive of Groupe Bouygues is being investigated for corruption and misuse of corporate funds. The head of Dassault Aerospace, Serge Dassault is wanted for questioning by the Belgian police for alleged false accounting. Guy Dejouany, previously the chief executive of Compagnie Générale des Eaux is being investigated for corruption. The former leader of the Socialist Party, Henri Emmanuelli, was sentenced to 18 months imprisonment during 1996 and was banned from holding public office. Emmanuelli was convicted of illegal financing of the Party.[110] Michel Gillibert, a former minister for the disabled is being investigated for corruption. Gérard Longuet, former president of the Republican Party, is being investigated for the misuse of corporate funds.[111] The head of the giant Auchan supermarket chain, Gérard Mulliez is under investigation for alleged corruption. Ex-mayor, Michel Noir[112] was sentenced to 18 months imprisonment and has been banned from holding public office for 5 years for illegally receiving corporate funds. Claude Pradille, a former Socialist Senator, is currently serving a 5 year term of imprisonment and has been banned from holding public office for 5 years, for forgery and corruption. Louis Schweitzer, the current head of Renault is under investigation for the unlawful use of telephone-tapping when he was Chief of Staff to former Prime Minister, Laurent Fabius. Marc Vienot, PDG of the third largest bank in France, Société Générale, is under investigation for breach of the rule which bans a company from purchasing its own shares.[113]

The investigation into one member of the Bouygues family has extended and now includes Martin Bouygues, who was arrested on the orders of J.I. Joly[114]. It can be the case in England, as was alleged by Elizabeth Forsyth in the Polly Peck saga, that when it becomes known that the SFO has started an inquiry into a company the trading position of that company can suffer as consumers lose confidence. The same

is true in France when it is known that a J.I. has been appointed. In the case of Groupe Bouygues the chief executive, Nicholas Bouygue, had, prior to the arrest of Martin Bouygue, already severely jeopardised the group's position by transferring stakes good stakes held in reputable and profitable companies to the collapsed bank Crédit Lyonnais. The effect of this move was to undermine the market value of the stable companies. This bad fortune has now been compounded further by the arrest of the head of the television channel, TF1, Patrick Le Lay, who is suspected of *abus de biens sociaux* and is a former director of Groupe Bouygue. Prior the arrest of Le Lay, Patrick Poivre d'Arvor, a presenter for the television channel TF1, was convicted of fraud and receiving bribes, totaling 800,000 Fr. francs. He was given a suspended prison sentence and fined. Poivre d'Avor was never suspended from work and continued to present the news and current affairs programmes throughout the investigation and hearing[115]. This particular result concluded a 2 year investigation during which Le Lay was also questioned by J.I.'s over the suggested bribery of officials to ensure that broadcasting of the national lottery results remained with TF1.

Gérard Colé, former chief of the national lottery and also a former adviser to President Mitterand, lived with his mistress, Dominique Galakoff. When the relationship was terminated by Colé, Galakoff reported to the police that her former lover was in receipt of large sums of cash from the television channel TF1. At his trial Galakoff testified that bundles of cash, amounting to 10 million Fr. francs, were delivered to the couple's apartment for insurance. The 'insurance' being, that the government would not allocate the highly lucrative national lottery broadcast to one of TF1's competitors. Colé, convicted along with Poivre d'Avor, was introduced to Le Lay by the white collar fraudster Bernard Tapie[116].

Jean-Marie Charpier, the J.I. appointed to investigate[117] Patrick Le Lay, has alleged that the suspect made unlawful payments to local authorities to secure public works

contracts,[118] and there is speculation that a fictitious consultancy company, Cerail, donated 5 million Fr. francs to political parties in exchange for favourable treatment. Phillipe Chalendon, Commercial Director of Bouygues Offshore, has also been placed under official investigation. Pierre Richard, Scientifique Director, Eugène Biezanowski Director of Public Works for Paris and Marc Allouch, Director of Developments at Bouygues are also under investigation[119].

### 4.12 A 'proliferating cancer'

Commenting on these examples of white collar crime involving influential businessmen and politicians, Roberts[120] said,

> 'Beyond this weary succession of judicial tales, my country is today quite sick. With the justice system in the hands of its political masters, we have no thermometer to measure the extent of its fever. we can only describe then assess the symptoms. The arrest of Bouygues is the latest sign of a tenacious and proliferating cancer'.[121]

In 1996 a cartoon on the front page of Libération[122] showed Alain Carignon and Bernard Tapie in conversation in prison, 'You're sure we can rebound from this?' asked Tapie, 'No problem, I've got four years to get in training' retorted Carignon. It would seem that loss of status and custodial sentences have little deterrent in France.

In July 1995 André Lévy-Lang, chairman of Compagnie Financière de Paribas, was asked, 'Will you achieve your 15% return on equity before you retire'.[123] He replied, 'I hope so, and I can retire early'.[124] His retirement may be sooner than he anticipated as he has now joined the growing number of heads of industry in France, who are being investigated for alleged fraudulent accounting.[125] Unfortunately for Lèvy-Lang,

the close network of the directorships within French Industry can mean that one investigation will be the catalyst in another. In this case, Serge Tchuruk, sits as a member of the supervisory board for Banque Paribas and is now chairman of the Alcatel Alsthom.[126]

## 4.13 Alcatel Alsthom

In 1994, the chairman of Alcatel Alsthom, Pierre Suard, was arrested in Versailles by the *brigade financière* on the directions of Jean-Marie d'Huy, the appointed J.I. Suard was investigated for abuse of corporate funds and is still under investigation for the alleged overbilling of France Telecom by £70 million. The J.I. imposed an order on Suard banning him from making contact with any company officials whilst his inquiries were in progress. Consequently, it became impossible for Suard to conduct the business affairs of the telecommunications and engineering group and the board members requested his resignation in June 1995.

The Alcatel trial started on 24th March 1997[127] at the *Tribunal Correctionnel*, Evry[128]. The state prosecutor originally sought to prosecute 38 defendants, this was reduced to 4 for this particular hearing[129]; Pierre Suard, Pierre Guichet, PDG of Alcatel-CIT, José Corral, *Directeur Financier d'Alcatel CIT* and Antonio Léal, who was Corral's assistant. Corral and Léal were charged with, *escroquierie* and *abus de biens sociaux* and Suard and Guichet were both charged with *abus de biens sociaux*. The proceedings lasted for 3 weeks from original case outline to conviction.

The *Tribunal Correctionnel* is a three judge court with no jury and the finding of guilt was determined in one hour from when the judges retired to consider verdict. The role of defence counsel is noticeably different from in England as there is no jury to persuade. Defence lawyers gain little from emotive pleadings and the judges, who have seen the *dossier* in its entirety, are invariably more familiar with the case than

the defence[130]. The status of the state prosecutor is clearly defined in the courtroom and he takes a seat on the bench, though not alongside the judges. The *partie civile*[131] is also represented in court and the lawyer will have an allocated position opposite defence counsel. The state prosecutor will sum up the case and then he remains silent whilst the defence presents concluding speeches. The summing up by the defence will include an appraisal of the *dossier* and may include condemnation of the J.I. Defence counsel will point out issues that appear inconsistent or insufficiently proven,[132] and this may include specific comments on the 'excessive verbal force used in questioning'[133].

During the concluding speeches little reference is made to the applicable law and established jurisprudence, however, defence counsel for Suard made numerous references to the quality of the State's case against his client.[134] References throughout to the *juge d'instruction* and the *parquet* are noticeably personal,[135] in a way which would be unacceptable in an English courtroom and at one point, to amplify his point, defence counsel pointed his finger repeatedly at the bench[136].

Defence counsel for Guichet spent one hour explaining why the charges were not made out against his client. 'What is the problem with these accounts, nothing, the problem is with the prosecution case'[137]. 'This is an infraction without abstention. 'No, this is an infraction with abstention'[138]. This was in direct response to the opening of the case where the *procureur* had requested the punishments from the court.[139] It is unusual to the English observer to hear the request for a specific sentence in advance of the conclusion of a case, particularly so in a major fraud trial where the state had asked for relatively brief periods of imprisonment after an investigation that has taken four years to prepare.[140] Final speeches conclude on the 28th March and after one hour of deliberations the bench delivered the verdicts. All four were found guilty.

Sentences were delivered on 6th May 1997. Suard was sentenced to 3 years imprisonment, double what the state prosecutor had requested, he was fined 2 million Fr. francs and ordered to pay 4,908,000 Fr. francs compensation to Alcatel.[141] Guichet was sentenced to prison for 4 to 6 months, suspended, and fined 200,000 Fr. francs. Léal was sentenced to 4 years imprisonment as he was considered the main initiator of the fraud and corruption. Corral had given assistance to the investigation and this was reflected in the sentence of two years imprisonment, one year being suspended. Counsel for Suard, Baloup,[142] likened the outcome to the infamous Dreyfus affair, where Alfred Dreyfus was wrongly accused and convicted of betraying military secrets to the Germans and the authorities were proven to have forged documents to support the prosecution[143].

In the Alcatel case the initial complaint came from a jealous neighbour[144]. Léal, had apparently moved up to a new BMW rather too frequently. An anonymous phone call was made to the tax office and an inquiry commenced. Four years later, four senior company officers were all imprisoned for falsification of accounts and abuse of corporate funds by creating fictitious construction companies to undertake work for Alcatel that was neither needed nor ever completed. The payments were going direct to the defendants. The compensation order against Suard was for the installation, into each of his three homes,[145] of security equipment which he billed to Alcatel. Suard is still under investigation for the overbilling of France Telecom by Alcatel. The *juge d'instruction*, Jean-Marie d'Huy, was unable to put an exact figure on the total amount of works completed for Suard and his estimate of 3 million Fr. francs was eventually increased by the bench to the figure of compensation they awarded.[146]

### 4.14 Limitation of actions

The law in France relating to the offence of *abus de biens sociaux*, stipulates that the offence is justiciable from the date of discovery. Generally, criminal offences in

France are statute barred, prescribed, after 10 years.[147] This means that if a murder is committed and the offender is not prosecuted within 10 years of the commission of the crime, then the state may not proceed against them. There are exceptions to this rule and in the case of *abus de biens sociaux*, an offender may be prosecuted at any time during 3 years from discovery of the offence.[148] Discovery of an offence may be a considerable time after the commission of an offence and this legal anomaly has been the subject of a number of rulings by the *Cour de Cassation.*

In the recent case against Serge Crasnianski,[149] the *Cour de Cassation* confirmed the law in respect of *'prescription'*, the rule relating to whether offences are statute barred. On the 6th February 1997 the Court held in Crasnianski, that for the offence to be complete there must also be a loss suffered.

In the Guinness saga[150] neither the company nor the shareholders had made a loss, in fact, it was ultimately a gain for the company as it improved its trading position as a result of the take over, if a situation similar to this were to occur in France then under the Crasnianski ruling no offence would have been committed. Crasnianski has had the effect of potentially decriminalising some white collar crimes.

The decision by the French Appeal Court (Criminal Division) to confirm the convictions of Michel Noir and Patrick Poivre d'Arvor,[151] was made on 27th January 1997, the issue of 'loss' was not subject to comment at this time. Within two weeks a decision, by the same court, resulted in the acquittal of Crasnianski. It may be that as white collar offences are frequently linked to political scandals in France, the judiciary does not have truly independent status, and its decisions are subject to political influence and the appeal by Noir and Poivre d'Arvor was never likely to succeed[152]. If this is the case then the malaise discussed in the previous chapter has spread from the investigation stage to the courtroom.[153]

## 4.15 Conclusion

To countenance the damage that high profile inquiries can cause, particularly when during the past two years so many have featured politicians, there have been proposals to substantially reduce the publicity released prior to trial.[154]. During the investigation into the alleged misuse of public funds by Jean Tiberi[155] during 1996, the P.N. refused to execute a search warrant at Tiberi's apartment. The case against the mayor was subsequently dropped. An opinion poll in Le Parisien showed that 64% of those asked felt the J.I. was wrong to drop the inquiry.[156] In view of the experiences like these the J.I.'s are likely to strenuously oppose any changes to the existing law.

Eva Joly, in spite of threats to her own safety, continues as the one of the principle white collar crime J.I.'s in France. Her colleagues and the press have given her a notoriety that is uncommon in England amongst investigators. The names of lawyers and accountants employed by the SFO and police officers involved in fraud investigations are largely unknown. It could be said that a J.I. who has a national reputation may well have two advantages over the suspect; the power to remand in custody and the power to 'intimidate' by reputation during the interrogation. Neither of these 'advantages' are available to investigators in England.

In France the volume of investigations into alleged white collar crimes is increasing. The period that prisoners spend on remand awaiting trial remains at an average of eight months and it takes at least two years to conduct a complex white collar inquiry.[157] The decision by the *Cour de Cassation,* in February 1997,[158] has not changed the process of investigation in France and once an inquiry into a white collar offence is complete and a suspect is charged, then the conviction rate is far higher than in England.[159] 'It is clear that as only five per cent of defendants are acquitted in

hearings in the *Cour d'Assises*, the trial process is largely conducted in advance of the hearing'.[160]

The above investigations have resulted in 20 convictions and a further 21 suspects being charged with white collar crimes. 2 defendants, Tapie and Carignon, were charged and convicted of bribery. At the time of the conviction both defendants held political office. Tapie as an MP and Carignon as a minister. They both appealed against sentence, the appeals have failed. 7 defendants were convicted of share fraud in the Pechiney-Triangle case, they all received a 2 year custodial sentence. In the Crédit Lyonnais scandal 5 suspects have been charged with false accounting. Floch-Prigent and André Tarello have been charged with false accounting and Biddermann and Boucheron have both been sentenced to 4 years imprisonment for false accounting in the Elf-Aquitaine investigation. In the Bouygues inquiry; Crozemarie has been charged with false accounting, Nicholas Bouygue has been charged with misuse of company funds and Dassault has been charged with false accounting. Emmanelli has been convicted of fraud and sentenced to 18 months imprisonment and Gillibert and Mulliez have been charged with corruption. In the case against Noir and Pradille they have both been convicted and received custodial sentences, Noir has been sentenced to 18 months and Pradille 5 years. Schweitzer has been charged with telephone tapping and Veinot with shares fraud. Martin Bouygue and Le Lay have been charged with *abus de bien sociaux* and Poivre d'Arvor and Cole have been convicted of fraud, each received a suspended prison sentence. Chalendon, Richard, Beizanowski and Allouch have been charged with fraud and Lévy-Lang with false accounting.

In all of these examples there is a direct link between the defendants and politicians. In many of the cases the defendants are politicians and in the others the bribery and corruption has involved politicians. The only case which has not been associated with

politics is the Alcatel matter which resulted in all the defendants being convicted of *abus de bien sociaux* and fraud. In total there have been 2 appeal which failed and one is pending in respect of Suard from the Alcatel matter. 2 charges of forgery were brought, 7 of share fraud, 6 of false accounting, 2 bribery, 6 charges of *abus de bien sociaux* and 12 of deception (fraud). There are no examples of any acquittals. This is not surprising because, as was discussed in the chapter which dealt with the J.I., the process of compiling a dossier of evidence means that if the indictment court sanctions the charging of a suspect, then it is highly likely that the trial will result in a conviction. The basis for an appeal is substantially reduced for the same reasons as the scrutiny of the dossier pre-trial will highlight any procedural irregularities which the indictment court can then order the J.I. to deal with before the trial. The second basis for appeal is sentence. As was shown in chapter 3 the state prosecutor will suggest a suitable sentence to the trial court that it may accept or reject. In the Alcatel case the state prosecutor requested a sentence of 18 months imprisonment this was doubled by the trial court to 3 years. The appeal brought by Poivre d'Arvor and Noir is one of the few examples where white collar criminals have challenged the law, in this instance in relation to the period of prescription. The appeal court dismissed the appeals.

The cases from France show a pattern that differs from that in England. In England the criticisms of the SFO arise largely as a result of the prosecutions it has brought. There are no such criticisms of any J.I. in France. In England there is evidence of failed convictions and the trial courts have made specific references to the number and appropriateness of the charges. There are no examples of this from France. There is commonality of offences relied upon, in England and France, which reflects the narrow parameters of the nature of white collar crime. In both countries the most common charge is deception and secondly false accounting. There is no specific offence of fraud in England which accounts for a greater use of deception, whereas

in France the state prosecutor may support charges of fraud by *escroquerie* and also the specific white collar crime of *abus de bien sociaux*.

Overall the J.I. appears to have a remarkably successful investigation record as all those matters that proceed to trial result in a conviction. What is not known about the investigation of white collar crime in France and England is how many reported allegations never proceed to trial. It is known, for example, in the Blue Arrows case that there were originally 14 defendants but only 4 eventually stood trial[161], in Alcatel there were 38 suspects, 24 have stood trial so far,[162] it is also known that J.I. Joly has instigated 75 formal investigations into suspects in the Crédit Lyonnais investigation[163], it is not known how many will proceed to trial.

On balance have the investigators more successes than defeats? In respect of the statistics the figures reveal little. It was proposed in the chapter on the English police, that since officers have considerable discretion, they can filter out cases and either decide that the reported matter does not constitute a criminal offence or a caution can be administered. In France the position is similar. While the police do not have wide discretionary powers, the *juge d'instruction* does, and accordingly he may decide that the incident reported to him does not amount to a criminal offence. It is the case in both jurisdictions that many allegations which are reported are not deemed to require further investigation or prosecution, and it is these incidents that are not recorded. It is not possible to say, therefore, how many inquiries never result in a prosecution. Those offenders who are charged may not be prosecuted for a wide variety of reasons. The defendants who are tried may be discharged, again for a number of reasons. The nature of major white crime investigations will attract press attention and this will always invoke the defence of abuse of process of the court, or trial by media before trial by jury. Geoffrey Robertson. QC., said in the aftermath of the Forsyth release, 'She could never have had a fair trial because the publicity

surrounding the collapse of Polly Peck had made Asil Nadir's name a by-word for fraud'.[164] The only real test of success is to assertion whether; firstly, an offender has been identified and secondly, whether he has been charged with the relevant offence. In England it is inappropriate to reflect on the ability of the investigators to do their task effectively if success is calculated by conviction rates. The SFO does have a role to play in the management of trials and it recognises this. The office maintains links with the court staff, the Circuit Administrators, who in addition to their other tasks, are responsible for the allocation of courtrooms and time. The implementation of plea bargaining may reduced the number of trials that are contested. This is something that would assist the SFO and benefit the progress of trials. The SFO is only one of the agencies charged with investigating serious white collar offences but as one member of the SFO commented, 'It's like a cricket tour. No one remembers your minor victories if you lose the Test matches'.[165]

The cases analysed in France and England demonstrate that the basis for evaluating the success of the agencies charged with investigating white collar offences is flawed. In England the SFO is criticised for failed prosecutions when in fact the reason for acquittals is rarely within the control of the SFO, and in France the J.I. appears successful and yet there is no way of knowing how many investigations never proceed to trial through the inability of the J.I. to conduct a thorough investigation. Consequently the measure of success in France is results from the courtroom and on this basis the J.I. comes out better than the SFO.

The special powers that permit the SFO to demand answers to questions have been evaluated in chapter 3 and the attitude of the courts have been discussed in this chapter. The exceptional powers under section 2 CJA 1987 can compromise a suspect's human rights but this is the price that is paid for committing exceptional offences. These problems are not apparent in France where the criticisms are

leveled at the J.I.'s powers to remand into custody, which in itself does not amount to a breach of the ECHR. One solution for England would be to remove white collar crime investigations from the sphere of the criminal law and regulate offenders through civil action. A second solution is to cause the SFO to comply with the 'Saunders' ruling from the European Court of Human Rights. In the following chapter these two issues are investigated and evaluated in the knowledge that the newly formed Financial Services Authority will have the power to investigate and prosecute and the ECHR will become part of UK legislation in the year 2000.

## Endnotes.

[1] Markensis, B. 'Comparative Law- A Subject in Search of an Audience' *The Modern Law Review.*(January 1990) Vol. 53. No. 1. pp. 1-21. at p.1.
[2] *SFO Annual Report, 1995-96* London, HMSO (1996) 'Aims and Objectives.' p.53.
[3] ' Staple Puts Fraud Law In The Dock.' by Frank Kane, *The Sunday Times.* 03/11/96. Current figures for the period 1996-97 show that there are 82 active caseloads. Source. *SFO Annual Report. 1996-97,* London, HMSO (1997) p.19.
[4] *ibid.* Sunday Times.
[5] There have been 156 trials, 351 prosecutions and 220 convictions since the SFO started in 1988. Source. *Serious Fraud Office. Case History,* London, HMSO (1997) p.1. There is no comparable figure for the Metropolitan Police Fraud Squad as the Report of the Commissioner of Police of the Metropolis is a particularly uninformative document that puts all cases of fraud and forgery together. Consequently the figure for April 95-March 96 records 33,952 offences of fraud and forgery recorded as notifiable offences by the MPD. There were 9,030 arrests within this category. Source *Metropolitan Police Annual Report,* London, HMSO (1995/96) p.53.
[6] Sentenced 24/02/94. The figure put on the loss by the SFO is £105 million .For an appraisal of this conviction see; Damien McCrystal. 'R v Wallace Duncan Smith', *New Law Journal.* Vol. 144. No. 6645.24/04/94. p. 575.
[7] This was reduced to 6 years by the Court of Appeal. *R v Naviede.* CA (1997) reported in *The Times* 22/03/97. No evidence was offered against co-defendant Anthony Smithson and the matter was formally withdrawn on 07/07/96. Muhammed Naviede the former chairmen of Arrow Trading, had obtained £45 million by deception from various banks. In the light of the House of Lords decision in *R v Preddy and Others.* HL 3.WLR. 1996. 255. his appeal against conviction for deception was successful, however, the Court substituted other convictions for S.1.Theft Act 1968 offences. It was for these reasons his sentence was reduced from 9 to 6 years.
[8] *The Times.* 26/07/94. p.38.
[9] *Re European Leisure.* CA (1997). Reported in *The Financial Times* 22/03/97. Ward's sentence was increased to 2 years imprisonment and he was banned from being a company director for 7 years. Howarth, former Finance Director for European Leisure, had his sentence increased to 20 months imprisonment and received a 5 year ban. George Hendry, who had previously pleaded guilty, had his sentence increased to 2 years suspended. Ward was already serving a 12 month sentence for making false statements to the SFO.
[10] 03/04/97.
[11] *The Times.* 31/10/96. Business News.
[12] *The Times.* 19/01/96. 'Five years for ex-bank manager in fee fraud.'
[13] Convicted 25/01/96
[14] Operating as the firm Durnford Ford, convicted 19/12/95.
[15] Clowes purchased the 'Boukephalas' a 100 ft yacht for £1.4 million from Christina Onassis.
[16] Naylor was sentenced to 18 months imprisonment. Von Cramer was acquitted and Newman was acquitted after he successfully pleaded that he was drunk for the entire period that he worked for Clowes and therefore did not know what he was doing.
[17] The charges against Levy were dismissed on 02/07/90 after an application to that effect. Ian Crabtree and David Mitchell were formally acquitted on the direction of the trial judge two days( 12/02/92) after conviction of Clowes following a submission of no evidence against them by the prosecution.
[18] 'Work as Usual for the 100 Conman.' Dawn Alford. *The Sunday Express.* 10/11/96. p.20. and see 'Wallace Duncan Smith- Conman or Victim.' Parry, H. & Johnstone, P. *The FT Fraud Report.* January 1997. pp.9-11.
[19] 'Cowboy Advisors Escape the Net.' David Robertson. *The Sunday Times* 02/03/97. Section. 4. p.7.and 'Golden Boy Gets Off Too Lightly.' Lesley White. *The Sunday Times.* 11/02/96. p.3. 6. Opinion.
[20] 'SFO Chief to Quit Post after Maxwell Fiasco.' *The Sunday Times.* 21/01/96.p.1.
[21] The original Maxwell trial, against Kevin and Ian Maxwell, Larry Trachtenburg and Robert Bunn resulted in Bunn being discharged due to his health,(August 1995) and the three remaining defendants being acquitted by the jury. Albert Fuller and Michael Stoney did not stand trial due to the severance of the indictment.
[22] '£31 million Price Of The Maxwells' Freedom: Question Marks Over The Serious Fraud Office.' David Williams & Michael Seamark. *Daily Mail.* 20/09/96. p. 14.
[23] *Op.cit.* Note. 3. 'Staple puts Fraud Law in the Dock' by Frank Kane.

[24] *ibid.*
[25] *ibid.*
[26] See further 'The One That Got Away; Or; Decline And Fall Of A Minister.' Widlake, B. *Serious Fraud Office,* London, Little Brown (1995) pp. 110-158. and comments, re Elizabeth Forsyth. *infra.*
[27] *ibid.* Widlake. p.191.
[28] Charles Villiers, Chairman of County NatWest, CNW, Paul Smallwood, Director of UK equity sales, Timothy Brown, Director of Phillips & Drew and Elizabeth Brimelow, Compliance Director at CNW. Stephen Clark, acquitted 30/08/91, Jonathen Cohen, Philip Gibbs and David Reed all convictions quashed on appeal, July 1992. County Nat West, UBS Philips & Drew Securities Ltd. all acquitted on the directions of the trial judge, 30/01/92. Alan Keat acquitted on the directions of the trial judge, 30/09/91. Christopher Stainforth acquitted 14/02/92. Elizabeth Brimelow and Charles Villiers acquitted 03/08/92.
[29] Mr. Justice McKinnon had practiced at the Chancery bar.
[30] He had been elevated two years before.
[31] Trial transcript at p.6 *et seq* cited in Levi, M. *'The Royal Commission on Criminal Justice 1993, The Investigation, Prosecution, and Trial of Serious Fraud'*, London, HMSO (1993) Cmnd. 2263. Research Study No.14. p.107.
[32] *Op.cit.* Note. 26. Widlake, B. *Serious Fraud Office.* p.215.
[33] Rosalind Wright, Director of the SFO speaking at the 17th Symposium on Economic Crime, Jesus College Cambridge. 13th -19th September 1998. 'Prosecution white collar crime - what's going on?'
[34] 'Why Saunders Could Not Have Been Faking It' Dr. Thomas Stutterford. *The Times.* 19/12/96. p. 14.
[35] For a comment on all these cases see; Zoe Brennan. *Press Association.* 17/12/96/ FT Profile. Text 178. UKNEWS.
[36] Pennington. 'Restoring Faith In British Justice' *The Times.* 28/11/95. p.27.
[37] Section 151(1) prohibits a company from using its own funds to buy its own shares. This was one of the charges put to Blue Arrows. Section 151 (3) 'If a company acts in contravention of this section, it is liable to a fine, and every officer of it who is in default is liable to imprisonment or a fine or both'.
[38] Sections 432 & 442 Companies Act 1985.
[39] The SFO's offices, 10-16 Elm Street, London. WC1X OBJ.
[40] The counts included, False Accounting, Theft and Conspiracy. Saunders was the only defendant to give evidence at the trial.
[41] Subsequently reduced to 30 months due to his poor health. See also Note. 34. *supra.*
[42] *Op.cit.* Note. 31. Levi, M. Royal Commission. Cmnd. 2263. p.220.
[43] A discontinuance of proceedings. It is not an acquittal and does not bar proceedings in the future.
[44] Who was conducting his own defence and had been diagnosed as suicidal.
[45] A partner in the firm of stockbrokers, Cazenove & Co, who advised Guinness.
[46] Both were formally acquitted under Section 17 Criminal Justice Act 1967. In view of the decision in Guinness 2 against Seelig it is unrealistic to think he would have stood trial in Guinness 3.
[47] Twice, 16/05/91 and 28/05/95. The second application as a result of the provisional ruling from the Commission at the ECHR.
[48] The late, Lord Taylor of Gosforth.
[49] *The Times.* 28/11/95. p.25.
[50] *ibid.* The Times
[51] The European Convention on Human Rights.
[52] It is the findings of the Commission, *supra* Note. 47 to which Saunders refers when commenting on the position at the ECHR in relation to the 'Scathing attack on the judicial system' *The Times.* 28/11/95.
[53] *The Case of Saunders v The United Kingdom.* (43/1994/490/572). Judgment. Strasbourg. 17 December 1996. p. 16. para 58.
[54] *Op.cit.* Note. 49 *The Times.* 28/11/95. p.25
[55] *R v Morrisey (Ian Patrick); R v Staines (Lorelie Marion) The Times*, 1 May 1997. CA (Crim Div)
[56] Contrary to Section 1(8) Company Securities (Insider Dealing) Act 1985.
[57] *R v Saunders.* The Times 28 November 1995 (1996) 1 Cr App R 463. In which Lord Chief Justice Taylor held that if Saunders was successful in Strasbourg then the UK's obligations under the treaty would '...require consideration to be given to giving effect in the United Kingdom to that decision'
[58] *supra.* The Times. note 55.
[59] *ibid.* The Times
[60] *ibid.* The Times
[61] *The Guardian.* 18 March 1997. p.19.

[62] Chief Executive of Polly Peck International, PPI.
[63] Forsyth, E. *Who Killed Polly Peck? The Corporate Assassination of Asil Nadir*, London, Smith Gryphon (1996).
[64] *ibid.* Forsyth. p.43.
[65] Richard Cook and the disgraced and convicted Michael Allcock of the Special Office No.2. of the IR. Michael Allcock was sentenced to 5 years imprisonment on 19th February 1997 for six charges of corruption while heading a special unit, known as 'Ghostbusters' Of the estimated £5 million that he accepted in bribes £150,000 has been traced. Allcock also owes £200,000 in taxes to the office he worked for. See further; 'Corrupt Taxman's Five Years Too Lenient, Say MPs' Tim Jones. *The Times.* 20/02/97. p.3.
[66] The day of the SFO raid, 19/09/90.
[67] *Op.cit.* Note. 63 Forsyth, E. *Who Killed Polly Peck?* p.20.
[68] *ibid.* Forsyth
[69] *ibid.* Forsyth
[70] *Op.cit.* Note. 63. Forsyth, E. *Who Killed Polly Peck?* p.113.
[71] 11th February 1992.
[72] It is worth noting that the SFO had a new Director, George Staple, and the office had only just been severely criticised for overloading the indictment in the Blue Arrow case, this may reflect on why so many matters against Nadir were dropped and not as Forsyth implies, that the charges were without substance.
[73] 19th September, exactly 4 years after the SFO raid on SAM.
[74] *Op.cit.* Note. 63 Forsyth, E. *Who Killed Polly Peck?* p.184.
[75] 1. Between the 16th and 22nd days of October 1989 you dishonestly undertook or assisted in the retention, removal, disposal or realisation of certain stolen goods, namely £88,050 in monies belonging to Polly Peck International plc by or for the benefit of another, or dishonestly arranged to do so, knowing or believing the same to be stolen goods.
2. Between 16th and 22nd days of October 1989 you dishonestly undertook or assisted in the retention, removal, disposal or realisation of certain goods, namely property to the value of £307,000 belonging to Polly Peck International plc by or for the benefit of another, or dishonestly arranged to do so, knowing or believing the same goods to be stolen. Both Contrary to Section 22 (1) Theft Act 1968.
Somewhat amusingly Mr.Justice Harman was required to consider whether Forsyth could be imprisoned for Contempt of Court following an application by administrators Deloitte & Touche. Chris Wood had brought the action having failed to get Forsyth to reveal her assets in an *affidavit*. Forsyth who at the time was in HMP Cookham Wood was given 7 days in which to report her assets, including any royalties from the publication of her account of the SAM saga, to Wood. *The Evening Standard.* 05/07/96. p.36.
[76] *The International Herald.* 18 March 1997. p.11.
[77] Nadir commented to the press that he thought the trial judge had clearly, 'Lost his objectivity'. *The Independent.* 18 March 1997. p.21.
[78] *Op.cit.* Note. 26 Widlake, B. *Serious Fraud Office.*
[79] *ibid.* Widlake. p.158.
[80]The position is that it is up to the individual officer to decide whether to record a complaint as a crime. The Metropolitan Police Fraud Squad keep a record of all inquiries received and those that are prosecuted are recorded. This is not information within the public domain and D.S.Peter Bennett of this office advised me it was not material to which I would be permitted access. This is a curious response in view of the fact that my research may well have shown that officers within these specialist departments deal with many more inquiries than their recorded crime figures indicate.
[81] Robert, D. *Business as Usual Despite the Scandals,* Paris, Stock (1996).
[82] Referring to Robert, D. *Business as Usual Despite the Scandals*, *supra*, in *The Guardian.* 15/08/96. Paul Webster. p. 11.
[83] Carignon was sentenced to 4 years imprisonment, 23/05/96 at Lyons, for corruption whilst in office as the Mayor of Grenoble. It is interesting to note that Carignon spent 203 days on remand before sentence. *France v Carignon. La Cour de Cassation. Chambre Criminelle. 27 octobre 1997. Pourvoi: No 96-83.698. Arret No 5593.*
[84] The Pechiney-Triangle Affair. *Pechiney-Ugine-Kuhlmann Conglomerate. Re The Polypropylene Cartel: SA Hercules Chemicals NV v EC Commission [19992] 4 CMLR 84. ECJ.*
[85] *Business Week.* International Edition.18/12/95. p.26.
[86] *ibid.*

[87] Ruggiero, V. *Organized and Corporate Crime in Europe. Offers that Can't be Refused*, Aldershot, Dartmouth (1996) p.97.
[88] *ibid.* Ruggiero. p.151.
[89] Masters, C. 'Fraud May Top $1.8 Billion', *The European.* 29 May 1997.p.1.
[90] *ibid.* Masters.
[91] *ibid.* Comments made by Michel Rouger, Chairman of the government formed, CDR.
[92] International Bank SA, IBSA. Altus Finance, Crédit Lyonnais Bank Netherland, CLBN. Societe De Banque Occidentale, SDBO, Colbert Saga and SBT-Batif.
[93] Former chairman of Olympique de Marseilles Football Club, now serving a term of imprisonment for fraud. *France v Tapie. La Cour de Cassation. Chambre Criminelle. 27 fevrier 1995. Pourvoi: No 94-80. 502, 15 fevrier 1994, Pourvoi: No 93-84. 218, 16 juin 1992. Pourvoi: No. 90-87. 524.*
[94] Chief Executive of the collapsed Swiss company SASEA.
[95] At the time the group employed 35,000 staff. The government were not prepared to sanction such job losses. Source: *Op.cit.* Note. 89. Masters, C. 'Fraud May Top $1.8 Billion'
[96] *supra.* Masters. note 89. see also: *France v Crédit Lyonnais. La Cour de Cassation. 2 octobre 1997. Pourvoi. No. 96-84. 453. Arret No. 5250.*
[97] He had been convicted of perjury and falsification of documents in Delaware, USA, in October 1996. Source: McClintock, D. *post*
[98] See further: McClintock, D. 'The Predator', *Fortune* (July 1996) Vol. 134. Issue 1. pp.128-138. Where the author outlines the entire Parretti saga and comments on the subsequent fire at the headquarters of Crédit Lyonnais in Paris which to date remains an unsolved arson..
[99] Curtil, C. 'The Media and French Law-Part 1' *New Law Journal* (January 8, 1999) pp. 25-27. at p.26.
[100] The French Stock market is the 3rd largest in Europe and comprises of 73 member firms, 14 are controlled by foreign companies. Regulation is conducted in agreement with the COB by the self-regulatory authority the *Conseil des Bourses de Valeurs*, CBV. The rules proposed by the CBV are agreed by the COB in conjunction with the *Banque de France* and the Finance Ministry. Litigation is not encouraged and lawsuits are a rarity. The French state considers itself to have a legitimate role in the protection of the activities of *La Bourse* which extend beyond any potentially harmful acts contrary to the health or defence of the nation. The government can intervene in a proposed 'take over' or merger to enforce a 'French Solution'.
[101] Canadian Bank, CIBC.
[102] He is nicknamed Pink Floch because of his strong Socialist sympathies.
[103] Elf obtained a former oil refinery in the previous East German city, Leipzig. André Guelfi, a Swiss businessman, and currently under investigation, alleges that he paid £5 million in 'commissions' for Elf to secure the contract. *Le Parisien.* Tuesday 29th April 1997. p.10. See also, *'Affaire Elf Confession Explosive' L'Express. No. 2357. Samedi Du 5 Au 11 Septembre 1996.* pp.56-57.
[104] The Transport Minister, Bernard Pons had publicly stated that Floch-Prigent would have to resign if the Appeal Court refused his bail application. *The Times.* 19/07/96. p.15.
[105] This was as a result of the execution of a second warrant at the offices and home address of Floch-Prigent where further evidence was obtained. The inquiry has now extended to the ex-wife of Floch-Prigent who is suspected of receiving fraudulent payments from the company.
[106] *La Santé* is attracting its own notoriety now as the main prison for the housing of white collar criminals. Maurice Biddermann, whom Floch-Prigent is alleged to have unlawfully supported, as well as Alain Carignon and Bernard Tapie are amongst its most recent inmates. The prison now has its own, 'special detainees' VIP entrance to the white collar crime wing. *The Sunday Times.* 14/07/96. p.17.
[107] Instances of such protection in England are largely restricted to those judges who are/ have sat in Northern Ireland terrorism cases. See further. *The Times.* 08/07/96. p.9.
[108] *In absentia.* Boucheron was convicted of embezzlement for the period when he was Mayor of Angoulême.
[109] Along with Le Floch-Prigent from Elf-Aquitaine. Both continued to control their businesses from their cells.
[110] He was sentenced to 2 years imprisonment, suspended for 2 years and banned from holding public office for 2 years.
[111] He appears to have used company funds to purchase and refurbish his villa in the south of France.
[112] Previously Mayor of Lyons and former Minister for Foreign Trade. See also: *Groupe Bouygues. La Cour de Cassation. Chambre Criminelle. 4 juin 1997. Pourvoi: No. 95-86. 018.*
[113] This has caused severe embarrassment to the board of Alcatel Alsthom, as Vienot was appointed temporarily to replace the convicted Pierre Suard. *infra.*

[114] 27th February 1997. Patrick Le Lay was arrested on this day also.
[115] *The European*. 06/03/97. p.9.
[116] See further. *The Sunday Times*. 12/11/95. p.27.
[117] The initial complaint was to the magistrate from the Internal Revenue Department.
[118] This inquiry is running in parallel with a number of inquiries into the affairs of the Groupe Bouygues, which includes the 'Drappo' affair. This is an alleged massive fraud involving the collusion of a computer company, Drappo, and payments for guaranteed contracts. The European Commission have commenced legal action against the French government over the awarding of the contract to *Groupe Bouygues*, to build the new 80,000 seat football stadium in Paris, venue for the 1998 World Cup Tournament. The Commission allege that the government ignored EU single market rules when awarding the contract.
[119] See further. '*Les Lézardes de L'empire Bouygues.'Le Point. 9 Décembre 1995*. pp.14-15.
[120] Robert, D. 'A Neat Web of Gallic Corruption.' cited in *The European*. 06/03/97. p.9.
[121] *ibid.* Robert.
[122] 10/07/96.
[123] *Euromoney*. July 1995. p.48.
[124] *ibid.*Euromoney
[125] In his case for presenting false accounts relating to Conso-Ciments Francais.
[126] As is Ambroise Roux, Honorary chairman of Alcatel and board member of Banque Paribas.
[127] Four years from the start of the investigation.
[128] A suburb, South of Paris and the district in which a division of Alcatel is located.
[129] A further 20 defendants were prosecuted and received sentences ranging form 3 years imprisonment to fines. see further *Le Figaro*, 07/05/97. p.11.
[130] This is based on the fact that the tribunal will have had access to the entire *dossier* before the trial commences and the defence have only a limited right to the file contents as discussed in Chapter 3.
[131] There were three present, one representing the interests of Alcatel.
[132] As was observed by the author who attended these proceedings in Evry. See also: *Alcatel Alsthom. La Cour de Cassation. Chambre Criminelle. 4 juin 1997. Pourvoi. No 97-81. 706. Arret No. 3308.*
[133] *ibid.* Alcatel.
[134] Whereas in proceedings in England the original documents would have been produced it is not uncommon for photocopies to be produced in France. In this particular case a photocopy of a cheque, allegedly signed by Suard for illegal payments to a fictitious building company, was accepted by all parties in the trial. It is most unlikely that this would have been the case within this jurisdiction.
[135] In 1993 a judge from a Regional Appeal Court was disciplined for his description of the defence counsels attitude as, '...verging on complicity with a fraudster', *The Times*. 08/04/95. p.33.
[136] The casual manner is immediately clear and when a journalists mobile phone went off the bench made no comment about an issue that in the English courtroom would amount to a contempt of court.
[137] Notes made by the author. 24/03/97.
[138] *ibid.*
[139] In Guichet's case the state had requested 4 months imprisonment and a fine.
[140] The request for Suard was for a closed prison sentence of 18 months plus fine and costs.
[141] The sentence was *avec sursis*, e.g. part suspended. In this case 12 months was part suspended.
[142] *Libération*. 25/03/97.p.9. This was before his client was sentenced..
[143] Alfred Dreyfus was court-martialled and sentenced to imprisonment on Devil's Island. In 1896 it was established that a Major Esterhazy was responsible for the passing of the information. The military and government sought to suppress this information and thereby avoid the embarrassment of a wrongful conviction. After a major controversy and questions by the French novelist Emile Zola (who published the work *J'accuse* 1898 which publicly indicted Dreyfus's persecutors) and Georges Clémenceau, 'The Tiger' a radical politician and journalist who later became Prime Minister, he was retried and found guilty with extenuating circumstances. In 1906 he was declared innocent by the *Cour d'Appel* and reinstated in the army. A particularly unpleasant outcome of the original investigation was the proven falsification of evidence and the continued persecution of Dreyfus because he was Jewish.
[144] Richard Pallain, a *juge d'instruction*, is currently conducting an investigation into the affairs of 59 staff employed by the Conseil Général des Yvellines. Like many current inquiries of this nature the main offence stems from a series of alleged payments to secure building contracts. This major investigation was prompted by anonymous information. see further; '*Faits Divers*', *Le Parisien* 28/11/96. Section. P.

[145] 500,000 Fr. francs at his apartment in Neuilly-sur-Seine, 352,352 Fr. francs for works at his house in the *Savoie* and 39,000 Fr. francs worth of work completed on another of his homes at Boulogne-Billancourt.
[146] Notes made by author. 24/03/97.
[147] For a discussion on this see , '*Abus de biens sociaux: le droit, rien que le droit' L'Express* 20/02/97 pp. 32-33.
[148] *ibid.* L'Express
[149] Chief Executive of Kis. Crasnianski had, *inter alia*, been prosecuted for attempting to bribe the J.I. conducting the investigation . Decision of the Court, 6th February 1997..
[150] *Op.cit.* Note 53. *The case of Saunders v The United Kingdom.*
[151] *Op.cit. La Cour de Cassation.* Note. 112.
[152] For a comment on this see, '*Aux Politiques de Trancher' Le Point, Numéro* 1273. 08/02/97. pp 44-46.
[153] The issue of matters of '*abus*' being justicable beyond the normally prescribed period was subject to decisions of the *Cour de Cassation* as follows; 1967 decided that a case proceeded against in 1957 but discovered in 1953 was not statute barred. 1968 held that the offence was statute barred. 1970 was statute barred. 1974 was not statute barred. 1975, when the delays were 4 years and 5 years respectively, were not statute barred. 1977 held 4 years was not statute barred. 1978 confirmed ruling of 1977. 1981 held that 4 years was not statute barred. 1986 held that 3 years was not statute barred. 1989 held that 6 years was not statute barred. The decisions of the Court have not been published since 1989. The implication of this is that given the recent decisions, *supra*, the matter will be resolved by the Court unless the defendant is well placed and of influence politically and within the business community. Source. *Le Nouvel Economiste. Numéro* 1072. 31/01/97. pp. 60-64.
[154] For comment on the reforms see; ' *Francis Dominguez: Une Arme Fatale.' Le Figaro.* 18/12/96. p.6. Dominguez is a white collar crime defence lawyer who opposes the proposed reforms suggested by the President of the Law Commission, Pierre Mazeaud. Dominguez is also author of one of the few books, *Dominguez, F. De l'Abus de Biens Sociaux, Paris, Editions de Guerrier Auto-Existant Jaune* (1996). See pp. 81-93 ans p. 171 for a definition of the offence of *abus de biens sociaux*. He explains the lack of written material on the political nature of the crime which means that publishers are not prepared to print the material. This is probably fair comment when one considers that at Dalloz in Paris, the main supplier of law texts, there is one book in print, Dominguez's.
[155] Mayor of Paris.
[156] *Le Parisien.* 04/07/96. p. 3.
[157] e.g. The Alcatel inquiry took 4 years to bring to court. For a comment on this see, '*Alcatel: Le Juge Frappe Interdiction.*'by Blandine Hennion. *Libération.* 11/04/97. p.9.
[158] For a commentary see *'Abus de biens sociaux: le droit rien que le droit' L'Express.* 20/02-97. pp. 32-33.
[159] Cooper, J. 'Criminal Investigations in France', *New Law Journal.* (1991) p.381 cited in Uglow, S. *Evidence. Text and Materials*, London, Sweet & Maxwell (1997). pp.5-7.
[160] *ibid.* Cooper. p.7. and for a comment on the speed with which cases are dealt with at trial see: Tigar, M. 'A French White-Collar Trial: Quelle Différence!', *The National Law Journal* (January 20, 1997) pp A15-17.
[161] *The Guardian.* 15/08/96. p.11
[162] 4 in the trial at Evry and a further 20 have now been convicted. Source: *Le Figaro* 07/05/97. p.11.
[163] *Op. cit.* Note. 89. *The European.* 29/05/1997. p.1.
[164] *The International Herald.* 31 January 1997. p.4.
[165] *Daily Mail.* 20 September 1996. p.14.

# Chapter 5

# The SFO, the new regulatory regime and the ECHR

## 5.1 Introduction

The SFO has been provided with the statutory authority to demand the attendance of suspects at its offices and also the power to demand that information is supplied, irrespective of whether or not the suspect has been charged with a criminal offence. It has been held that the provisions of Art 6 of the ECHR do protect the defendant from self-incrimination and the UK government has been successfully challenged at the ECtHR over these issues. The powers conferred on the SFO remain in place but the Human Rights Act 1998 will become law in the UK in October 2000. The UK government has recently re-evaluated the interface that exists between the criminal prosecution of white collar crimes and the regulation of white collar offenders. The debate that remains is whether or not a white collar crime should be dealt with by means of regulation and the imposition of a civil sanction or whether white collar criminals should continue to be dealt with by the criminal law. As part of this re-evaluation process a new agency has been formed, the Financial Services Authority. The legislation that gives the FSA the power to investigate and prosecute white collar offences is contentious in much the same way as the section 2 powers under the CJA 1987 are. It would appear that rather than resolve the differences that exist between the SFO interpretation of human rights and the rulings of the ECtHR, the English government is about widen the division by granting the new agency even greater powers than the SFO.

Under the Financial Services & Markets Bill the FSA will have the authority to impose unlimited fines on white collar offenders without the suspect being given the protections of the standard of proof required in the criminal law. In this chapter current UK legislation that possibly contravenes the ECHR is introduced to

contextualise the proposals that are currently being presented before parliament in respect of the FSA. The formation of the FSA is then commented upon and then the contentious issues surrounding the power to impose fines, that are criminal in nature, but civil in law, are analysed. In this chapter it is argued that the UK government has taken little note of the rulings of the ECtHR when the decisions are related to white collar criminals. The insular position taken by the UK will create problems for the future success of white collar crime investigations when the nature of these crimes means that they are likely to become increasingly international and co-operation with agencies in countries that do respect the ECHR are vital

**5.2 The impact of the ECtHR rulings**

The SFO has been challenged a number of times over the right to use evidence gained from a previous civil inquiry, such as one conducted by the Department of Trade and Industry, DTI, the Bank of England, insolvency proceedings or one of the financial service industry regulators. If a suspect is interviewed by a civil agency which does not have the power to bring charges that may result in a custodial sentence, then it is conceivable that the answers supplied to questions may be substantially different from those given to the SFO, particularly since the suspect in the first instance may not have a solicitor present during the civil agency interview. The SFO has also been challenged for using evidence obtained before charge in the SFO interview conducted after charge.

The use of evidence obtained in both of these ways is potentially in conflict with Article 6 ECHR as the suspect may argue that the opportunity for a fair hearing has been substantially reduced. It can be argued that the UK has been held to be in conflict with the spirit of the ECHR as, '... the trend in England has been towards attrition and formal restriction of the privilege [against self-incrimination], the European Court and the European Commission of Human Rights have been

reconstituting the privilege as an implicit element of the right to a fair trial under article 6(1) of the European Convention '[1].

**5.3 UK legislation in conflict with the ECHR**

Funke[2] was convicted and fined for failing to supply information to customs officers. His case at the ECtHR was that he had an unassailable right not to supply evidence against himself. The ECtHR held that there was a breach of Article 6(1). This was a clear statement of principle by the ECtHR and was followed in Saunders[3], where it was held that answers supplied to the DTI, under s. 432 of the Companies Act 1985, and subsequently used in the SFO interviews were a breach of Art. 6 as Saunders was compelled to answer the questions or face imprisonment for contempt. The UK government argued, unsuccessfully, that Saunders had co-operated with the DTI of his own volition and had not incurred a penalty.

On the basis of the Saunders decision, the power to demand answers to questions, utilised by the DTI under s. 432 of the Companies Act 1985, and used by the SFO, is in conflict with Art. 6 ECHR. In R v Morrissey and R v Staines[4] the provisions of s. 177 of the Financial Services Act 1986 were challenged. Under this section defendants are obliged to answer questions and any answers given may be used in evidence against the defendants. Morrissey and Staines appealed to the Court of Appeal on the basis that the provisions of s. 177 were in conflict with Art.6 ECHR. In the light of the Saunders decision it would seem that Morrissey and Staines have grounds for appeal to the ECtHR and that s.177 is also in conflict with the ECHR. Under the Police Act 1997 the police are required to obtain prior approval, from a High Court judge, if they wish to install surveillance equipment into premises where there is likely to be material subject to legal, medical or journalistic privilege. However, if the matter is urgent then the police can retrospectively seek judicial

authority. There is the potential here for this UK legislation to be in breach of Art 8 ECHR which affords privacy to citizens.

Under section 11 (3) (b) of the Criminal Investigations and Procedure Act 1996, the defence must supply the prosecution with a written defence statement. Until the enactment of this law the defence was under no obligation to reveal matters to the prosecution. If the defence fails to comply with the CPIA, then the trial court may draw adverse inferences which could jeopardise the prospect of a fair trial, resulting in a breach of Art.6 ECHR. Section 2 of the CJA 1987 has been commented upon extensively already and it has been established that similar provisions exist under the Companies Act 1985 and the Financial Services Act 1986. Paragraph 16.5 of the Codes of Practice contained in PACE 1984, prohibit questioning after charge, however, as has been shown in R v Director of the Serious Fraud Office, *ex parte* Smith (Wallace Duncan)[5] the SFO, under section 2 CJA powers are entitled to question after charge. It might be thought that to counterbalance the powers of the SFO it would be obliged to disclose the documents and information held against a suspect. This is not the case as was established in R v Director of the Serious Fraud Office *ex parte* Maxwell[6].

A guidance note for prosecutors has been issued by the Attorney General which advises on the use of answers obtained under compulsory powers in criminal proceedings. The purpose of the note is to give guidance to all criminal prosecuting authorities about the approach to be adopted when seeking to use evidence obtained under powers such as s. 434 of the Companies Act 1985, s.2(8) of the Criminal Justice Act 1987 and s.94(3) of the Financial Services Act 1986[7].The guidelines apply to any answers obtained whether the investigation is regulation or criminal and it applies to companies and individuals. Guideline 3 states that, 'In all cases the prosecution should not normally (subject to the discretionary exceptions mentioned in

paragraph 4) use in evidence as part of its case or in cross-examination answers obtained under compulsory powers'. This sounds fairly all encompassing until the exceptions are considered and then it becomes clear that the SFO and CPS may in fact continue to abrogate the Saunders ruling in white collar prosecutions. The exceptions are, either when the defendant has provided the answers himself in evidence, or 'where the defendant has been subject to a statutory duty to provide answers in the course of an administrative or regulatory procedure, or has been required to answer truthfully in the course of judicial proceedings and the subsequent prosecution is based on (a) a failure or refusal to answer; (b) an omission to disclose a material fact which should have been disclosed; or (c) the giving of an untruthful answer.' (which sounds very much like the terminology used in France where the J.I. is required to 'seek the truth'), Perhaps not unsurprisingly examples of such judicial proceedings exist in virtually all the statutes cited above[8].

**5.4 White collar crime: Regulation or prosecution?**

In England and France there are a number of agencies which investigate allegations of misconduct by members of the business community. The offenders may be dealt with by way of a number of civil sanctions which include; a suspension or ban from working in the particular sector, or fines. The investigation by the regulators can also lead to a criminal investigation and this would then be dealt with by the SFO or the police in England. When the criminal investigation results in the matter progressing to trial the evidence gathered by the regulators is frequently used as part of the prosecution case. As the decisions of the ECtHR show the imposition of a fine, whether civil or criminal, can amount to a criminal sanction and as such the defendant should receive all of the protections of the criminal law.

In recent years investors in England and France have experienced catastrophic losses, Maxwell, BCCI and Crédit Lyonnais are three of many. In the aftermath of

these collapses the financial service industry, and the press, usually conduct a *postmortem*, and while it is extremely difficult to apportion all the blame, the regulators and the SFO have been identified as having a crucial role to play in protecting the interests of investors and the victims of business crimes. The lines of demarcation are not always clear, some of the offences committed by white collar criminals are controlled by regulation, others are clearly criminal, the agencies charged with controlling these matters will often find that there is overlap between the work being conducted by one agency and another but, until recently, the division of responsibility was clear. Regulators applied civil and administrative sanctions and the SFO applied criminal. This can no longer be said with absolute certainty.

**5.5 The Financial Service Authority**

On 30th July 1998 the UK government published The Financial Services and Markets Bill: A Consultation Document [9]. 'An efficient and effective financial services industry is vital for our prosperity, stability and international competitiveness...That means having in place a clear, robust structure which provides a high level of market confidence, protection to consumers and the means to effectively tackle malpractice and financial crime' [10]. In the previous October the UK government had created a new statutory body the Financial Services Authority, FSA . The FSA brought together a number of regulators from banks, building societies, investment firms, insurance companies and others who are regulated in the financial services industry, to form one body that will regulate the entire financial services sector. The FSA has, '...clearly defined objectives and a single set of coherent functions and powers'[11]. In fact the FSA has taken over the responsibilities of nine regulators and is now one of the most powerful financial regulators in the world[12].

The consultation document was produced to allow the financial services industry the opportunity to comment on the proposed powers that the FSA would have to,

'...provide the solid foundations of a regulatory system that will last well into the 21st Century' [13]. It is worth reflecting at this point on the fact that the SFO is not a regulator of the financial service industry, it is a criminal investigation and prosecution agency. It is also worth reflecting on the fact that the powers afforded to the SFO have been the subject of considerable criticism, within England and also at the ECtHR and yet in this Bill, which has now progressed to the stage of being presented as an Act before parliament, the government has created an agency that will be charged with tackling financial crime.

The Joint Committee of the House of Lords and the House of Commons, which by its constitution is unique as this is the first time that a committee has been formed comprising of Lords and MPs, reported that, 'The main focus of the comment on the Draft Bill has been the disciplinary process. There has been a perception that the FSA's internal procedures may lack fairness and transparency, or be unduly costly and burdensome, and that the FSA will be able to act as 'prosecutor, judge and jury'"[14]. The question is does the FS&M Act create a super regulator or a super SFO?

Financial crime is defined in Clause 6 (3) of the FS&M Bill as (a) Fraud or dishonesty, (b) Misconduct in, or misuse of information relating to a financial market; or (c) handling the proceeds of crime. This is rather curious as there is no offence of fraud in England and the wide range of activities that these provisions are designed to encapsulate have previously been dealt with by the police and the SFO, not by a regulator. Clause 77 of the Bill states that the FSA may, '...make rules applying to authorised persons in relation to the prevention and detection of money laundering' This would appear to give the FSA the authority to make legislation. It is a requirement of Art.7 of the ECHR that a defendant can reasonably expect to know what offence he has committed prior to committing it. The FSA's legislation will not

be set out in statutory instruments and therefore will not be subject to direct parliamentary control. It is of serious concern that the Director of the FSA will have the authority to create legislation at all and it is particularly disturbing that the scrutiny of this will be limited to the relevant minister of state. The likely outcome of this provision is that there will be considerable litigation and the domestic courts and ECtHR will be expected to interpret the law in lieu of well drafted and well scrutinised legislation.

Under Part IX of the Bill the FSA is given extensive powers to gather information and conduct investigations into offences committed under the FS&M Act and also under Part V of the Criminal Justice Act 1993 (Insider Dealing) and offences committed under Regulation 5 of the Money Laundering Regulations 1993[15]. It is proposed under the legislation that the FSA should have the power to require information from any person who is or was formerly an authorised person. This provision extends to those who are connected with an authorised person as well as those who are connected with a recognised investment exchange or clearing house. This means that not only those who are, or where directly involved in the provision of financial services are caught, but also third parties[16]. Subsections (4) and (5) provide that documents subject to legal professional privilege may be withheld, although a lawyer can be compelled to disclose the name of his client. A person acting as an officer under the authority of the FSA can demand information and the production of documents without delay and a failure to comply with a request, or obstruction of the exercise is a criminal offence.

At this point it is worth reflecting back to the nature of regulation. Regulation is a civil measure which ensures that people working within certain sectors of the business community comply with codes of good practice. Failure to do so may result in sanctions being imposed all of which are civil in nature, not criminal. This means that

the requisite standard of proof is 'on the balance of probabilities', which is a lower threshold of proof than is needed to impose a criminal sanction. 'On the face of it, therefore, designating a regime as "civil" rather than "criminal" advantages the prosecutor by making it easier for him to get a favourable result. This raises the question whether using the civil burden of proof would fall foul of the ECHR in relation to provisions which are criminal for that purpose'[17] The FS&M Act incorporates a number of measures that are clearly criminal and yet the body that is authorised to implement the legislation is not the SFO or the police but a civil regulator. Surely it would be better to resolve the issues before enactment rather than leave it to the courts to determine which standard of proof is applicable.

The authority to conduct an investigation is vested in the FSA under the provisions of Clause 98 and covers the range of contraventions outlined above as well as 'It may be exercised in respect of any other 'related' offence which the Authority has power to prosecute under the Act, but has no power to investigate'. This would seem to invest the FSA with the ultimate 'catch all' proviso and suggests that in respect of conducting investigations the new FSA is to have powers even greater than those given to the Serious Fraud Office under the provisions of the Criminal Justice Act 1987. The FSA is also sanctioned to enter any premises occupied by the party subject to the investigation and to take copies of, or extracts from any documents. This power is included under the provisions of 'a request for further information' and is an authority to enter without warrant [18].

The model of the SFO powers are further apparent under Clause 104 which enables the investigating officer to, '...require the person who is subject of the investigation or any other person connected with the person under investigation- (a) to attend before the investigator at a specified time and place and answer questions on oath; or (b) otherwise such information as the investigator may reasonably require for the

purposes of the investigation'. In keeping with the spirit of the powers vested in the SFO a failure to comply with the request to attend or furnish information is punishable with a fine and/or imprisonment. Any attempt to conceal, destroy or falsify information increases the term of imprisonment to 2 years on indictment [19]. The FSA is empowered to keep the fines that it imposes.[20] Is it not a conflict of interests that the FSA can investigate and then determine venue and mode of disposal? Surely it is in the FSA's best interests to keep as many matters within the framework of civil disposal as possible, as this creates revenue for it and reduces the costs borne by central government.

There appears to be considerable overlap between the power and authority of the existing prosecuting authorities and the FSA. The response from the government was that, 'The Bill fills the gap in the current legislative framework to deter abuse of the financial markets through the introduction of a new civil regime for market abuse. This will complement, not replace, the criminal regime'[21].The FSA is authorised to conduct inquiries nationally and internationally, it has been granted powers to conduct investigations at all levels for itself and on behalf of other regulators from outside of the UK [22]. The FSA has now joined the police, CPS and SFO in the investigation and prosecution of white collar crimes.

The FSA powers raise a number of points for discussion. There are similarities that can be drawn between the role and function of the SFO, it can be argued that both agencies are quasi-inquisitorial and a move away from the model of accusatorial prosecutors, and that the authority to impose sanctions raises substantial concerns which are in direct conflict with the ECHR. The power to create legislation is of great concern and also since the FSA can instigate civil and criminal proceedings how will it put in place appropriate walls to segregate a civil inquiry from a criminal, or, will all the information obtained, under compulsion, be available to the criminal prosecutors?

Conversely, since the fines that are imposed by the FSA remain with it, will cases be dealt with as civil when in fact the full protection of the criminal law should have been made available to the suspect, as the alleged offence is criminal?

The drawing together of all financial services regulation is a welcome move. The objectives of maintaining confidence in the financial service system and promoting public confidence and understanding are crucial if the financial service sector in England is to compete in global markets. But these best intentions must be balanced against fairness and accountability. 'Of course nothing in the Bill will conflict with the government's wider approach to the freedom of information...' [23]. Supervisory failure is one of the criticisms that has been leveled at the financial service sector in England in the aftermath of BCCI, Maxwell and Barings. The response from the government has been to create a new agency with draconian powers and sufficient autonomy that the burden of responsibility moves away from central government. In the future it may be extremely difficult to establish at exactly what point the government or the Bank of England should have intervened in a pending white collar crime scandal when the onus of responsibility rests firmly with a regulatory body operating which operates some considerable distance from the Treasury.

The imposition of fines and compelling a suspect to answer questions have been held to be criminal in nature however, the ECtHR does not have the authority to cause a state to change its criminal laws and consequently the provisions of the ECHR can be ignored by a nation state. The UK has effectively done this as no changes have been made to the law in the light of the Saunders ruling. The FS&M Bill is written in the spirit of the CJA 1987 and on the basis that the imposition of fines by the FSA and the power to impose a penalty for failing to answers questions is not criminal. Opinion is divided on this.

### 5.6 The 'British' Article of the ECHR

To determine that an offence is criminal rather than disciplinary three issues must be considered, (a) whether the law defining the offence falls into the category of criminal law under domestic legislation, (b) the nature of the offence, (c) the nature and degree of the penalty. Lord Lester, QC believes that the nature of the provisions contained in the FS&M Bill should be interpreted as criminal. Firstly because the offence of market abuse can lead to the imposition of unlimited fines and yet the offence itself is insufficiently defined in the Act. 'If you look at the definition of market abuse, Clause 56 (1)(c) in particular, that is not, I submit, a prime example of something that gives people a very clear intention of what conduct is permissible'[24]. If this is the case then a defendant would be liable for committing an offence that he did not know existed. This is contrary to Art. 7 ECHR which prohibits the retrospective imposition of criminal offences and penalties and requires that in accordance with the principal of legal certainty an offence must be clearly defined in law in order that an individual may reasonably foresee the consequences of his actions [25]. Secondly, because 'So far as concerns the disciplinary offences provided for in Parts V and XII of the Bill...we have found nothing ...to cause us to differ from the view expressed in the joint Opinion of 27 October 1998, that such offences are likely to be treated as criminal in substance for the purposes of attracting the procedural safeguards of Article 6'[26]. The decisive test in the view of Lord Lester is what is at stake for the individual or firm, the gravity of the offence, and the severity of the potential sanction. 'These are not alien, foreign, curious European standards; the standards in Article 6 of the Human Rights Convention were drafted by British legal civil servants reflecting ancient British principles of natural justice and fairness and Article 6 is described in Strasbourg as the 'British' Article of the Convention'[27].

## 5.7 The Joint Committee of the House of Lords and the House of Commons

The joint committee from the House of Lords and the House of Commons expressed serious concerns over the issue of human rights and requested that the Treasury respond to the points raised by Lord Lester [28], that the, '...Government's approach is too sweeping..., and leaves scope for considerable legal uncertainty and a real risk of successful legal challenge in a particular case' [29].

The government has issued a statement under s.19 of the Human Rights Act 1998 to state that the FS&M Bill provisions for market abuse fully meet the Article 7 requirement for certainty.[30] This does not however, satisfy all the points already raised. The Bill still has no clause to restrict the use of compelled statements and unlimited fines have been retained. In the words of the Economic Secretary to the Treasury, 'The distinction between protective and punitive is not an absolute one...the disciplinary regime applies to the limited group of people who have chosen to become authorised persons within the regulatory regime of financial services' [31]. The arrogance of this response is quite astounding and the message is clear, if you choose to work in the financial services industry then don't expect the protection of the law as it applies to the rest of society.

The government's response to criticisms over the potential abrogation of human rights has been predictable given the attitude taken towards the decision of the ECtHR in Saunders. 'There is a very real difficulty in applying ECHR jurisprudence to regulatory and disciplinary decision-making. The Minister told us there was "room for disagreement between lawyers" about the application of the ECHR, and that the case law was complex and inconsistent...' [32].

Regulators are charged with supervising the conduct of members of the business community who have the opportunity to tread the fine divide between sharp business

practice and criminal conduct which is frequently fraudulent[33]. Fraud is an offence that can be committed as a civil offence as a misrepresentation and also as a criminal offence as a deception. It is becoming increasingly difficult, as the nature of these offences become more complex and span numerous jurisdictions, to define precisely at which point the civil law stops and the criminal law begins. The interface between civil and criminal offending is becoming blurred in the efforts made by governments to protect consumer interests. This is in part a justification for the establishment of the FSA. It may also be that imposing unlimited fines on white collar criminals, who do not have the protections of the criminal law, is a very cost effective way of controlling the expense of investigating and prosecuting white collar crime. Andrew Large[34] stated that, 'An important question that must be addressed in the debate over the design of the system is the trade-off between the costs of regulation, the level of loss from fraud and the failure that can be permitted, and the extent to which any resulting losses should be borne by individual investors'.[35]

## 5.8 Conclusion

'The idiot who praises with enthusiastic tone

All centuries but this and every country but his own'.[36]

In *R v International Stock Exchange of the United Kingdom*[37] Bingham MR commented that, '...in a highly sensitive and potentially fluid financial market...the courts will not second guess the informed judgment of responsible regulators steeped in the knowledge of their particular market'.[38] Misconduct in the business sector should be discouraged from the outset and if regulators were completely successful at identifying misconduct then it might be reasonable to expect an absolute minimum of criminal prosecutions. In cases not amounting to a white collar crime the regulators should take the lead in stopping the activity and compensating the victims. When regulation and discouragement fails, white collar offenders should

be prosecuted and punished. It follows that the need for regulators to co-operate with investigators, nationally and internationally, is crucial. It does not follow that regulators should be given increased powers to conduct their own civil and criminal investigations and prosecutions.

Evidence gathering is not the sole preserve of the police and the SFO, it is also a legitimate function of regulators and it is increasing, as the nature of enforcing compliance provisions can involve proactive and covert activities, for example, the Securities Investment Board, SIB, have referred 49 cases to the police/SFO. This has resulted in 8 trials and 8 convictions[39]. Regulators are well placed to observe unauthorised investment transactions and gather information in advance of intervention.[40] Where appropriate, when criminal charges are to be laid these bodies can assist in the preparation of charges as well as subsequently assisting the trial court in estimating losses and methods of restitution.

The regulation of an international financial services industry is complex, it is not always possible to define, precisely at which point sharp business practice becomes criminal. Consequently, it is crucial that regulators and criminal investigators know where the division of responsibilty is, as a failure to appreciate this can lead to procedural problems at trial. The standard of proof required in civil and criminal proceedings is different, as are rules of evidence, procedure and confidentiality. It appears that many of the evidential problems have been overcome, some would say to the detriment of the victim and the defendant's human rights.[41] The Director of the newly formed Financial Services Authority, Howard Davies[42], commented,

> 'I would see a couple of weaknesses [in the present system]. One is that the two-tier structure has meant there have been far too many sterile debates about whose powers should be used and in what order. There is a second question about whether the law itself needs to be changed.

There is a strong argument for saying that the new Financial Services [and Markets] Bill will give us the opportunity to look at certain aspects of this, such as whether you need civil penalties for insider dealing as opposed to criminal penalties or as well as criminal penalties...if you come up with a workable definition of insider dealing and market abuse, civil penalties would be more appropriate'[43].

The confidence which the FSA and SFO place in civil remedies is misplaced. The multinational companies who are operating within the financial services sector have experienced massive increases[44] in fraud and the message that regulation can all too frequently send out is that it is acceptable to appropriate company funds because if you get caught then the regulators will not prosecute and it is the company that will be fined for failing to control their staff. Corporate governance is territorial at present and to allow this to continue may foster confusion for the future, particularly if the investigators of white collar crime in England and France are encouraged to reciprocate and the regulators are not.

The regulation, investigation and prosecution of white collar frauds have attracted considerable notoriety in recent years. Part of the reason is simply that criminals have perpetrated elaborate and highly effective crimes, part of the reason is ineffective regulation and part is due to investigation and prosecution methods that have been found to treat white collar offenders less favourably than other criminal defendants. The standard of conduct expected of company officers and companies throughout Europe is not uniform and consequently the regulation of malpractice is divergent. The attempts to introduce a European Company Statute have so far failed to reach more than discussion level and nationalistic preferences still appear to dominate progress.[45]

The introduction of a single regulatory authority in England is a good idea, it means that consumers, victims, and regulators and investigators from other jurisdictions will, in the future, know who to direct inquiries through. The powers vested in the new regulator are draconian, ill thought out and will do very little to promote confidence in the financial markets in England, either internally or externally. The provisions of the FS&M Act allow for the recuperation of costs, at the discretion of the court, from the convicted party. This assumes that convictions will follow. The similarities between the FSA and the SFO are clear. Given the difficulties that the SFO has experienced in securing convictions, perhaps it is not unrealistic to suggest that the FSA will encounter similar problems. In which case the burden of paying for this duplication of roles will fall on the financial service provider, not, as at present the government. The draft documentation does not satisfactorily deal with the balance that needs to be struck between effective regulation, the promotion of an active market and risk accountability.

The UK government will soon ratify Article 4 of Protocol No.7 of the ECHR, when it does the FS&M Act will be in violation of that Article as it allows for the dual prosecution of a person for breach of the criminal law for insider dealing or breach of s.47 of the Financial Services Act 1986, and also prosecution under the FS&M Act for the offence of Market Abuse. A further consequence of the incorporation of the ECHR into domestic law is that it will be unlawful for a public body, such as the FSA, to act in a way that is incompatible with a Convention right.

The UK financial services industry accounts for 7% of the GDP[46] and London continues to be a major global financial centre. The restructuring of regulation in the UK has implications for the effective prevention of white collar crime in England and beyond, within the EC and globally. There are differing opinions about the merits of whether to regulate or prosecute, however, until the creation of the FSA at least the

division of responsibility was clear. The introduction of the new super regulator has clouded the picture of white collar regulation and prosecution within England.

The Joint Committee on Financial Services and Markets made 43 recommendations to the government, in respect of just one issue it said the following, 'We consider that there is a compelling case for the Government to respond to the concern that the market abuse regime is criminal in substance in ECHR terms and that the necessary safeguards do not appear in the Bill as drafted'[47]

In the following chapter the international dimension of white collar crime investigation is discussed with a particular emphasis on mutual co-operation. As a result of the FS&M Act it is very difficult to see how a J.I. in France, who is charged with investigating a multi-jurisdiction white collar crime, could be confident in who to request assistance from in England and also, whether the assistance given would pass the hurdle of fulfilling the requirements of the ECHR.

## Endnotes.

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[1] Dennis, I. 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the privilege against self-incrimination', *Cambridge Law Journal* (July 1995) Vol. 54. No. 2. pp.342-376. at p. 342.
[2] (1993) 16 EHRR 297
[3] Application No. 19187/91, *The Times* 8th December 1996
[4] *The Times* 1st May 1997. CA
[5] 1993. AC 1
[6] *The Times* 09/12/92. CA
[7] The full list is: Section 43(5) or 44(5) Insurance Companies Act 1982, Section 434(5), 443, 446(3) or 447(8) Companies Act 1985, Section 433 Insolvency Act 1986, Section 94(3), 105(5) or 177 (6) Financial Services Act 1986, Section 41(10) or 42(5) Banking Act 1987, Section 2(8) Criminal Justice Act 1987 and Section 83(6) Companies Act 1989.
[8] S.1 perjury Act 1911, s. 451 Companies Act 1985, s.353 Insolvency Act 1986, s. 98 Banking Act 1987 and s.2(14) Criminal Justice Act 1987.
[9] The document is divided into three parts. Pt 1. Overview of Financial Regulatory Reform, Pt 2. Draft FS&M Bill, Pt. 3 Explanatory Notes.
[10] Gordon Brown MP, Chancellor of the Exchequer. Forward to Part 1. Financial Services and Markets Bill
[11] *Financial Services and Markets Bill: A Consultation Document*, London, HMSO (July 1998) Part 1. para. 1.1
[12] Joint Committee on Financial Services and Markets, *Draft Financial Services and Markets Bill*, First Report, London, HMSO (April 1999) Vol.1. p.31. para 103.
[13] *supra.* Note.11
[14] *supra.* Note 12. p.40. para. 147
[15] Clause 216 (1) (a) (b)
[16] Clause 105. 'Under subsection (1) any person exercising powers under this Part to obtain documents which appears may be in the possession of a third party (i.e. not the person under investigation or a connected person), may exercise the power in relation to a third party'
[17] *Op.cit.* Note 12. p.47. para. 175.
[18] Clause 101. It does not extend to domestic premises.
[19] Clause 106 (5) (b)
[20] *Op.cit.* Note 12. p.56. para. 226.
[21] *ibid.* Note 12. p. 44. para. 15.5
[22] *ibid.* Note 12. p. 44. para. 7.9
[23] Graham, G. 'Frankenstein's watchdog?' *Financial Times*. 04/08/98
[24] *Op.cit.* Note 12. p.63. para. 262.
[25] *ibid.* Note 12. p. 95. para. 3 and see: Kokkinakis v Greece (1993) 17 EHRR 397.
[26] *ibid.* Note 12. p. 97. para. 11
[27] *supra.* Note 12. p.46. para. 164
[28] Joint Committee on Financial Services and Markets, *Draft Financial Services and Markets Bill. Parts V, VI, and XII in relation to the European Convention on Human Rights*. Second Report. London, HMSO (1999).
[29] *ibid.* p. 6. para. 10.
[30] *'Memorandum from HM Treasury to the Joint Committee on Parts V, VI and XII of the Bill in relation to the ECHR'.* 14th May 1999. para. 15.
[31] *supra.* Note. 28. Joint Committee on Financial Services and Markets, Second Report. Examination of Witnesses. 19 May 1999. Ms Patricia Hewitt. p. 7. para. 4.
[32] *Op.cit.* Note 12. Joint Committee on Financial Services and Markets, First Report. London, HMSO (1999) Vol.1. p.41
[33] Referring to business regulators. Brathwaite 1984. cited in Croall, H. *White Collar Crime: Criminal Justice and Criminology* Buckinghamshire, Open University Press (1994) p.83.
[34] Former Chairman of the Securities Investment Board, SIB.
[35] *The Costs and Effectiveness of the UK Financial Regulatory System. The City Research Project, Subject Report II .March 1993*, London, The London Business School (1993) p.2.
[36] Charkham, J. *Keeping Good Company,* Oxford, Clarendon Press (1994) p.363.
[37] [1993] 1 ALL ER 420.

[38] Rider, B. 'Enforcement of Financial Services Law with Reference to Insider Dealing.' in Rider, B. & Ashe, M. (eds). *The Fiduciary, the Insider and the Conflict*, London, Brehon and Sweet & Maxwell (1995) pp.193-229. p.195.
[39] *supra.* Note 35. The London Business School. p. 2.
[40] The quality of the evidence gathered in England for use in a subsequent trial would appear on the facts to be of a very high standard as to date 76 of 82 defendants have been convicted in cases where the regulators have referred the matter to the criminal authorities. Source: *Op.cit.* Note 35. The London Business School (1993) p.2.
[41] Rider, B. ' Proceeding in the Public or Private Interest?', *The Company Lawyer* (1994) Vol.15 No.9.p.258.
[42] Davies was formerly deputy governor of the Bank of England. See further; De Salis, H. & O'Neil, N. 'Further Thoughts On The Future Of Regulation', *Compliance Monitor* (July 1997) Vol.10. No.2. pp193-194.
[43] *The Sunday Times*. 25 May 1997. p.3. a view regrettably endorsed by the former Director of the SFO, George Staple. See also: Rider, B. *Op.cit.* Note. 38 at. p.206.
[44] For a guestimate of losses see, Monty Raphael 'Economic Crime'. *Lawyers in Europe* (February 1994), Issue 29. pp.9-11.
[45] *Op.cit.* Charkham Note. 36. p.154
[46] Source: Gordon Brown. *Op.cit.* Note.10.
[47] *Op.cit.* Note 12. p.67. para 280.

# Chapter 6

# Cross-Border White Collar Crime Investigations and Mutual Cooperation.

## 6.1 Introduction

International white collar crime creates specific problems that are not encountered domestically in that legal, linguistic and cultural barriers all combine to present potential barriers to effective investigation and prosecution. Co-operation between the agencies from different countries is absolutely vital and this can be effective, whether it is formal or informal. In England 43% of central squad operations are directed at cross-border crime of which 9% is specifically international. 36% of those international cases are frauds.[1] As yet there is no overall strategy in England or France for responding to this phenomena. It is apparent that a range of issues, political, financial, territorial and differing legal cultures, have so far prevented a concerted and combined effort between the investigating agencies of either jurisdiction to effectively deal with international white collar crime. In this chapter I shall investigate the channels that currently exist for mutual assistance between the police, judiciary and lawyers in France and England.

In the fight against white collar crime European legislation has shown the way forward and the implementation of European Directives in France and England have provided the basis for a greater understanding of the differences that exist in the compilation of evidence within each jurisdiction. These provisions have caused the legislature in each country to consider further measures to prevent and detect complex white collar crime. In France the proposals have been implemented, in England the relevant legilstaion has yet to be enacted. In this chapter I propose that there should be an immediate implementation of Sections 1-6 of the Criminal Justice Act 1993.

It was shown in the previous chapter that white collar crime is not exclusively investigated and prosecuted by the police, SFO and the J.I. In this chapter the role of the regulators, nationally and internationally, is commented upon within the context of mutual assistance, in order that a complete picture is presented of the complexity of issues that can deter effective white collar crime prevention and detection. In the conclusion to this chapter it is recognised that the likelihood of either France or England ceding national sovereignty in criminal matters is remote and a unified EC legal system is a vision for the future. For the present, the success of multi-jurisdiction investigations must lie in a greater understanding of existing legal systems together with the promotion of a climate of cooperation.

## 6.2 Cross-border crime and mutual assistance

One of the many challenges facing the agencies charged with investigating white collar crimes is how to effectively deter and detect white collar offences committed by the traveling cross-border offender as well as dealing with the international fraudster who is able to facilitate the criminal act through electronic communications without leaving a jurisdiction. Those who travel to commit crime are recognised as generally being experienced criminals. The competent fraudster will use the differences that exist in policing and evidence gathering in France and England to increase his criminal enterprise. It is a deliberate strategy of the experienced criminal to improve his chances of completing criminal acts or reducing the chances of detection by devising inter-country complex frauds. Effectiveness and accountability are challenges to the police forces of France and England which must be satisfied alongside inter-agency investigations. The desire to satisfy local authorities and domestic politicians at the expense of combined international operations is a real threat to current efforts to counteract complex cross-border frauds.

'It sometimes happens that the police in one country are trying to combat a criminal activity, while at the same time the police in another country are trying to combat another part of the same activity. In a manner of speaking, the left hand does not know what the right hand is doing. Public prosecutors and the police of various countries can help each other if they are aware not only of the activities of their respective colleagues, but also how the law operates in this area. Most police officers and some public prosecutors have no idea how international co-operation can be brought about. international criminal justice is not normally taught at police academies and is often only an option at universities. It is also usually taught from the perspective of the law of that particular nation'[2].

This is a very pertinent remark given that the volume of multi-jurisdictional frauds which the authorities of England and France are required to investigate is increasing, and the need to work alongside investigators from the other jurisdiction is itself becoming a regular feature of white collar crime inquires[3], for example, a current and ongoing investigation by the French authorities into alleged insider dealing in Eurotunnel shares, has resulted in officers of the *brigade financière* visiting England and working together with lawyers from the SFO.[4] The investigation 'Calibre Chase' into the affairs of Bank of Credit and Commerce International has at present resulted in inquiries in 15 jurisdictions.[5] In the Pechiney-Triangle investigation into insider trading, it was the the American Securities & Exchange Commission, SEC, that notified the French authorities of the substantial volume of trading being generated from France in advance of the takeover of the US based Triangle Industries[6].

### 6.3 International co-operation

International co-operation between investigating agencies, within the context of the European Union, has developed along both formal and informal lines. Police officers will frequently rely on a personal contact from another country rather than use the

official channels which can themselves be counterproductive.[7] Concern over the ability of the criminal to profit at the expense of poor collaboration between police forces generated the *Premier Congrès de Police Judiciare Internationale* in Monaco in 1914. The outcome of this conference was the creation of the international police organisation in 1923, Interpol.[8] The member states of the European Union took specific action against the increased threat of terrorism and transnational crime by the creation of the consultative body, TREVI.[9]

The increased international nature of serious crime led to the development of a European Drugs Intelligence Unit which has now become part of the European Criminal Police Office, Europol.[10] There are twenty seven Liaison Officers at Europol and all can access their own national databases for information on suspected criminals.[11] The terms of reference for this unit are, 'Exchanging and analysing information and data on the following once they concern two Member States or more: Unlawful drugs trafficking, illicit trafficking of radioactive and nuclear materials, illegal immigration networks, illegal trafficking in motor vehicles and the criminal organizations involved therein and associated money laundering'.[12]

The Single European Act 1987 sought to establish a Union without internal frontiers in which, '...the free movement of goods, persons, services and capital is ensured'.[13] It was anticipated that these objectives could be achieved by 1st January 1992 and a Co-ordinating group was established comprising of police, customs and immigration to identify how the objectives could be achieved without compromising the security of the EU.[14]

There is a further system for mutual co-operation between those countries that are party to the Schengen agreement.[15] In the Schengen Convention, Articles 39-47 of Title 3, inform police officers of their legal position during operations which involve

cross-border operations, setting up telephone taps, radio and telecommunications lines and the authority of officers on secondment in alternative member jurisdictions. It is crucial for the effective investigation of serious crimes that the police are familiar with the laws of the country in which they are operating. In the field of white collar crime the complexity of issues will require the investigator to be not only conversant with their own provisions but also the differences that exist within the application of the criminal law, as criminal procedure and codes are, as we have seen, markedly different within the Common Law jurisdiction of England and under the codes of France. When considering the investigation of white collar offences in both countries the way in which police powers are defined also presents a considerable challenge to investigators when the primary source for investigation is the police. This is particularly so for the English police officer who has a broad degree of autonomy which is not mirrored in France, and may well be perceived to be a negative factor when conducting an inquiry within France into a multi-jurisdictional fraud offence. No police officer has delegated powers in another member state and the development of Europol has not created a Euro-wide police officer, with international policing powers. The criminal law remains distinctly domestic and the powers to investigate have remained largely within the appointed officers nation.

Specific provisions have been enacted to support the investigation procedures between contracting European Union member states. The closest that England and France have had to come to facilitating operational cross-border policing has been through the opening of the Channel tunnel.[16] The opening of the tunnel means that in the future English police officers will operate in the immediate vicinity of the frontiers of France and French police officers will operate on English soil. A major issue for debate which has yet to be resolved is the carrying of firearms in England by French police. 'The Protocol on policing the Channel Tunnel'[17] requires the two nations to work together and '...to the fullest possible extent co-operate, assist one another and

co-ordinate their activities in discharging their duties'.[18] Whilst this has created unique policing issues which have an application within the sphere of serious fraud investigations, the potential problems that dual policing may create within the tunnel are directed towards terrorism rather than fraud.[19]

In respect of the potential for an organised fraud to be effected against transnational train carriers, the legal position is distinctly different in each jurisdiction. In France avoiding payment of fares is a civil offence. It is only an *infraction* if the passenger subsequently fails to pay SNCF the revenue. 'Fare dodging' is not, however, a minor offence in England where although the individual may only be withholding a relatively small amount of payment in gross terms the volume of frauds committed against the former British Rail in 1990 amounted to £50 million.

When viewing serious and planned frauds, the distinction between offences and the organisation of criminal conduct within each jurisdiction tends to fuse, there is little to differentiate between the serious criminal operator in France and England. Investigations into alleged frauds against the French state railway SNCF are investigated not by the OPJ but professional investigators who have delegated powers to search and arrest.

**6.4 Local accountability, international problems**

The concept of mutual assistance is constantly compromised by the local pressures under which all investigators must operate. Multi-National frauds compound this dilemma as the cost of conducting inquiries is at a premium in domestic white collar offences. Once the allegation assumes international status then the financial burden on each jurisdiction is multiplied considerably. If a bi-jurisdictional fraud is investigated in England and there are duplicate issues which are already contained in the file generated here then it would be expeditious if the same file could be

transferred to France. Although the facility for this exchange of information exists, the reality may be that this does not take place and the relevant authorities are effectively duplicating the contents of a file for submission within their own jurisdiction. To advance a system whereby an exchange file is admissible in another European Union state would be both time and cost effective. The EU Justice Ministers agreed in January 1996 that the criminal justice systems of the member states should be integrated where possible[20].

Operational policing which transcends national boundaries creates its own unique difficulties as the officers have no jurisdiction within each other's country. In theory officers from one jurisdiction can liaise with their colleagues across a border through the channels of Interpol. This is both time consuming and ineffective if the matter is urgent. Personal contact has therefore been the established route for a number of years and international conventions are the fora at which these vital links are frequently established. Language barriers have been addressed, specifically in respect of the Channel tunnel, and a formal communications system has been established for cross-border inquiries and major incidents.[21] There is at present no provision for these projects to extend into the development of a general language for the facilitation of multi-jurisdictional inquiries. What policing the tunnel has stimulated is an appraisal of the entire question of multinational policing against the already established, albeit modest, integration of police forces within the Schengen Convention and Europol.

The UK has resolutely declined to join Schengen although there are clear advantages as well as the alleged disadvantage of not controlling entry and exit points into this jurisdiction. With regard to policing a range of criminal offences, including complex white collar crimes, an advantage lies in Article 39. Paragraph 1 of The Schengen Agreement which states, 'The contracting parties undertake to ensure

that their police authorities shall, in compliance with national legislation and within the limits of their responsibilities, assist each other for the purposes of preventing and detecting criminal offences...' Such assistance is extended to facilitating cross-border pursuits under Article 41. Retrospective approval is therefore obtainable in matters of urgency and this range of assistance provided for amongst the Schengen countries would undoubtedly foster mutual respect and co-ordinated assistance if the UK were to join. The current provisions are workable but are frequently hampered by bureaucracy and time delays, all of which are to the advantage of the suspect and not the investigators.

The era of multinational cross-border investigations is a reality for the future of all Europe and given the geographical location of England, mutual assistance in complex inquiries with France must be a priority. The decisions of the domestic courts as well as the ECHR and the ECJ have all indicated a move towards harmonisation of the application of the law in respect of a suspects pre-trial and trial procedures.[22] It is unlikely that the powers of officers attached to Europol will be extended.[23] A European type FBI and supra-national policing is not on the immediate agenda, albeit, the issue is subject to regular attention from the press. However, the establishment of national investigators has become a reality in England with the creation of the National Crime Squad, under the provisions of the Police Act 1997. National police squads are already established in France where complex frauds are investigated by the PN. To sustain an isolationist view of law enforcement is regrettable as it is the international criminal who profits from the politics of competing nations.

### 6.5 Measures to stimulate the flow of information

The successful prosecution of international offenders is largely dependent on the flow of information and co-operation between investigating agencies. This means the

obtaining of evidence from another jurisdiction either by the officers investigating from the forum state or on their behalf by officers of the other jurisdictions. France which has terrestrial borders[24] with a number of other countries has developed a comprehensive system of mutual co-operation to defeat trans-frontier crime. There is evidence of good working relationships between operational police forces who together police borders, particularly where the French language is common to each police force. The border region around Lille in France and Kortrijk in Belgium is policed by officers from each country and the exchange of information has official bi-national support and financial assistance. There is a regular exchange of data between the two forces and officers from each station visit each other's territory regularly. The key to the success of this arrangement would appear to be the mutuality of language. The OPJ who are charged with the investigation of serious crimes in the region are able to use the environment of trust and respect established by their uniformed colleagues to conduct criminal investigations in a manner that would be familiar to internal policing, not transnational.[25]

The view taken by the French police is that it would be extremely difficult to provide meaningful language training in the languages of all the bordering states. Training is therefore concentrated on English, which is frequently a common second language to all the countries. All new recruits to the PN receive a minimum of 40 hours tuition in English language and for those entrants who have no previous familiarity with English this is increased to 80 hours. Officers of the OPJ who investigate serious white collar offences which frequently transcend national borders are permitted to apply for additional language training.[26]

The exchange of data between investigation agencies is not only facilitated through bi-lateral agreements but is also formalised through the work of Europol. At present information held by Europol is restricted for use by the EU member states, however,

it is proposed that in the near future this should extend to non-EU countries. The development of Europol is outside of the parameters of this thesis but it is worth noting that if the proposals are implemented then the role of Europol will become global. This creates a potential conflict, as the global face of international policing is currently represented by Interpol. If this occurs then there are implications for the investigation of white collar crime. Who should an investigation agency direct its questions through, Interpol or Europol? Whose laws of evidence will apply to the collection of the data? How will the source of the data be verified? Will Europol be liable for the supply of incorrect information? Will officers from Europol be required to attend court and give evidence and if so what is their status? Are they attending as expert witnesses from another jurisdiction? [27]

As the work of investigators becomes more specialised, as in the investigation of serious frauds, then the need to develop a close working relationship with officers from a corresponding jurisdiction increases. Specialist departments, such as, fraud squads and the *brigade financières* have the opportunity to establish links through conducting multinational inquiries and through liaison offices. The French Liaison Officer for the PN based at the National Criminal Intelligence Service, NCIS, in London, is a regular visitor to New Scotland Yard and the channel through which links are established between investigative officers from each country. The establishment of liaison officers means that problems common to each police force can be discussed in an environment of mutual professional trust and respect and that any further inquiries can be conducted through a known source.

The unofficial method of police co-operation is of benefit to those investigating serious white collar offences as they can establish commonality of objectives, which in itself contributes to the enhanced policing of all Europe rather than an individual nation state within Europe. Increased co-operation between investigators is a

practical and necessary tool to help combat crimes which transcend national boundaries and the continued reliance on national, rather than International, criminal law makes the understanding of the Civil Law and Common Law crucial to the role of specialist investigators for the foreseeable future.

Broad support for increased police co-operation is a key issue for development in the immediate future as it is through the establishment of personal contacts that multi-national complex investigations can be harmonised. The first step in successfully investigating a complex white collar crime which has been perpetrated in both France and England is that the investigators should talk to each other in an environment of mutual trust. Where the system fails is that the establishment of *ad hoc* case-by-case relationships does not secure any future environment for mutual co-operation and if an investigator is transferred to another specialist unit then the experience established is lost to the detriment of future inquiries.

In complex frauds, a number of issues will be frequently interrelated. The free flow of information between specialist units in England and France is essential for the future combating of transnational frauds,

> 'For effective cooperation between all the services with a police duty, it is of course necessary that conditions must be created for rapid exchange of the most recent information. Currently there is no harmonization at a European level of inquires, and consequently, it is not possible to link various inquires with international aspects. So, provisions must be made rapidly to ensure good communication between the various teams in European countries'.[28]

The authority for investigators to operate within another country is extremely limited and officers must always be accompanied by investigators from the host state. The

alternative to this is to establish a body of investigators, of professional status such as the SFO and the *juge d'instruction* who have authority to personally conduct inter-country inquiries. This is the situation in respect of investigations into alleged fraud against EC community funds, where the Commission has established a form of police unit, UCLAF[29] which is based in Brussels.

> 'The picture in relation to serious fraud is different in that almost by definition offences have a cross-border dimension which is likely to be national or international. The indications are that although the numbers of offences in this category are static over time, they may be becoming more complex and global in nature...The problem this type of cross-border crime presents to forces is...even when a force is investigating a known offender, difficulties are often presented to an investigating officer relating to the gathering of evidence from the many locations that are invariably involved in the major fraud enquiries'[30].

White collar crime represents a particular challenge to law enforcement co-operation as the complexity of issues has by necessity caused the development of multi-disciplinary investigation teams. Police officers are frequently suspicious of other police officers and so to expect that they are not reluctant to share information with lawyers and accountants even from within their own jurisdiction would be naive. To develop a framework of mutual trust amongst multi-national and multi-disciplinary agencies requires a considerable amount of trust and co-operation. This can only be developed by the promotion of official agreements combined with the establishment of specialist international agencies. At present the system is over reliant on goodwill and professionalism.

Tupman has commented, 'Existing policy-making structures are competitive and contradictory. This has its roots to some degree in the post-war continental European resistance to centralisation in the field of policing policy arising out of the totalitarian experience of the Second World War. Nevertheless, the involvement of the Ministries of Justice, the Interior (normally now translated into English as Home Affairs), Defence, and in the case of fraud and customs duties, Finance, makes for a long drawn-out policy-making process. Multiply four ministries by 15 Member States and calculate the chances of obtaining unanimity from 60 units, and it comes as a great surprise that any progress has been made at all'[31].

### 6.6 The European Convention on Mutual Legal Assistance

The European Convention on Mutual Legal Assistance in Criminal Matters 1959, ECMA, and the 1978 Additional Protocol, are agreements between the European Union member states which form the legal channels for the exchange of information and assistance in obtaining of evidence between contracting states. In France when the J.I. requests a *commision rogatoire* he will use the provisions of the European Convention on Mutual Legal Assistance in Criminal Matters 1959.[32] Article 1 states, 'The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences, the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.' The ECMA does provide grounds for refusal which incorporate seizures of evidence in respect of fiscal offences and offences committed which contravene military law.[33]

Article 3, paragraph 1, ECMA states, 'The requested party shall execute, in the manner provided for by its law, any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting party for the purpose of

procuring evidence or transmitting articles to be produced in evidence, records or documents.' Whether the request is from England or to England, all requests for assistance should be viewed in the context of established international mutual assistance such as extradition, transfer of proceedings in criminal matters and transfer of the enforcement of verdicts under criminal law.[34]

The ECMA was ratified by the UK in 1991 and is one response to deterring international fraud within Europe.

> 'First, having recognised the inadequacies of our existing legislation, we have been determined to secure arrangements which will place us in the first rank internationally in our ability to co-operate with other countries in this most important of areas. Secondly, we have sought to ensure that, once the measures that have been adopted in the bill have been enacted, we will be able to seek assistance from countries to just the same extent, and in some ways, as we are able to offer help to them. Thirdly, we have been conscious that, however much we may wish to assist other countries, we cannot ask Parliament to make greater powers available on behalf of overseas authorities that are not available to our own police or prosecutorial authorities in domestic cases'.[35]

Section 3 of The Criminal Justice (International Co-operation) Act 1990, CJICA, is the statutory basis for the issuing of a Commission Rogatory, letter of request, when the assistance of a foreign jurisdiction is sought in the obtaining of evidence. This act is the principle source of United Kingdom mutual assistance powers and has authorised the Secretary of State to direct a court to take evidence at the investigation as well as the prosecution stage of proceedings in another jurisdiction.[36] Evidence includes documents and all other articles. This is clearly wide enough to include the current

and diverse methods by which information is stored and retrieved. These provisions do not affect the established police-to-police requests for preliminary inquiries to be conducted and all such maters are officially dealt with through Interpol.[37]

There are two distinct elements to the CJICA, obtaining evidence from abroad for use in the English courts and obtaining evidence on behalf of a requesting alternative jurisdiction. The Secretary of State is authorised to designate courts in England to accept requests for assistance from a court or tribunal or judicial authority in France. It is a requirement of acceptance that an offence has been or is reasonably suspected to be committed in the requesting country and also that, either an investigation is being conducted or proceedings have commenced.[38]

Section 7(10) of the CJICA permits the police to search and seize for evidence on behalf of the investigating authorities in France. This is an extension of the powers contained under PACE but is limited to those matters which are considered to be an arrestable offence[39] or a serious arrestable offence[40] in the requesting jurisdiction. The Central Authority will require sufficient information to assist the court in deciding whether or not the offence constitutes an arrestable offence under English law.[41] The evidence obtained must be then forwarded to the Secretary of State for onward transmission to the requesting country. The provisions can be interpreted by the following example: If a British national resident in the UK is suspected of planning and arranging a serious fraud whilst in England and of committing the fraud in France, the J.I. may request a search of the suspect's home and offices in England. The English police, or the SFO, may also apply to a circuit judge for a production order to gain access to the suspect's bank in England to attempt to trace the proceeds of crime.

In *Regina v Secretary of State for the Home Department and Another*, *Ex parte Fininvest SpA and Others*[42], the defence alleged that the request for evidence to be obtained by the SFO had been a 'fishing trip'.[43] Lord Justice Simon Brown held that,

> 'When one spoke of evidence in the context of a criminal investigation, the permissible area of search had inevitably to be wider than once the investigation was complete. In short, the 1990 Act [Criminal Justice (International Co-operation) Act 1990] created a wholly new scheme for mutual assistance with regard to criminal investigations under which it would plainly be necessary to examine altogether more material than would ultimately constitute evidence at any trial'.[44]

The Central Authority is specifically required to consult with the SFO over matters relating to requests for assistance in England where a serious fraud case is being investigated abroad. It must also consult with the SFO when the English authorities, who are investigating a serious fraud, require assistance from another country [45].

Challenges to the jurisdiction of local courts are particularly prevalent in international fraud cases as the challenge itself is a delaying tactic and increases all parties' costs. This may appear detrimental to the defendant as well as the prosecution. However, as we have seen in the previous chapter, in England, the potential cost of the trial is a major issue in the decision whether to continue with a case or not. Complex multi-national frauds invariably raise issues of applicable law when the investigators are seeking to obtain evidence from another jurisdiction. The obtaining of the evidence is rarely in itself contentious it is the subsequent use of that evidence which may give grounds for challenge. In the case of white collar crime there is the opportunity to delay the inquiry by applications for review of the actions of the investigation authorities and the applicable law. This is a legitimate and effective means of causing

the substantive proceedings to remain dormant, particularly as 'Questions of foreign law are questions of fact which must be proved to the satisfaction of the judge'[46]. it follows that, 'There is no shortage of opportunity for a well advised defendant to raise legitimate challenges to the jurisdiction of the English courts'.[47]

## 6.7 Liaison magistrates and reformed powers for the J.I.

One of the bureaucratic barriers removed by the Schengen Agreement is that contracting states are able to apply directly to the judicial authorities in the corresponding state.[48] This alleviates the need to send letters of request to the relevant ministry which then vets the inquiry and then forwards it for execution. The power to make requests has been statutorily extended to particular offices which includes the SFO. The adoption of Schengen would permit the officers of fraud squads to have this facility also. At present, in what amounts to a very similar document to the English letter of request, the J.I. will ask for assistance in a serious fraud investigation from the police or the SFO. Letters are sent in French with an English translation and are filtered through C2 Division, the Central Authority at the Home Office.

The role of the J.I. in facilitating expedient inter-jurisdiction inquiries has been reviewed recently and two proposals have been announced[49], Firstly the J.I. will have greater responsibility for ensuring that the OPJ's are using resources effectively, particularly the financial investigation departments of the OPJ, and secondly, resources available to the J.I. for the investigation of white collar crime are to be increased in Paris, where the J.I. and state prosecution service are to grouped together.

It will be very interesting to see the response from the OPJ in respect of the first initiative. The evidence of the previous chapters would support the view that there

appears to be little mutual respect between the police and the J.I. The implications of this initiative are that the J.I. will have increased powers, this runs counter to the proposals put forward by President Chirac and the Delmas-Marty report, and is likely to meet considerable hostility from the police who at present are answerable to the relevant minister, not a local J.I. The second initaitive fuses the state prosecutors with the J.I. in Paris. This again seems a most curious proposal. The J.I. is allegedly an independent professional who is charged with 'finding the truth'. He is not working for the state prosecution department and he is not charged with compiling a case for the prosecution, so who will decide on the appropriate course of action that a live file takes and who will decide at which point an investigation is complete? If the J.I. is to assume greater responsibillity for case management and costs, then there may be a temptation to close an investigation at an earlier stage than previously. Later in this chapter the UK government is criticised for failing to implement sections 1-6 of the Criminal Justice Act 1993. It is argued that in failing to do so the investigation and prosecution of international white collar crimes is hampered. The French initiatives may achieve exactly the same result, it remains to be seen.

Since 1993 France has operated a system of 'liaison' J.I.'s who have been placed in each of the EC countries at the relevant Ministry of Justice. This programme has now extended to the USA.[50] The role of the liaison J.I. is to deal efficiently and effectively with cross-jurisdiciton inquiries as soon as they arrive. 'A very specific example of the contribution which can be made by liaison magistrates in the field of international cooperation is the guideline which has been sent to French magistrates in order to help them with the drawing up of rogatory letters to be sent to the countries in which they are based. These are full of practical advice, and indications linked both to the rules on criminal procedure and to the most formal presentation problems or problems in the translation of certain legal terms'[51].

There are clear advantages to the French liaison system. The J.I. in the host country has the opportunity to see the investigation and prosecution processes in action first hand. He is also well placed to comment on the law and procedures that are applicable in France. The J.I. may also be able to prevent, or at least dilute, the frequency with which inquiries will be conducted at the same time in two different countries, and most importantly, the J.I. can assist in educating investigation agencies in the alternative jurisdiction, about the French criminal legal system.

### 6.8 International co-operation between regulators

The regulatory bodies of France and England are required to assist other regulators intra and internationally. Dominique Foult[52] has reiterated the need for international co-operation[53] and stressed the powers of the investigation department of COB which include its ability to 'Summons anyone to give evidence, seize documents and sequestrate funds and decide on whether or not to bring a criminal prosecution or take administrative action. Alternatively administrative and criminal action may be taken together at the same time'.[54]

There is evidence of formal mutual co-operation[55] between the financial centres of Europe, for example; the Financial Service Authority provides support to the Treasury on European Community negotiations. France and England are members of the International Organisation of Securities Commissions, IOSCO. The EC Directive on Investment Services, ISD,[56] and the Capital Adequacy Directive, CAD, have Community wide application. The governments of France and the UK are currently working with the Commission in the development of; an Insolvency Directive, Investor Compensation, a Winding Up Directive and possible EU regulation of financial conglomerates.[57] The Securities & Investment Board, SIB, in collaboration with the Bank of England established the Financial Fraud Information Network, FFIN. There is

also the potential for the informal exchange of information held in central registers[58] and the mounting of joint operations.

Greater co-operation between the agencies involved in the regulation and prosecution of white collar offenders is not greeted with enthusiasm from all quarters. The dangers for London, as an international market leader in the provision of financial services, have been identified as fourfold; firstly the 'one size fits all' problem where regulation may be less adapted to individual markets and institutions[59]; secondly, the fusion of regulation and prosecution, proposed for the FSA, may make regulation remote from practitioner expertise, '...a feature of London's self-regulatory system is constant access to practitioner experience in fast evolving markets'[60]; thirdly, that agreement is difficult to achieve and once established is difficult to change, '...the more difficult it is to reach agreement in an international harmonisation context, the greater the reluctance to risk disagreement by addressing shortcomings'[61]. Finally, regulation is becoming more contentious as national commercial interests are at stake. The attempts by the EU to increase business within all of the Community cannot be at the expense of established trading by one centre with markets outside the Community.

The Financial Services Authority is committed to playing an active role in national and international regulation and policy development.[62] It proposes to participate with international regulatory organisations and '...develop and maintain an economic research capacity covering both the UK and overseas economies'.[63] The objective of this approach is to assess the impact that developments abroad might have on UK financial institutions. This is to be achieved while promoting, '...fairness, transparency and orderly conduct in financial markets'.[64] It would seem that the FSA is committed to openness and the exchange of information internally and externally and it wishes to build on the relationships that already exist with regulators overseas. Achieving

peace and harmony within the financial markets sector, whilst maintaining a high profile prevention and detection policy is challenging for any country. Imaginative yet fair legislation is one way of achieving this.

It has been seen, above, that France is proposing legislation that will make the financial investigation police more accountable to the J.I., France has also implemented a policy of placing J.I.'s in other countries in order that white collar crime investigations can be expedited more efficiently. The Criminal Justice Act 1993, sections 1-6 have been drafted to reduce the procedural barriers in white collar investigations. It is discussed, and the failure by the government to enact all of it, is criticised in the following section.

### 6.9 The Criminal Justice Act 1993

Part 1 of the Criminal Justice Act 1993 refers to a range of substantive offences that are frequently used in the prosecution of offenders committing complex and serious frauds. These matters are referred to as Group A offences and include: theft, obtaining property by deception, evasion of liability by deception and procuring the execution of a valuable security by deception.[65] Sections 1-6 of this Act are not at present enforceable, despite the fact that they have existed since 1993. In 1996 the House of Lords dealt with the issue of obtaining property by deception when the offender has been charged with obtaining funds, to purchase property, where the mortgage advance has been credited to the lender by means of an electronic transfer. In the case of *R v Preddy*[66] their Lordships held that the debiting of an account was not the obtaining of property for the purposes of S.15 Theft Act 1968.

In response to this the Theft (Amendment) Act 1996 was enacted, the provisions of which are now contained in the Theft Act 1968. Under section 15A a person is guilty of an offence if by any deception he dishonestly obtains a money transfer for himself

or another. 'Deception' has the same meaning as Section 15 of the Theft Act 1968 and on conviction a person is liable to a term of imprisonment not exceeding 10 years.[67] A further offence, introduced under the Theft (Amendment) Act and now inserted after Section 24 of the Theft Act 1968 is Section 24A, which states that, 'A person is guilty of an offence if (a) a wrongful credit has been made to an account kept by him or in respect of which he has any right or interest, (b) he knows or believes that the credit is wrongful and (c) he dishonestly fails to take such steps that are reasonable in the circumstances to secure that the credit is canceled.

Complex frauds are frequently a multi-jurisdictional matter where proving that a substantial result of the offence was effected within this jurisdiction can create a bar to prosecution. To date, liberal judicial interpretation of the common law has been the only means by which a prosecution can progress. In the case of *R v Smith*[68] the defence placed reliance on the dictum of Viscount Dilhorne in *DPP v Stonehouse*, who stated 'I can find no authority for the proposition that the English Courts have jurisdiction in a case where the false pretenses were made in this country and the obtaining of the goods or money in consequence thereof occurred outside the jurisdiction. The law that might have so provided and that Parliament might make that law, I acknowledge but I do not think it is the law now'[69]. The Court of Appeal rejected this and held that the only feature of the deception committed outside of England and Wales was the transference of funds into an account held in New York and as at the time of the transfer Smith made the telephone call from London, the bank to whom the representation was made were located in London and all the relevant documentation relating to the incident was also held in London. 'In our judgment it would be astonishing if the English courts did not have jurisdiction in such a case and certainly there would be nothing inimical to international comity in the English courts assuming jurisdiction'.[70] Clearly the court was conscious of the need to adapt the

question of jurisdiction to keep pace with the significant advances that have been made in electronic communications which frequently span national boundaries.

In anticipation of the implementation of the Criminal Justice Act 1993, the Theft (Amendment) Act 1996 specifically caters for the inclusion of the 15A and 24A offences within Group A offences and provides that, 'In Section 1(2) of the Criminal Justice Act (Group A offences for the purposes of jurisdictional provisions) paragraph (a) list of offences under the Theft Act 1968) shall be amended as follows, (2) After the entry relating to section 15 insert section 15A (3) After the entry relating to section 22 insert 24A'.[71]

The honorable, though somewhat generous, application of the common law need not be an issue in the future if the provisions of section 2(3) of the Criminal Justice Act 1993 are implemented, as this section holds that, 'A person may be guilty of a Group A offence if *any* of the events which are relevant events in relation to the offence occurred within the jurisdiction'. In respect of the new 15A[72] offence a person is guilty of an offence if by any deception he dishonestly obtains a money transfer. It would appear on construction of the Criminal Justice Act 1993 that what is required to establish jurisdiction is either that the deception or the obtaining of the property took place within England and Wales. As currently the prosecution must rely heavily on the common law, those defendants charged with deception are committing a criminal offence justicable in England if the property is obtained here. This would presumably follow in the case of obtaining a money transfer.[73] In *Smith*[74] the deception took place within this jurisdiction and would therefore be caught and in any future *Preddy*[75] type obtaining of money transfers, these would also be caught regardless of where the money transfer took place.

## 7.0 Conclusion

'If we had asked the Mafia organisations to set up their own economy so as to serve their own interests, they couldn't have managed anything better than globalisation. Today, for these organisations, it is less risky and more profitable to buy a bank than to try to hold it up' [76].

The investigation of complex white collar crimes has always been difficult, it looks set to become increasingly so in the future. In response to this England, France and the EU have made various proposals. The development of a supranational force, a European FBI[77], is not a realistic proposition for the future until there is harmony in legislation and investigators of white collar crmes throughout the EU understand each others legal systems. The CPS,SFO and J.I. have a vital role to play in pressurising the legislature of each country to enact further provisions for mutual co-operation. When, and if, this accord is achieved, the challenge will then be to maintain democratic accountability for the investigators, not only those who face each other across the Channel but who operate throughout the EU's 15 jurisdictions. There is at present no mandate for Eurowide policing. If Europol is to develop a 'global' face, and operate inter-country powers of search, arrest and questioning then a uniform approach to procedural rights is essential. The EU is proposing to expand and in doing so open internal borders, this will facilitate complex criminal operations and create new targets for the international fraudster. A federal criminal code may be the only realistic option for the future of policing the new Europe if an exponential rise in white collar crime is to be combated[78].

The response to mutual co-operation has been described by Walker[79] as 'pragmatic and ecumenical'.[80] No organisation exists to represent the interests of the police forces of Europe and the isolation that exists between forces can be partly attributed to the lack of representation within the Commission and the European Parliament.

The English police have a considerable degree of autonomy whereas the French police are strictly controlled by central government. These issues may in themselves appear to be of national importance only. In reality differing levels of accountability can be a real impediment to mutual co-operation. An enhanced sense of European policing would have significant advantages for future inter-state investigations into serious crimes. Currently there is no common definition of police powers throughout France and England due to the divergent legal traditions, law and codes. Monet[81] referred to police traditions in France as a country where '...we like to cast our traditions in bronze, it is more solemnly established than in other countries'.[82] However, it is as difficult for an OPJ to understand the concepts of hearsay, precedent and disclosure as it is for a member of the fraud squad to imagine how an interview without a lawyer or the contents of a *dossier* can amount to admissible evidence.[83] These differences should be understood and appreciated, not a bar to progress.

There are two distinct though interrelated strands to mutual co-operation in the field of white collar crime investigations; greater investigating agency co-operation, through mutual assistance legislation, and increased understanding of legal systems. In 1989 the Law Commission reported on jurisdiction over offences of fraud with a foreign element.[84] Commenting upon this Kirk and Woodcock[85] said '...and what are the obligations of other states to assist in the investigation and the provision of evidence for the purposes of a fraud trial in this jurisdiction. The answers are far from clear'.[86] This does not mean to say that the distribution of tasks between investigation agencies should be seen as territorial, this only engenders waste, competition and promotes petty rivalry. Deliberate co-ordination through a structured framework of understanding and professional respect must be the way forward. The businesslike organisation of white collar crimes requires great expertise and co-operation with

respect to investigation prior to prosecution. *A fortiori* mutual co-operation is the future.

Identifying potential white collar offenders is a particularly difficult task. Liaison between criminal and *bona fide* clients is commonplace in the business world, 'In all major organised crime there were corrupt bank officials'.[87] White collar crime is unique it is subject to both regulation and criminal sanctions in France and England, but this should not deter co-operation, it should foster it, as both countries need active and legitimate business.

Gower[88] commented that 'Some of the activities of the City may bear considerable resemblance to those of a casino...even so there is much to be said for a regulatory system which would ensure the roulette wheel is not rigged'.[89] The challenge for the future of prevention and detection is not how can England and France, as joint partners within the European Community, best achieve the desired outcomes individually, but how can they be achieved collectively. 'No jurisdiction has had a great deal of success in utilising the criminal law to combat sophisticated abuse activity on its capital markets. The standards and procedures of the traditional criminal justice system, which are necessary to ensure general civil and human liberties, present almost insurmountable barriers to the effective prosecution of economic crime'.[90] This is little reason not to strive for effective investigations and prosecutions in the future. Being resigned to failure, individually or collectively, will only engender discontent and greater abusive practices. The European Union is far more than an amorphous mass of sovereign states and its identity lies in the formulation of measures which will effectively promote similar regulatory and penal sanctions with multi-jurisdictional application.[91]

The preservation of the integrity of the London markets is not the theme for the future, it is the integrity of the EC's financial centres compared with those operating in other parts of the world. As I have previously suggested in respect of criminal investigations into serious white collar offences, the future goal must be to produce enhanced mutual co-operation not isolation.[92] The regulators and investigators of France and England, cannot remain autonomous. The provision of financial services is international, and for policing it to be effective, it must also be international.[93]

The implementation of sections 1-6 of the Criminal Justice Act 1993 are long overdue. In England effective investigations and prosecutions are hampered by a reliance on the common law which requires that a *substantive* part of the offence took place here. A preferable regime has been provided for under statute and Sections 1-6 of the CJA 1993 are at present still under active consideration, implementation should gain greater status on the political agenda in order that the investigation and prosecution of white collar offenders is progressive and effective.[94]

The fundamental freedoms of the European Union are unencumbered movement of people, goods, services and capital. Achievement of these objectives will improve the quality of individual lifestyles as well as enhance the status of the EU as a major world economy. Freedom also permits increased criminal activity and facilitates multi-national crime and cross-border offences. The enhanced capability of telecommunications means it is becoming increasingly easier for the international white collar criminal to facilitate his crimes. Illegal transfer of capital is itself a growing trend due to the ease with which international markets can be accessed. 'An alarming increase in transnational criminal activities has taken place in recent decades. This new international dimension of crime has emerged, to a considerable extent, as the reflection and outcome of modern advances in electronic and transportation technologies...Thus, illicit international trade and commerce and world-

wide travel have been paralleled by the rapid growth of an international criminality that utilizes (sic) the same means of transport and communication'[95].

Until the passing of the CJICA the Home Office had commented that, 'The United Kingdom's failure to participate in formal mutual legal assistance arrangements has earned us a poor reputation for co-operation...it has also caused serious problems for our own prosecution authorities'.[96] The UK was the last country, of the member states, to ratify the ECMA in November 1991.

Complete harmonization of methods and laws between France and England is clearly a long way off. An *Espace judiciaire européen* remains a vision for the future and neither France nor England seems likely to cede criminal sovereignty. The problems of mutual co-operation are legal, linguistic and cultural. In white collar crime investigations the suspects are frequently associated with members of government, it is perhaps unsurprising, therefore, that the political will to foster genuine mutual co-operation may sometimes appear to lack impetus in this sensitive area.

The work of the EU fraud investigators, UCLAF, has been mentioned in this chapter in the context of models that are currently in place. UCLAF is one agency that embraces a more unified approach to the investigation and prosecution of the white collar offence of fraud, than many of the individual member states. Tupman has said, 'In all this complexity and confusion...it is free of the multi-national decision making processand, given the sad compromise that is now Europol, is the only supra-national body capable of driving cross-border investigative policy and practice forward. It also has the advantage of being able to concentrate on a single type of crime: fraud...'[97]

## Endnotes.

[1] Source. Colin Phillips. Chief Constable of Cumbria Police. 15th April 1997. 'Tackling Cross-Border Crime. A Paper Presented To 5th Liverpool Conference'. p.3. This amounted to 191 international cases of which 69 were major international frauds, in the period 1994/1995. Source. 'International, National, Inter-Force Crime' *ACPO Research Data* (April 1996). p.3.
[2] Koers, J. 'International Co-operation between Investigation Authorities and Public Prosecutors' *The Journal of Asset Protection and Financial Crime* (1993), Vol.1. No.2. pp.156-168 at pp 156-157.
[3] Interview with DC Glyn Jones of Metropolitan Police Fraud Squad. One current inquiry is of such complexity that the investigating officers from this jurisdiction are traveling to France, Italy and the USA, to work alongside police officers from those countries.
[4] *The Sunday Times*. 10/11/96. p.1.
[5] *inter alia*, Pakistan, Saudi Arabia, Kuwait, Columbia, Panama, Peru, France, UK, USA, Jordan, Oman, Argentina. See further: Kochan, N. & Whittington, B. *Bankrupt. The BCCI Fraud*, London, Gollancz (1991)
[6] See further: Pechiney-Ugine-Kuhlmann Conglomerate. Re The Polypropylene Cartel: SA Hercules Chemicals NV v EC Commission [1992] 4 CMLR 94. ECJ
[7] The author experienced a delay of five months, having used the official channels to expedite an inquiry into an Art Fraud from the Montpelier region of France.
[8] The International Police Organisation, ICPO, has worldwide 175 country membership and these are split between 7 regions of operation. 1) Europe-Mediterranean/North America/Middle East. 2) East Africa. 3) West Africa. 4) South America. 5) Asia. 6) Central America/Caribbean. 7) Pacific. Interpol has no investigative powers and all officers are on secondment from their national police forces. Its principle function is the exchange of information between member states.
[9] TREVI, so named after the Trevi fountain in Rome, the city where meetings were held, is an informal police co-operation body formed in 1976. The body of consultants includes; Ministers of Justice and of Home Affairs, senior police officers and representatives form the security services. Their remit was extended to include; Serious and Organised Crime by the working group on the Mafia created 18/09/92. See further. *The Guardian*. 19/09/92.p.5.
[10] Operational from 16/02/94 and based in The Hague.
[11] With a total budget of 2 million Ecu. The original name was EDIU, European Drug Intelligence Unit but this was felt to be potentially restrictive for the future when the unit would expand its terms of reference to include other criminal activities.
[12] Adopted by the Council of Ministers. Article K.3. Treaty on European Union. March 9-10 1995.
[13] The Single European Act. 1987. Article 13.
[14] The Group produced the 'Palma Document: Free Movement of Persons' 1989.
[15] An agreement between the Benelux States, Germany and France originally and since 1990, Italy and 1991 Spain and Portugal with Greece joining in 1992 and Austria joined in 1995, which has resulted in the abolition of internal border controls. Schengen 1 came into effect on 14/06/85. Since this time the abolition of border controls has been fully implemented in Schengen 2, of 26/03/95. The UK, Ireland and Denmark remain outside Schengen.
[16] Covered by the Channel Tunnel Act 1987 and Channel Tunnel Security Order 1993. The 1987 act established Kent as the lead police authority to work alongside the BTP and the Metropolitan Police Special Branch at the English side. Formal relations were established with the *Préfet* of the *Pas de Calais*.
[17] Protocol France. No.1. November 1992.
[18] *ibid*. Article.3.
[19] The Metropolitan Police have developed a number of liaison units who advise on issues relating to policing with a European dimension. The Organised Crime Branch has its own European Liaison Section as does Special Branch. In response to the Heysel Stadium disaster in 1985 all the police forces of Europe exchange information in advance of international football matches. In England this is conducted by the National Football Intelligence Unit. Although they had no operational jurisdiction officers from this unit attended the World Cup finals in Italy in 1990 and worked alongside the Carabinieri. Anti-Drugs liaison units have been part of the European policing agenda since 1971 when the Pompidou Group formed CELAD, *Comité Européen de la Lutte Anti-Drogue.*
[20] See further: 'Criminal Harmony' *Law Society Gazette* (1996) Vol.93/09. 3 March. p.10
[21] The Lingua Net project, which is a progression of the earlier PoliceSpeak project. The former project examined a range of operational communication needs and has standardised radio procedures. This project involves police forces from Kent and Suffolk, France. Coquelles and Calais, Belgium.Bruges

and Ostend and The Netherlands, Rotterdam, Flushing and Ijmuiden. New terminals have been requested by the Sussex Police and British Transport Police at Waterloo International.

[22] e.g. contrast the outcomes of *Malone v UK* (A/82) (1985) 7 EHRR 14 and *Huvig v France* 9A/176-B) (1990) 12 EHRR 528, *Funke v France* (A/256) ECHR (1991), *Kostowski v The Netherlands* (A/166) 12 EHRR and the ECJ decision in *Orkem v The Commission*. ECJ. 374/87. Judgment of 18/10/89.

[23] For an analysis of the current position see further: Verbruggen, F. 'Euro-Cops? Just Say Maybe. European Lessons from the 1993 Reshuffle of US Drug Enforcement', *European Journal of Crime. Criminal Law and Criminal Justice* (1995) Vol.2. pp150-201.

[24] Mainland France has 6 land frontiers.

[25] For a discussion on this see further: Ingleton, R. *Mission Incomprehensible,* Avon, Multilingual Matters Ltd (1994) pp.77-85.

[26] Courses are conducted at Clermont Ferrand Police Training Centre and last for 15 days, full-time. 51 improver courses were run in 1991 attended by 530 officers. 590 officers took written and oral examinations in a second language. Senior officers are also eligible to attend courses conducted at national training centres, such as Bramshill, in other countries. Source. *ibid.* Ingleton. p.84.

[27] See further: 'Europol prepares for ''global'' exchange of data' *Statewatch* (September-October 1998) Vol 8. No.5. p.20

[28] Wilzing,J. & Mangelaars,F. 'Where Does Politics meet Practice In Establishing Europol', *European Journal on Criminal Policy and Research* (1994), Vol.1-4. pp.73-81. p.76.

[29] *Unité de la Coordination de la Lutte Anti-Fraude.* Established in 1989 to co-ordinate all anti-fraud measures throughout the 23 Directorate-Generals of the EU. UCLAF has its own database, IRENE 3 (IRegularities, Enquiries, Evaluation). UCLAF reports direct to the Community Coordination Committee on Fraud Prevention. COCOLAF.

[30] 'International, National, Inter-Force Crime. A Study Commissioned by the Association of Chief Police Officers'. *Research Data* (April 1996), part. 3. p.11. para. 3.27 The report found that 36.5% of inquiries conducted by specialist fraud squads was international. *ibid.* p.21..

[31] These comments refer specifically to attempts to curb fraud committed against the EU budget, but the sentiments can just as easily apply to the whole area of mutual cooperation. See further: Tupman, W.A. 'The Search for Supra-National Solutions: Investigating Fraud against the European Budget, *Journal of Financial Crime* (1998) Vol.5. No.2. pp. 152-159. at. p.156.

[32] Whereas under English law the agreement had to be enacted, under French law the provisions have immediate effect and are legally binding.

[33] Also included are: political offences, Art 2a. Fiscal offences Art 24, para 2.and Military law offences which are not also criminal law offences of the parties, Art 1 para 2.

[34] e.g.The Schengen Agreement. (Fully implemented 25th March 1995). The Benelux Treaty on Extradition and Mutual Assistance, The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, Art 5. Transfer of Verdicts Ordering Confiscation. Art.6. Extradition. Art. 7. Small Mutual Assistance in Criminal Matters. Art.8. Transfer of Proceedings. The United Nations convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1988. The Strasbourg Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990.

[35] Minister of State of the Home Office in the House of Lords. cited in *Journal of International Planning* (1992), Vol. 1 No. 3. December. p.137.

[36] Section 4. The Criminal Justice (International Co-operation) Act 1990.

[37] e.g. Identification of a suspect inquiries or supplying lists of previous convictions.

[38] Section 4 (3). CJICA

[39] Section 7 (2). CJICA

[40] Section 7 (1). CJICA

[41] See 'International Mutual Legal Assistance in Criminal Matters' Central Authority for Mutual Legal Assistance in Criminal Matters. The Home Office. United Kingdom Guidelines. August 1991.para 27. p.9 and Annex E. An update of this guide is currently being prepared the only difference will be the deletion of para.36 p11 as this is now contained in S4 (2) (A). Criminal Justice and Public Order Act 1994. Source. Simon Watkins. Home Office Judicial Co-operation Unit. 31/07/97.

[42] Judgement of 23 October 1996. Reported *The Times* 11/11/96.

[43] *ibid.*

[44] *ibid.*

[45] *Op.cit.* note.41. p.12. para. 38.

[46] Friedman, P. 'Jurisdiction and Beyond', *New Law Journal* (1995), August 4. pp.1158-1160. p.1159.

[47] *ibid.*Friedman.
[48] Article 53 para 1.Schengen Agreement.
[49] See further: Pelsez, E. 'France: International Judicial Cooperation in the Fight Against Economic Crime' *Journal of Financial Crime* (August 1999) Vol.7. No.1. pp.83-88.
[50] The framework was formalised on 22nd April 1996 and specified that the J.I.'s should play a specific role in the fight against EU fraud. *supra*. Pelsez, E. Note 49. p.86.
[51] *supra*. Pelsez, E. Note. 49. p.85
[52] *Adjoint au Chef du Service de l'Inspection*. COB.
[53] 14th International Symposium on Economic Crime. Jesus College. Cambridge. 8th-13th September 1996. on 11th September.
[54] *ibid.* COB can also impose a fine up to 10 million Fr. francs and if a profit is made the fine is up to 10 x profit made. COB is the official liaison department for foreign inquiries.
[55] Requests for information or evidence by an authority having a specialist regulatory function in France, that is the regulation of companies, financial services (including insider dealing), banking or insurance may be accepted under the provisions of the Companies Act 1989 which affords the Secretary of State specific powers to authorise assistance.
[56] Came into force 1st January 1996.
[57] The process is fully explained in 'Review of the Implementation and Enforcement of EC Law in the UK' London, Department of Trade and Industry.
[58] The SIB central register, the Shared Intelligence Service, SIS, has 57,000 entries and has processed more than 1 million inquiries since April 1988. Source. Large, A. *Financial Services Regulation: Making the Two Tier System Work,* London, Securities and Investment Board (May 1993) p.75
[59] The example quoted in *The Competitive Position of London's Financial Services. Final Report. The City Research Project. March 1995*. p. xiii, is '...rules on transparency which do not distinguish between auction markets and dealer markets'. A further specific reference to differences between the London and Paris markets is given at 4-3.
[60] *ibid.* City Research Report. 'Our analysis of the books of a sample of UK equity market-makers suggests that the SEC [The US Securities Exchange Commission] methodology *totally* ( original emphasis) fails to distinguish between the risk of different books...' at 4-4.
[61] *ibid.*
[62] *Financial Services Authority: An Outline*. London, Financial Services Authority (November 1997) p.23
[63] *ibid.*
[64] *supra*. Note 62. at p.30.
[65] Group A offences. Theft, deception, obtaining services by deception, evasion of liability by deception, obtaining a pecuniary advantage by deception, procuring the execution of a valuable security by deception, false accounting, blackmail and handling stolen goods. All Contrary to Theft Act 1968. Copying a false instrument, forgery, using a copy of a false instrument, possessing, making or possessing materials for the making of a false instrument. all Contrary to the Forgery and Counterfeiting Act 1981.
[66] *R v Preddy and Others*. HL. 3 WLR. 1996.
[67] Section 1 (5) Theft (Amendment) Act 1996. A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding ten years.
[68] R v Smith (Wallace Duncan) CA (Criminal Division) November 3, 1995 and at [1996] 2 Cr. App. R. I, [1996] Crim LR 329.
[69] *ibid.*at 17. *DPP v Stonehouse* (1977) 65 Cr.App.R. 192. [1978] A.C. 55.
[70] *ibid.*
[71] Section 3 (1) (2) (3) Theft (Amendment) Act 1996.
[72] Theft (Amendment) Act 1996. This Act came into force on 18th December 1996.
[73] Section 4 (1) deals with determining where the event took place, that is: (1) The obtaining of the property and (2) the communication of instructions, requests, demands and other matters. If the property is either (1) dispatched from a place in England & Wales or (2) received at a place in England or Wales.
[74] *Op.cit. R v Smith*. note. 68.
[75] *Op.cit.R v Preddy*.note. 66.
[76] The words of J.I. Van Ruymbeke cited in Perez, E. *Journal of Financial Crime*. Op. cit. Note. 49. at p.83

[77] The US Federal Bureau of Investigation, FBI, was formed to combat white collar crime. It is an agency of the department of Justice which investigates those areas of federal law not assigned to other agencies.
[78] This idea was firmly rejected by the former Lord Chancellor, Lord Mackay who stated, '...it is not necessary, and in my view highly undesirable, but to believe it would succeed is simplistic', Diversity in Unity. European Laws, Luxemborg. Churchill Memorial Lecture. 1992. cited in Fijnaut, C. (ed) *The Internationalization of Police Cooperation in Western Europa*, Boston. Mass, Kluwer (1993) p.24
[79] Walker, N. *The United Kingdom Police and European Cooperation*, Dept.of Politics. University of Edinburgh (1993)
[80] *ibid*. Walker. p.131.
[81] Monet, J-C. 'Comparing Police Systems: A Final Comment'. in Brodeur, J. (ed) *Comparisons in Policing: An International Perspective*, Aldershot, Avebury (1995) pp.213-227.
[82] *ibid*. Monet. p.227.
[83] The proposed development of a European police academy would be one approach towards creating a parity of understanding and promoting of mutual objectives. See further. Verbruggen, F. 'Euro-Cops? Just say Maybe. European Lessons from the 1993 Reshuffle of US Drug Enforcement' *European Journal of Crime, Criminal Law and Criminal Justice* (1995) Vol. pp. 150-201 at. p.199.
[84] 'Jurisdiction Over Offences of Fraud and Dishonesty with a Foreign Element.' *Law Commission* (Law Com No 180) 27 April 1989.
[85] Kirk, D & Woodcock, A. *Serious Fraud. Investigation and Trial* London, Butterworths (1992)
[86] *ibid*. Kirk. p.229.
[87] René Wack. *Chargé de Mission. Credit Lyonnais Group*. Comments made at 14th International Symposium on Economic Crime. Jesus College, Cambridge. 8th-13th September 1996.
[88] Gower, L. 'Big Bang and City Regulation.' M*odern Law Review* (1988), Vol.51.p.1. cited in 'Transparency in UK Equity Markets. Financial Fraud.' Rinita Sarker. *Journal of Financial Crime* (October 1995), Vol.13. No.2.
[89] *ibid*. Sarker. p.189.
[90] Rider, B. ' Enforcement of Financial Services Law with Reference to Insider Dealing' in Rider, B. & Ashe, M. (eds) *The Fiduciary, the Insider and the Conflict*, London, Brehon and Sweet & Maxwell (1995)pp. 193-229 at p.198.
[91] There are, of course, examples of not only Eurowide but International Co-operation within this field which are highly successful, *inter alia*, The International Organisation of Securities Commission Associations, IOSCA. Working Party 4 of IOSCA is chaired by the Director of COB and the UK has representatives from the Treasury and SIB as full members of this group. The already good working relationship between France and England is therefore seen as the basis from which Working Party 4 can develop good practice guidelines for other countries. Source. Simon Knot. HM Treasury.
[92] This creates a potential problem for England as the current move is away from regulation by means of SRO's and a greater emphasis being placed on the use of written rule books.
[93] This chapter has not included a discussion on the future of the jury trial. This is outside of the pre-trial investigation, however, jury competence is a relevant factor in any discussion about white collar crime. It is acknowledged from the outset that such discussion would be otiose in France as there is no role for the jury in serious white collar trials, there is no jury at the *Tribunal Correctionnel*. There have been a number of criticisms of the role of the jury within this jurisdiction largely framed around the difficulties that juries encounter, *inter alia,* understanding the complex issues in fraud, being able to attend jury service at trials which often last many months, and staying attentive during lengthy and complex white collar cases. The Ernst & Young Report, '*Fraud- The Unmanaged Risk'* Published 16th May 1996, found that three quarters of the companies they surveyed felt that juries had no place in fraud trials. The survey group would prefer to see cases dealt with by experienced business people. The Home Office have confirmed that they are looking into the role of juries in long and complex fraud trials. Included in this review is an appraisal of the system that was in use in Hong Kong. Under the former legislative procedures juries in fraud trials consisted of six members all of whom had to reach a minimum educational standard. *The Financial Times*. 22 September 1996. In opposition to change the former Master of the Rolls stated that 'The fact is that, perforce, we have already abandoned the traditional jury trial in long cases, whether or not they involve fraud. The issue is what do we put in its place.' *The Times*. 23 January 1996. Suggestions from the *Royal Commission on Criminal Justice.* (Research Study No.14) are: i)Trial by judge with assessors. ii) Trial by special jury, this is of limited value as there is no means by which to assure that the specially selected jurors would be any more inclined to follow judicial directions than present jurors. iii) The Mixed system, this proposes a tribunal comprising of a judge, assessors and lay persons. The *Cour d'Assises* operates a system of 'mixing'

three judges with nine lay jurors all of whom retire together to consider the verdict. Critics of this system in France claim that the result is a forgone conclusion as the legal professionals dominate the proceedings. There is a case made out for another alternative by Sean Doran and John Jackson, in 'The Case for Jury Waiver'. *Criminal Law Review*, (March 1997), pp. 155-172. They rightly point out that the right to trial by jury is conditional not absolute. It is only truly peremptory in cases where the defence opt for trial in either way offences. The notion of jury waiver is already established in the USA, Canada, a number of Australian states and New Zealand. As a measure to achieve greater co-operation and legal comity with France there is much to be said for removing juries from white collar trials. I would not propose such a move in isolation and suggest that a package of reforms be considered which include evaluation of all the options above.

[94] This is particularly relevant where neither country can establish who should actually take charge of a prosecution. An example was cited by Simon Watkins of C2, (01/08/97), who said that a problem not infrequently encountered was establishing losers. A cheque book had been stolen in England, the offender was British and the loser was a British bank. All the stolen cheques had been presented in the South of France. The French authorities alleged that they had no jurisdiction and referred the matter, via letters rogatory, to the relevant English police forces. The Home Office advised the French authorities that as the offences were perpetrated in France they should assume jurisdiction. This transference of proceedings, effectively resulting in the matter often being 'written off' only serves the offenders interests. The adoption of either Schengen or the CJA 1993 would immediately eradicate this. See also: 'Eurojustice in the Balance', *The Times*. 17 January 1995.p.8. and 'The Magnificent Seven's Dream', *The Times*. 19 November 1996.p.31.

[95] United Nations (1990) World Ministerial Summit. (London Declaration ref. A/45262) cited in Hebenton, B. & Thomas, T. *Policing Europe. Co-Operation, Conflict and Control*, Basingstoke, Macmillan (1995) p.155-156.

[96] *ibid*. Hebenton.

[97] Tupman, W.A. *Op.cit*. Note. 31. at p.158.

# Chapter 7

## 7.1 Conclusions.

> 'It must be remembered there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage than the creation of a new system. For the initiator has the enmity of all who will profit by the preservation of the old institutions and merely lukewarm defenders in those who would gain by the new one.' Machiavelli.[1]

The freedom to travel across national frontiers with relative ease and the promotion of international trade has benefited the legitimate and illegitimate communities of the European Union. Throughout this thesis the investigation and prosecution of white collar crime in France and England has been discussed and compared and it has been seen that in many of the cases reported it is the chief executives of international companies that have committed the criminal offences. White collar crime has become a truly international offence and the response to it can no longer be viewed from a domestic legal perspective.

The white collar crime most commonly prosecuted in France and England is deception where offenders have used their position of authority and trust, within the business environment, to achieve financial gain, for themselves or for their company. In France *abus de biens sociaux,* has also been used most effectively to prosecute white collar criminals. In England the prosecutors have relied, in the main, on theft and deception.

White collar crime is increasing, the amount and scale of individual offences has grown and the amount of loss has risen considerably over the past decade. The offences committed include; fraud, theft, false accounting, illegal share dealing, insider trading, bribery and handling stolen goods. This amounts to a broad range of

criminal conduct and there is concern expressed in France and England that by attempting to attach a definitive label to white collar crime the law will become ineffective and cause agencies to select which cases to investigate.

### 7.2 The need to adopt a common definition

White collar crime is not less of an offence than any other criminal act and should not be treated as such. In France the offence of *abus de biens sociaux,* recognises that the criminal who uses his status and authority in the workplace to achieve a criminal gain is specific. The legislation does not seek to treat this offender differently, he is deemed to be a criminal and is subject to the penal law. The law simply recognises that this offence is unique to the white collar offender. The legislators of England could learn from this example and adopt similar provisions and a working definition that reflects this specialism.

White collar crime is a serious criminal offence regardless of the gain. It is an offence which undermines the integrity of financial institutions. London, is an independent financial centre but England is not an independent legal system and we are intrinsically linked to the jurisprudence of the ECJ and after October 2000, when the Human Rights Act 1998 becomes effective, to the ECHR. A commonality of terminology is essential.

The development of a National Crime Squad in England makes the need for definitions even greater. The Police Act 1997 has determined that the NCS will investigate 'serious crimes'. The Security Service Act 1989 outlines the role that the Security Service (MI5) now has in the fight against organised and serious crime. Similarly, ss. 1 & 3 of the Intelligence Service Act 1994 permit the Government Communications Headquarters, GCHQ, and the Secret Intelligence Service (SIS) to assist the police in matters relating to organised and serious crime. The SFO

investigates serious and complex frauds and the new Financial Services Authority will regulate, investigate and prosecute civil and criminal misconduct in the financial service sector. If there is no definition of what white collar crime is, then how can the offences be effectively investigated?

In this thesis it has been argued that white collar crime is a specific offence, common to England and France but investigated differently. Both countries recognise that white collar crime incorporates acts committed by a fraud or theft by members of the business community who have used their position of trust or responsibility to achieve the criminal objective. The methods employed to prosecute these criminals vary in each jurisdiction and each has elements which raise questions of impartiality. The adoption of a common definition would go some way towards achieving harmony of objectives and approach in both jurisdictions.

Fraud is a common feature of white collar crime, it is not a universal term and it does not have a universal understanding. One issue that needs urgent attention is the development of a white collar offence that reflects the nature of the crime and will have an international application.

### 7.3 Similarities, differences and proposals

'Comparative law as a subject should have its primary object knowledge of law. Such knowledge can be gained neither by an examination of a single subject, since law transcends national systems, nor without comparison, for, as Rodolfo Sacco has stated, comparison begins at home. Comparison starts with making comparisons within one's own legal system' [2].

Specialist units are formed when there is a need for specific expertise and a unified approach to a particular type of criminality. White collar crime can be an international

offence which transcends national borders. The policing response must be flexible and itself able to adapt to the pursuit of transnational criminals. The development of the fraud squad in England and the *brigade financière* in France, means that provincial and *municipale* forces have a focal point of reference and the most complex cases can be handled by specialist officers at an early stage in the investigation. The central police squads, in both countries, investigate allegations which are of a protracted nature and require widespread national and international inquiries. In England, the Metropolitan Police deal with the largest and most complex cases of white collar crime. Unlike the PN *Brigade Financière*, the Metropolitan Police does not provide a support service to provincial forces. In France, the centralisation of the police forces means that the specialist units are contained within the capital and large cities. Officers from these areas then go out to rural locations to provide expert assistance to their colleagues. There is no such equivalent in England and all local forces have their own Commercial Units.

The police in France and England receive allegations from the public and from agencies such as the Stock Exchange, the DTI and regulatory organisations. Local authorities and the mayors of towns and villages in France, will also refer cases to the police. In England, the police are the first point of contact for making a complaint, this provides the police with the opportunity to decide on whether or not a matter should proceed further. In France, the report of a crime will frequently be made to the public prosecutor and he will decide on the most appropriate course of action. If the matter is suitable for investigation by the police the matter will be passed to them. In the case of complex frauds and white collar offences, the inquiry will most frequently be referred to the local *juge d'instruction*, and he will decide on what inquiries are to be completed.

In England, the police have the authority to charge an offender but in reality matters of serious fraud will be discussed with CPS beforehand. In France, the authority to bring charges rests with the Indictment Court, its decision is based on the file of evidence presented by the J.I.. The differences that appear to exist between the two systems are, in this respect, superficial, as in each instance the decision to proceed, and with what offences, will be decided by qualified legal professionals.

There are two issues which should be attended to by the English police. Tenure and regionalisation. Officers who are attached to specialist units, such as the SFO or Fraud Squad, are required to return to uniform patrol duties after a period of 5 years. This is a negative feature of policework in England and is the antithesis of the position in France where officers can spend an entire career developing expertise in one field of police work. Tenure is a feature which reflects a lack of trust by management in the specialist. This is misplaced and destroys moral. Regionalisation should be implemented as the number of national and international cross border inquiries is increasing. Provincial forces often have fraud squads that are little more than a centre for the recording of a complaint, and forces employing single numbers of officers in specialist white collar units should be encouraged to follow the model used in France and centralise their operations.

Just as there are similarities in the structure and form of white collar investigations in France and England so there are fundamental differences. In France the focal point of the investigation is the *juge d'instruction*, in England it can be the police, the SFO and in the future may also be the FSA. Fraud Squads in England can be involved in the entire investigation process and will attend regular case reviews to monitor the progress of a file, up to and beyond investigation. The officers of the specialist units in London and the City of London are frequently consulted during the evidence gathering stage, as well as, up to and including the presentation of case by the

prosecution. In France the police do not have the status of the police in England and they do not have the same degree of autonomy. The *brigade financière*, work closely with a *juge d'instruction* who is himself a specialist in the field of investigating white collar crime. The police are not, however, authorised to determine the outcome of an investigation. In France, the police are accountable to the J.I. who controls and conducts the fraud investigation. It is the J.I. not the police who will decide on what inquiries are to be conducted and which witnesses are to be spoken to.

There have been a number of reforms to the legal system in France over the past five years, one of which is that the J.I. now has direct control over the budget of the *brigade financière*. This unprecedented move is unlikely to be well received by the police, who already consider the involvement of the J.I. in case control to be at best duplicitous, but there may be another reason for the J.I.'s involvement in budgeting. The J.I. has been criticised severely by the current government and yet all previous reforms that have been attempted have failed due to the united efforts of the J.I.'s to resist change. The new powers vested in the J.I. may in fact be a poisoned chalice. The J.I. is not unpopular with the French public but the police are. If the J.I. fails to implement change and strict budgetary control in the sphere of white collar crime investigations then he may lose popularity with the public and in doing so allow the French government to reform the office of J.I. more easily.

In cases of serious white collar offences, the police in England and France perform a similar function, that of specialised evidence gathering. In England the police are subject to statutory provisions that control the way in which evidence is obtained. In Chapter 4, examples were given that show where the courts have frequently given a liberal interpretation to these provisions and endorsed the use of material obtained in a fashion that would not be acceptable in France. When these methods have been

questioned before the ECHR and the UK has been held to be at fault, the English courts have declined to restrict or reduce the use of this evidence.

### 7.4 Judicial investigations and prosecution authorities with extraordinary powers

'Because the dossier has been compiled by a judge whose function is 'the manifestation of the truth', its authority, by the time of the trial, is almost incontestable. Effectively, therefore, French defence lawyers are confined to the world of comment' [3].

In England, there are a number of agencies who are authorised to conduct investigations into white collar offences. Once the investigation is complete a file of evidence is submitted to the CPS which prepares the case for trial and conducts the prosecution. The Serious Fraud Office was formed to fill the perceived lacuna that existed between the role of the police in fraud investigation and growing need for a unit dedicated solely to dealing with serious frauds. However, the power vested in the SFO has gone far beyond the authority given to other investigating agencies and the particularly unusual feature of the SFO is that they investigate and prosecute. This duality of roles heralded a new dimension to legal process in England.

In France, the *juge d'instruction* has always had the authority to investigate serious criminal offences, and over the years, the J.I. has himself specialised into various fields of investigation, including white collar crime. The J.I. is charged with conducting an impartial investigation with a view to establishing the truth. Having discharged this duty, the J.I. is required to submit a *dossier* of evidence and the Indictment Court will decide on whether the alleged suspect should attend for trial to answer the charges. It is not the case that the J.I. has an absolute authority to decide on whether or not the suspect will stand for trial, the J.I. is however, a powerful figure in the French

justice system and despite a number of recent attempts to curb his power, he remains in a position of considerable authority and French criminal procedure remains inquisitorial.

The J.I. has been criticised by lawyers and academics. The extraordinary power to control investigations and demand that certain inquiries are, or are not, completed is in itself questionable. Should such power be vested in one office? The interrogation process is controlled by the J.I. and it is his version of the events that form the substantial basis of the file. The J.I. has retained the right to remand a suspect into custody and the opportunity for a J.I. to influence the opinion of the Indictment Court, overtly or covertly, does raise serious questions about due process.

To expect that the J.I. will not influence the proceedings is at best naive, they have such a range of chances to do so; when ordering inquiries; when remanding into custody; when conducting the interrogation; when interviewing witnesses; when advising the public prosecutor on appropriate charges and when submitting the completed *dossier* to the Indictment Court. Furthermore, the J.I. may give the press an audience before charge, to clarify any comments made by the suspect or by the witnesses.

In England a Royal Commission has investigated the inquisitorial system and in France, Delmas-Marty headed an investigation into the accusatorial system. The outcome has been slight modifications but not a wholesale move towards a reversal of either country's established systems. The development of the SFO can be interpreted as a move towards greater Europeanisation of the English justice system and this has been continued with the formation of the FSA. The SFO has powers which are more closely aligned to an Inquisitorial system. It has the power to demand answers from suspects and witnesses, and use evidence gathered by other criminal

and civil investigation agencies. The SFO decides on the outcomes of its own investigations, whether to prosecute or not. The safeguard of having another independent authority scrutinise its work is lacking. The SFO is a centralised authority in the same way that the police and J.I. is in France, and accountability is equally limited.

The decision by the European Court of Human Rights in *Saunders v United Kingdom*[4] has implications for the SFO and the entire approach towards the regulation and prosecution of white collar crime in England. The present UK government has made it clear that the European Convention on Human Rights is to be incorporated into the English domestic legal framework under the Human Rights Act 1998. The ECtHR determined that Saunders[5] was denied a fair trial, the Court of Appeal in England has regrettably been unable to follow this decision. A change in the law is long overdue and the English courts must be free to interpret the Convention and include the spirit of its protections. The European Court held that combating fraud, important though it was, could not be a justification for using answers obtained in a non-judicial investigation to incriminate an individual at his trial. This decision must be applied equally to all, including white collar suspects. The guidelines issued by the Attorney General to criminal prosecutors should have the status of law, and should be adopted by the SFO and the FSA, when dealing with regulation matters that become criminal.

'We are at a turning point in terms of regulation. The new Financial Services Authority (FSA) is to be given enhanced and very impressive powers...They will also have criminal powers which, at the moment, are the province either of the CPS and the SFO...As well as being able to take regulatory or civil action against abusers they will also be able to take criminal action against abusers...[6]. The powers vested in the SFO are draconian and have led to the abrogation of suspect's human rights. The

legislation that will give the FSA the necessary powers to operate are as questionable as the SFO powers, even on the admission of the Director of the SFO who referred to them as, '...pretty awesome powers and we will have to see how readily the FSA decides to take up the cudgels and use them' [7].

There is every likelihood that even with the implementation of the Human Rights Act, the UK government will be found to have created legislation, that vests powers in the FSA, that in application are criminal in nature and therefore, will be in direct confrontation with the provisions of Articles 6 & 7 of the ECHR.

In France, although the European Convention on Human Rights is part of the domestic legal order. This has not prevented abuses. The period of pre-trial detention in France can be excessive in itself. The interviewing of suspects does, in principle, safeguard the presumption of innocence,' ...if the object of criminal procedure is to arrive at the revelation of the truth, so that the authors of the crimes may be identified and convicted, it is indispensable that the presumption of innocence...is respected at each stage of the procedure'[8]. Nevertheless, the J.I. has the power to remand a suspect into custody and it is very difficult to accept that there is not a trade-off between actively assisting the J.I. and answering questions and remaining silent. After all, the J.I. will report to the indictment court that the suspect refused to answer any questions. This must add weight to view that the best way to resolve the issue would be to bring the suspect before the inquisition of the trial court.

What is particularly disturbing about the proceedings conducted by the J.I. is that it is the same magistrate who compiles the written account of all the interviews. Those who are in favour of the role of the J.I. see these provisions as a safeguard. That is, once a suspect has been interviewed by the police, then any admissions he has made, can be clarified and agreed or denied before the J.I. Given these options, it is

easy to see why it is that the exercise of the right to silence is rarely employed by suspects in France. Conversely, it is extremely dangerous to allow a summary of an interview to form the basis of evidence without a complete transcript of the entire interrogation.

### 7.5 The balance between control and due process

In both England and France, there is a need to balance the desire to effectively control white collar crime with a fair and equal application of the law. A legal system cannot be seen to be a variable which has different standards for different classes of offender. Until the recent decision in the Crasnianski case,[9] the position in France was clear, all suspects were treated the same. It had been the case that a white collar offender in France, would be treated the same as any criminal suspect. If the suspect was found guilty of specific business crimes, then he would be penalised. The *Cour de Cassation* has now held that to be guilty of *abus de biens sociaux* the offender must have caused a loss, as well as a financial gain for himself.

This decision, which effectively decriminalises certain white collar activities, is as harmful to the uniformity of justice, as endorsing the powers of the SFO to use material obtained by the DTI, but, for entirely different reasons. The position is such that whereas in England we treat the white collar offender worse than the houseburglar, as the serious fraudster has fewer protections under the law, in France they have now determined that the white collar offender has greater protection than the housebreaker, as the serious fraudster must cause a loss as well as obtain a gain. This is as perverse as endorsing the draconian powers of the SFO, and equally needs immediate legislative attention.

The current procedures for determining whether *prescription* is applicable in white collar cases is to refer the matter to the *Cour de Cassation*. This method is slow and

the outcome can lead to further confusion as the decision of this Court may, and has, change with each case. Albin Chalandon, a former Minister of Justice, has proposed that *abus de biens sociaux* should be decriminalised, the power to remand into custody should be removed from the J.I. and that all *prescription* should be applied uniformly.[10] Henri Nallet[11] suggests that all political parties are united in their desire to prevent corruption and white collar crime. To achieve this, it is necessary to implement severe sanctions that would increase the sentences that offenders are liable to receive. However, none of this should be achieved at the expense of a transparent and fair 'due process' and therefore, the power of the J.I. to remand into custody should be removed.

Michel Vauzelle[12] does not endorse the move by the *Cour de Cassation*, to decriminalise white collar crime, and he feels that the current anomalies could be overcome by implementing one system which would clarify the law relating to *prescription,* this would prevent *abus de biens sociaux* from being treated as a special class of criminality. Pierre Méhaignerie, also a former Minister of Justice,[13] believes that white collar crime is special and as such, there is a need for specialised measures. He would like to see the formation of a 'Europol' type *brigade financière*, which has the power to investigate across national borders. Méhaignerie also proposes that the powers of investigation remain private and are conducted behind the 'closed doors' of the investigating magistrate's office, as this is necessary for efficiency and thoroughness. All the former Ministers agree that the current 'trial by the media' must be stopped and the investigating magistrate should be prevented from commenting on proceedings prior to trial.

It is also the case that the pay and conditions of service for investigating magistrates needs urgent attention and modernisation is essential. A plan to restructure the organisation of the courts is needed. Previous attempts were unpopular and met with

opposition, by *greffiers*, secretaries and the J.I.'s. If the conditions of service and the applicable law are dealt with as a priority, then streamlining of the court structure may not be met with such intransigence in the future.

The authorities in France are aware that some anomalies have arisen in criminal procedure and have responded by introducing a Bill that will amend the Criminal Procedure Code[14]. It does nothing to change the Crasnianski[15] ruling but does propose that all suspects will have increased rights to consult with their lawyer, that periods of remand in custody will be limited to a 'reasonable duration' and that the J.I. will no longer have the authority to remand a suspect into custody. The response to this in 1993, when the same proposals were first put forward in the Delmas-Marty report, was that the J.I.'s went on strike. These new proposals have yet to be implemented. It will be interesting to see how far they advance this time[16].

In England the rights of suspects are generally better protected than in France. The exception to this applies to white collar suspects. The SFO has been granted wide ranging powers that frequently conflict with fundamental human rights and the statutory provisions have allowed a two tier system of justice to develop in England. Regardless of the uniqueness of serious white collar crime, this cannot be allowed to continue and the UK government should reform existing laws.

The creation of the Financial Service Authority in England is set to cause at least the same volume of condemnation, if not more, from the press than has been leveled at the SFO. There are fundamental flaws in the proposed legislation and these have been pointed out by eminent practicing lawyers and the Joint Committee of Lords and MP's. Lord Hobhouse said the legislation was, 'Just wrong in principle'[17] and Lord Lester QC has stated that, 'The sponsors of the bill are seeking to avoid the full panoply of protections calling it civil when it is in fact criminal'[18] The key problems

within the new legislation are: that the offence of Market Abuse is poorly defined making it likely that if prosecuted then an application under Article 7 of the ECHR would succeed, as it is a fundamental right of all defendants that they know the likely outcome of their actions; that the FSA will have the power to call witnesses, demand answers and be able to impose sanctions if a suspect or witness fails to produce materials for scrutiny or answer questions; that the FSA can create legislation without the full scrutiny of parliament; that the FSA can impose unlimited fines on suspects found guilty of certain offences and require that suspect to surrender any profits made; that the legislation has no territorial limits, and while I support the implementation of the sections 1-6 of the CJA 1993, that is a totally different piece of legislation as the offences covered are clearly defined. In the Financial Services & Markets Bill it is not clear whether, for example, a trader dealing on a non-UK screen based market, such as NASDAQ, is likely to be treated as 'trading on a designated market' for the purposes of the Bill. Consequently this provision will be confusing and potentially damaging to the financial status of London markets, and finally that, the civil offences can be committed regardless of any intent on behalf of the defendant. This is particularly disturbing given that expert opinion believes that the offences will in fact be determined by the ECtHR as criminal and yet the lower, civil, standard of proof will behave been applied to a suspect who has never formed an intention to commit the act. The principle of a single regulator for the financial services industry is well placed and following the example set in the UK this has now been followed in Japan, Korea and Iceland. The powers vested in the UK model are excessive and potentially an even greater effrontery to human rights than the powers vested in the SFO. White collar crime is complex, it is a unique type of criminality, however, in its present state, this legislation will do very little to advance the effective investigation and prosecution of this range of offending, either domestically or internationally.

## 7.6 Comparing legal cultures. Can the authorities really work together?

Investigating and prosecuting white collar offences that span jurisdictions adds a further dimension to the complexities that white collar investigations present. Arrangements for the gathering of evidence from another country can be particularly challenging for investigation agencies as the need to understand the legal system of the host country is paramount. *Ad hoc* arrangements can only go some way towards facilitating effective cross border operations, with the inevitable increase in white collar offending that transcends national boundaries, the future prevention and detection of these offences can only be achieved through bilateral agreements. New agreements need to be developed which extend the powers of investigators and place the exchange of information and the pooling of resources on a formal basis. The governments of France and England must realise that they have to work together to achieve a common purpose and this will necessitate a compromise in national interests. International offending does not respect geographical borders and the prosecuting authorities of France and England must accept the need to co-operate, to prevent white collar offences being attempted, rather than pursuing a suspect after he has committed the crime.

There are two models that appear to be working. Policing the Channel tunnel and UCLAF. The lessons that are being learnt from the ongoing shared policing of the Channel Tunnel should be used as one of the models for greater co-operation and understanding between agencies engaged in cross-border investigations. Police officers from France and England have developed working relationships with colleagues through joint operations and these experiences inevitably lead to mutual respect and a greater understanding of the applicable law within each jurisdiction. The opportunity to be involved in international operations is limited and officers who have conducted inquiries abroad must be encouraged to share their experiences with colleagues. Familiarity with the way police officers work in another country is

essential if in the future cross-border offending is to be professionally and effectively investigated.

In England there is a culture of complacency within the police service, officers are told that the 'British Police Service' is the best in the world, the basis for this claim is never fully explained and it has been my experience that there is no reason to think that a provincial force in England is any better, or worse, than a large municipal force in France. The police in England are given little encouragement to learn the French language, this is a major obstacle to convincing the police in France that the English police are serious about shared objectives and combined operations.

In France there is considerable support for the formation of a Eurowide police force with powers to investigate across national boundaries. The commonality of legal origins in mainland Europe means that police officers from one country are familiar with the judicial framework in another state. This is not the case in England and the police do not have an historical background that is similar to mainland European police forces. There is much ground to be made up. The police in England are not innately superior and a comprehensive programme of language training and familiarisation with the Civil Law would be a step towards achieving greater inter-jurisdiction co-operation.

UCLAF is not a police force and it does not have the powers of the SFO, FSA or J.I. UCLAF cannot arrest, question suspects, execute search warrants, seize evidence or order witnesses to attend its offices to answer questions. However, UCLAF can request that as a result of its investigation that further investigations, arrests and interviews are conducted in the state or states which are involved. Since UCLAF has no authority comparable to a police force the need to work effectively with other agencies is paramount. This has proved successful in some EU member states, but

the pressure of satisfying domestic investigation demands against the interests of the entire EU community mean that at times UCLAF has not received the assistance it has needed. '...officers from the Serious Fraud Office have told this author privately that, because of the costs involved in investigating and prosecuting a case of fraud, they do not investigate frauds below £5million...but if UCLAF is trying to operate through the SFO/DTI interface, it may not be dealing with sums large enough to engage their interest...'[19]. While it is accepted that UCLAF does not overcome the problem of local accountability, and it is funded centrally by the EU not individual countries, it is an agency that is charged with the prevention and detection of one sphere of criminal activity, fraud, and as such it provides a useful model that could be used as the framework for a European white collar crime agency[20].

### 7.7 Mutual assistance, developing confidence and a 'European Judicial Space' ?

The European Convention on Mutual Legal Assistance in Criminal Matters 1959, has been implemented in England and France, and this has substantially improved the basis for the exchange of information and assistance. However, responses to requests for assistance can be very slow, and there have been occasions where the answer has arrived after the case has been brought to trial. A problem area is the interpretation of the law. The need for the offence specified to be determined as an offence in the recipient country can be a barrier to effective investigations. The decision in France that to be an, *abus de biens sociaux*, the offender must cause a loss, does not have a comparable provision under the Theft Act, consequently, the French authorities would be obliged to return a request for assistance in cases where a company does not suffer a loss. In England, we require a witness to attend court in person, to make a deposition or give evidence at trial, in France this process is conducted in the office of the J.I.

Confidence in the legal system of the requesting country can only be developed over time. Familiarity will not breed contempt but respect for the similarities, rather than the differences. To achieve these goals, England should follow the example set by France with the liaison magistrate scheme, and promote a programme of exchange between lawyers from each jurisdiction. In cases where the law of one state appears to conflict with the law of the other, clarification could be determined by a commission. The Second Banking Directive,[21] designed to achieve a single banking market within the EC, has established a committee who clarify the rules relating to cross border banking business, this could be used as the model for a criminal law commission.

The barrier to effective assistance for judges and lawyers is not lack of mutual professional respect, and it is not lack of trust. The problem is delay, caused by procedural differences. A 'fast-track' route for requests for assistance, which does not have to stop at national borders, should be developed in order that investigating judges and prosecutors can pursue white collar offenders, efficiently and effectively, without being trapped in bureaucracy that can add years to proceedings. The first stage in achieving this is for France and England to provide a 'single passport' for police officers and prosecutors to work within each other's jurisdiction.

The basis for regulation is that good regulation should make the need for criminal sanctions redundant. This will never be achieved as the white collar offender is a well placed criminal who will manipulate loopholes in the financial services industry to achieve a criminal objective. At best, regulation will deter and where it fails the criminal law will step in. The financial services industry must, therefore, be able to work alongside the criminal law and ensure a cross-flow of good practice and common objectives. Compliance officers, in England and France should be encouraged to work with prosecutors inter and intra-jurisdiction. The problem facing

the business communities in France and England is that global business requires global regulation. This cannot be achieved when the structure and form of companies varies so greatly, in Europe and throughout the world. If a common definition of what is good working practice in France and England is established then this can be used by both countries to control the standard of conduct within the financial service sector.

Throughout this thesis I have proposed that greater efforts should be made, between France and England, to establish mutual assistance in the prevention and detection of white collar crime. There are great differences in the authority and procedures used by the J.I. in France and the police in England. However, these differences are not so acute when looking at the SFO and the J.I. The investigation of white collar crime, in both countries, is seen as being a particular type of investigation that requires specific provisions. In England, the SFO were formed for the sole purpose of investigating serious and complex frauds, an offence that is at the centre of white collar crime. To achieve its objective the SFO has been given wide ranging powers that are far closer in design to those available to the J.I. than are any other powers granted to an English investigation body. The J.I. has exceptional authority to conduct and control investigations, there is no direct equivalent in England, however, the law recognises the particular features of white collar crime and in France there is a specific offence, *abus de biens sociaux.* In France the offence has been developed, in England the agency to deal with the offence has been developed.

White collar crime is recognised as special and is treated as such by both countries. France and England recognise that there are particular unique features to the crime and both countries, in separate, but nevertheless specific ways, deal with the white collar offender as a criminal. Approaches to regulation may be harmonised in the future for the reasons I have discussed. Mutual co-operation is already legislated for

and combined operations will continue to be a necessary feature when investigating offenders who transcend national boundaries. If the European Community is to expand and firms are to be encouraged to provide a 'Europackage' of financial services, then there needs to be a criminal law, which when required, will permit prosecution in any member state. This amounts to a European Criminal Code.

Creating a European Criminal Code for the Civil Law states of the Community is not as problematic as creating a law that has application under Common Law and Civil Law. France as a Civil law country has an inquisitorial system that is similar in many respects to the other mainland European member states. Italy has recently rejected the 'continental' model, and developed a 'hybrid' system that is based on the accusatorial model. It is not impossible then to change systems and therefore, it should not be impossible to develop laws which are applicable under each system, while allowing the individual state to retain its own unique interpretation. This is the case in the United States and could be incorporated into Europe. It is not within the limits of this work to argue the 'pros and cons' of adopting a European Criminal Code, I would argue, though, that in the case of France and England, there is need for informed debate in order that the proposal be given full consideration[22].

The role of the *juge d'instruction* is at the very core of the French legal system. The difference that investigation takes in France and England provides for a stark contrast. In England, authority rests largely with the police and in France this authority is vested in the professional judge. Treated in isolation these differences appear to form the basis of two diametrically opposed legal systems. A further examination of the subject reveals that this is not the case. French law is codified and it can appear to be a coherent model that is complete. Interpretation of the code is a function of the courts. The J.I. also has the authority to interpret the codes as he conducts an investigation to establish the truth. In white collar cases the specialist J.I.

can employ a wide range of discretion and interpretive techniques. In essence the powers of the J.I. are no less than the power of the SFO. Both have the statutory means to ensure that a suspect will answer questions, even though a strict interpretation of the law will provide for the protection of a suspects' rights, a fair trial and a right to silence.

The investigating magistrate and the SFO have both borne the brunt of fierce criticism in recent years. Academics, politicians and the press, in each country, have criticised the speed at which investigations are completed, the results obtained in court and the sentences imposed. In England this is largely inappropriate. The investigation of complex frauds will require precise and lengthy evidence gathering and if insufficient time is spent on investigation the SFO would be accused of failing to discharge its duty. The SFO has little control over the outcome of a prosecution and cannot be rightly criticised when a jury acquits. In France a white collar prosecution is brought before a panel of judges. There are considerable merits to this approach and I believe could be successfully introduced in England. However, the lack of a jury in white collar prosecutions in France is a concern because the J.I. is a judge of the same status and court as the panel of judges which determines guilt in white collar trials.

There is no facility for a 'guilty plea' in France, regardless of what admissions the defendant may have made. Evidence obtained during the investigation, including any disclosures or submissions by the accused, form a part of the file. However, the suspect in white collar investigations is a 'special' class of accused in both countries, he will always be investigated by the powerful J.I. in France and in England, most frequently, by the specialist SFO. The investigation of white collar crime is different in each jurisdiction and yet similar, and both systems continue to compromise fairness during the investigation stage. Unlike England, France has not developed a unique

body to investigate serious fraud, the J.I. relies on his established authority to prepare a *dossier* of the truth relating to any criminal allegation. The SFO was formed for one purpose and the law was provided to authorise this. At present, the J.I. and the SFO operate independently, domestically and within the European Community.

I do not support a wholesale move towards the adoption of the inquisitorial system in England and I do not propose an adoption of the adversarial system by France. The CPS and SFO have particular functions, which in the field of white collar crime are similar to those exercised by the J.I. in France. The SFO has a number of features that make it more closely aligned to the inquisitorial model, than any other agency in England. This may change if the FSA gets all the powers that the government proposes. Any further moves towards making the SFO or the FSA quasi-inquisitorial should be resisted. Efficacy and common themes may be necessary if a united front against increased white collar offender is to be achieved, however, this cannot be used as an excuse for the erosion of fundamental protections and the right to a fair trial.

There are obvious differences between the legal cultures of France and England. These appear most distinct in the area of criminal law, where procedure is largely written in France and oral in England. A comparative study can never be exhaustive and this thesis has focused on the investigation of a narrow band of criminal offending. No legal system is totally integrated and the differences between England and France reflect that a comparison will show similarities as well as differences.

'What must remain the ideal comparatist could not be better expressed than by a Flemish monk who lived in Paris in the early part of the twelfth century: "He who finds his homeland sweet is still voluptuous; he to whom every soil is as his native one is already strong; but he is perfect to whom the entire world is as a foreign land"'[23]

## Endnotes.

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[3] Johnston, C. 'Trial by Dossier' *New Law Journal* (21 February 1992) pp. 249-250. at p. 259.
[4] *Saunders v United Kingdom*. ECHR. No.19187/91. (1996) 43/1994/490/572.
[5] *supra.* Note. 4.
[6] Rosalind Wright, Director of the SFO at XVI Symposium on Economic Crime, Jesus College, Cambridge. 13th-19th September 1998.
[7] *ibid.* Wright.
[8] West, A. 'Reform of French Criminal Procedure' *New Law Journal* (6 November 1998) pp 1638, 1648-1649. at p. 1638.
[9] *France v Crasnianski*. Cour de Cassation, 6th February 1997.
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[11] *ibid. L'Express*
[12] *ibid. L'Express*
[13] *ibid.L'Express*
[14] West, A. *Op. cit.* Note 8.
[15] *supra*. Note. 9.
[16] See further: Feuille-Kendall, P. 'Le Réforme de la justice en France: un nouveau coup d'épée dans l'eau?' *Modern and Contemporary France* (1998) Vol. 6 (1) pp. 75-85.
[17] ' Judge calls for Financial Services Bill clarity' *Financial Times*. 16/04/99. p.10.
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[20] For further discussion on the advantages and disadvantages of developing a Eurowide response to crime see: Tupman, W.A. 'Cross-national criminal databases: the ongoing search for safeguards' *Law, Computers & Artificial Intelligence* (1995) Vol. 4. No. 3. pp. 261-275.
[21] 'Cross-Border Banking Business And The Second Banking Directive: Legal Uncertainty Resulting From The Notification Requirement' *Butterworths Journal of International Banking and Financial Law*, September 1994. pp.373-376.
[22] For an informed discussion see: Boyron, S. 'General Principles of Law and National Courts: Applying a "*Jus Commune*"?' *European Law Review* (April 1998) Vol. 23.No. 2. pp. 171-178.
[23] Hughes de Saint-Victor [Hugh of St.Victor] *L'art de lire*[:] *Didascalicon* translated by Michel Lemoine (Paris, 1991) pp 154-55 [C'est encore un volupteux, celui pour qui la patrie est douce. C'est déjà un courageux, celui pour qui tout sol est une partie. Mais il est parfait, celui pour qui le monde entier est un exil.'] (Originally published in Latin in the years preceding 1130). Cited in Legrand, P. 'How to Compare Now' *International Comparative Law Quarterly* (199 ) pp. 232-242. at p. 241.

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