Franz-Hermann Brüner Memorial Lecture

Conference of International Investigators, Luxembourg 12th September 2012

I am deeply honoured to have been asked to give the Franz-Hermann Brüner Memorial Lecture at this year's Conference of international investigators. I worked closely with the late Mr Brüner for many years, both as a recipient of cases he referred to me at the Serious Fraud Office and, later, as Chairman and then a member of the Supervisory Committee of OLAF, the European Anti-Fraud Office, which he headed with such distinction for 10 years. I had enormous regard and affection for him. He built OLAF from its very beginnings, in 2000. He had the vision and the dedication to make it an effective and highly respected office, charged with the mammoth task of investigating fraud and financial misconduct against the interests of the European Community budget.

Franz-Hermann Brüner was wholeheartedly committed to the fight against fraud and corruption, to his mission to promote awareness of the threats posed by financial crime and corruption and to raise the standards of professionalism amongst those who work to battle against those threats. He did not live quite long enough to see his vision of an international centre to promote knowledge and practice in the field of anti-corruption become a reality. The International Anti-Corruption Academy in Vienna was something he dreamed of and worked hard to realise. He would have been so proud to see it functioning as an independent centre of excellence in the field of anti-corruption education, training, networking and cooperation, as well as academic research.

Fraud and corruption go hand in hand. They are toxic elements in the body politic of every country and, despite the efforts of the best of governments, law enforcement agencies and individual policy-makers and officials, raise their ugly heads throughout the world. No jurisdiction is immune. Those of us who are here today share a determination to fight organised crime and particularly financial crime within our borders and internationally.

But we cannot do it independently; we all rely on the co-operation of national and cross-border agencies, law enforcement offices and intelligence to tackle the twin threats of organised crime and fraud and corruption effectively.

There is a plethora of national and international bodies dedicated to the fight against cross-border crime. In Europe alone, apart from national police forces, some with a dedicated anti-fraud and anti-organised crime capability, and OLAF itself, Europol, Eurojust and the European Judicial Network all work to share intelligence and to facilitate targeted law enforcement action against international criminals. Mr Brüner himself recognised the vital importance of international co-operation in the field of ant-fraud and anti-corruption investigation and was assiduous in seeking out and negotiating memoranda of understanding with counterparts outside Europe to help OLAF in its own fight against financial crime.

Crime is very much a career choice nowadays. We see highly professional, multi-national, well-resourced groups, co-operating internationally on a scale and at a speed which would make many of the organisations represented at this conference envious. They have access to the most up-to-date technology and use the proceeds of drug-trafficking, people trafficking and illegal arms sales to finance terrorist activities and more crime. Crime feeds off itself; it is the one sure growth sector in today's strained world economies.

Indeed, the current unstable world economies are a major factor in the current upsurge of serious cross-border crime at unprecedented levels. Government resources are being diverted from crime-fighting to supporting their own economies. Making the fight against international economic crime a priority has faded from national agendas. At a time when the UK economy alone is losing some £73 billion a year to financial crime – and I am sure we are not alone – we cannot afford to let our defences slip.

Effective crime fighting on an international scale depends on a number of factors:

- the expertise and experience of those charged with the task of investigation;
- effective and practicable laws in place to cover the infinite mutations of crime in all its guises;
- up-to-date and accurate intelligence shared through effective communication channels round the globe;
- and, above all, the commitment of national governments to make crime-fighting on this scale a priority.

In addition, we need the co-operation of the private sector, through whose facilities so much dirty money is laundered and made available for the crooks to use. The response from the private sector has, sadly been inconsistent; their values are not always consonant with law enforcement: not surprisingly, they are driven principally by the profit motive. Though given the responsibility, indeed, the legal duty, to enforce money-laundering regulations, financial institutions are reluctant to see themselves as world policemen.

Money can be moved round the world at the touch of a computer key. Whatever the latest advances in information technology which is designed for legitimate business, the criminals have got in there first and are making maximum use of it. New vehicles for fraud are devised all the time: carbon trading frauds, identity theft using social networking sites, land banking frauds … As one door closes, and law enforcement gets wise to the newest means of separating man and his money so the criminals open many others and vary the modus operandi with limitless ease, seemingly to spit in the eye of the authorities.

But it is equally too easy for law enforcement and for regulators to go for the soft targets – the major banks, who admit readily when they have erred and controls have been breached. To bear down like thunder on the legitimate banking system and fine them millions of dollars for regulatory breaches when there are far more insidious and dangerous players out there untouched by law enforcement and apparently out of reach of the regulatory bodies must raise questions about the determination of the authorities to crack down on the real culprits: *hawala* banking is a case in point. A traditional means of transferring funds round the globe particularly to the Middle East and

the Asian sub-continent, with no questions asked, it is tailor-made for money-laundering. How many practitioners of this ancient trade have faced prosecution? Or casino operators, when large amounts of cash from dubious sources are transferred nightly through casinos, big and small, with, in some cases, the most cursory attention paid to money-laundering checks.

Investigators must be forthright and no respecters of "political correctness" or of sensitivities and external pressures, whether they be economic, religious or political. The notorious American bank robber of the early 20th century, Willie Sutton, is apocryphally said to have claimed he robbed banks "Because that's where the money is". Investigators must similarly allow no external factors to impede their search for evidence to nail crooks: if that's where the villainy is, that's where you must pursue your enquiries.

No case should be too large or too complex to be the subject of rigorous investigation. In the UK and in the USA, and indeed in all common law systems, we still cling nostalgically to a system of jury trial for all indictable offences, be they straightforward murders or financial crimes committed in the most arcane and esoteric of markets, using financial instruments that few people employed in financial services can readily comprehend, let alone a lay person off the street. The argument is then raised that the case is too complex to be tried and should therefore be abandoned. Rather, that the form of trial should be reformed to deal with any criminal behaviour, in whatever context. No criminal should be allowed to escape justice because he or she has deliberately obscured the audit trail or thrown up a smokescreen so dense that their offences become untriable.

And this brings me to the central theme of this lecture, which I cannot stress too highly: investigators must be independent; it is a fundamental and essential requirement. The single objective set by Article 11, paragraph 1 of EU Regulation 1073/99 for the Supervisory Committee of OLAF, on which I had the honour to serve for six years, was that –

> "The Supervisory Committee shall reinforce the Office's independence…."

This provision emphasises the fundamental importance placed by the European institutions on the independence of OLAF as the prime EU investigatory body for internal and external investigations and the vital role of the Supervisory Committee in ensuring that that independence is preserved and respected.

No investigator, whatever entity he or she works for, should be beholden to any vested interests, or cowed by deference to any external pressure when carrying out an investigation; the sole criterion

for any investigator should be to seek to obtain admissible evidence to support or rebut an allegation of crime or misfeasance.

I was occasionally asked by lawyers and investigators from overseas, when I was Director of the Serious Fraud Office, and before that, when an Assistant Director of Public Prosecutions, whether I was subject to pressure from my political masters in carrying out my job. I could in all honesty deny any such interference. I wonder if I could make such a declaration so wholeheartedly were I in post now. We who live in a free society, in a parliamentary democracy, take for granted the separation of powers between the executive and the legislature. Law enforcement and regulation is part of the executive function of the state; we do not make the laws, we enforce them. There are regimes throughout the world where this separation of powers cannot be taken for granted. Regimes where the governing party decides who should be investigated and prosecuted, irrespective of the evidence against them; or, conversely, who should escape punishment despite the commission of acts of brutality, dishonesty or worse. In a free society, no investigator should be forced to make decisions based on factors outside the ambit of criminal proof. The decision to initiate an investigation, to continue with it and to make recommendations for future action based on the results of that investigation should depend entirely on the strength of the evidence obtained. Prosecutors must weigh in the balance the additional factor of the public interest: a nebulous concept based on the seriousness of the allegations, the health and age of the offender and the wishes of the victim. If the public interest in not bringing a case to trial outweighs that in prosecuting, then the prosecutor has a discretion not to proceed But that is the business of the prosecutor, not of the investigator.

Some years ago, my successor at the SFO was in the process of investigating serious allegations of corruption against a major UK pubic company who had been engaged in conducting extensive business with a regime in the Middle East. The country concerned made representations to the UK Government, demanding that the investigation be terminated and threatened to withdraw co-operation in the field of anti-terrorist intelligence-sharing; this at a time when the UK had very recently been subject to a major terrorist atrocity in London in which 52 civilians were killed and over 700 severely wounded. In addition, they insinuated that to continue with the investigation would adversely affect relations between the United Kingdom and the country concerned and prevent the United Kingdom securing what it described as the largest export contract in the last decade.

The instruction to terminate the investigation was passed on to my successor, the Director of the Serious Fraud Office, by the Attorney-General, the government minister in England and Wales responsible for superintending the Serious Fraud Office. The Director considered the instructions and was minded to reject them. Further pressure was brought to bear on him, finally in a concerted approach from the British ambassador to the country concerned, form the Foreign Office and finally from the Prime Minister's office itself. At last, the Director decided to terminate the investigation. His decision was made the subject of judicial review proceedings in the High Court. It is interesting to see the comments made by Lord Justice Moses in the High Court. He explained the nature of the threats made to the UK Government by the country concerned and went on to say –

> "It is one thing to assess the risk of damage which might flow from continuing an investigation, quite another to submit to a threat designed to compel the investigator to call a halt.
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> "The constitutional principle of the separation of powers requires the courts to resist encroachment on the territory for which they are responsible. In the instant application, the Government's response has failed to recognise that the threat uttered was not simply directed at this country's commercial, diplomatic and security interests; it was aimed at its legal system. In written argument, the Director suggested that we should attach significance to the fact that the threat was not directed against him. But it was. While he, personally, was not being threatened with any adverse consequences, the threat was effectively being made to him, in his capacity as Director, and in relation to his statutory functions. The Government acted merely as a conduit, passing the threat on to him with an assessment of the danger should it be carried out. That threat was made with the specific intention of interfering with the course of the investigation. … Those who uttered and adopted the threat intended to prevent the course which the SFO wished to pursue. It is unlikely that so blatant a threat would have been made had those responsible not believed that it might well succeed.
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> "Had such a threat been made by one who was subject to the criminal law of this country, he would risk being charged with an attempt to pervert the course of justice. … But whether or not a criminal offence might have been committed, the essential feature is that it was the administration of public justice which was traduced, it was the exercise of the Director's statutory powers which was halted ….

> "One thread runs consistently through all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups. The implications of such surrender for the rule of law can hardly be exaggerated. As suggested in certain of the authorities, there may be a lawful response. But it is one thing to respond to unlawful threats, quite another to submit to them---the difference, although perhaps difficult to define, will generally be easy to recognise. Tempting though it may sometimes be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision with particular rigour-this is not an area where they can be permitted a wide area of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role."
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> Simon Brown LJ (in *R v Coventry Airport ex parte Phoenix Aviation [1995]* 3 All ER 37 at p.62).

> "The Director [of the SFO] and Government failed to recognise that the rule of law required the decision to discontinue [the investigation] to be reached as an exercise of independent judgment, in pursuance of the power conferred by statute. To preserve the integrity and independence of that judgment demanded resistance to the pressure exerted by means of a specific threat. That threat was intended to prevent the Director from pursuing the course of investigation he had chosen to adopt. It achieved its purpose. The court has a responsibility to secure the rule of law. ... We intervene in fulfilment of our responsibility to protect the independence of the Director and of our criminal justice system from threat."

I have quoted from his remarks at length because they indicate how fundamental is the regard for the Rule of Law in a civilised society and how vital it is that we safeguard the independence of the investigator from all such threats.

Political threats are not always so blatant and so easily recognised. The fact that they are extremely rare in my own jurisdiction needs to be emphasised. Other factors which may compromise the independence of an investigation include –

- Failure to support and resource the investigation team adequately to enable them to do a thorough job, or withdrawing resources at a crucial stage in an investigation;

- In so-called “internal” investigations, the failure of a department or body to co-operate with the investigation, despite regulatory or statutory obligation to do so;
- Failure to recognise and adequately manage conflicts of interests that may arise in the course of an investigation;
- Frank acceptance of inducements to discontinue an investigation.

I have encountered examples of all these factors in investigations I have been concerned with as a prosecutor over the years. None of these is acceptable; the last example, indeed, constitutes a very serious criminal offence.

Lastly, the length of an investigation is a source of pressure in itself. Nobody investigates in a vacuum. The demands made on the investigator depend very much on the intended destination of the product of the investigation itself: whether it is intended for internal disciplinary proceedings, a criminal trial or for civil recovery proceedings. It is a fine judgment for the investor and his or her superiors to make as to how much should be investigated: in other words, how comprehensive the investigation should be. Should every avenue be explored, every possible line of enquiry pursued? How much is enough?

Every organisation with which I have worked has faced similar criticism: the investigation has gone on too long and, in some cases, the end-product has been confusing, not been able to be easily presented to a court and allowed the defence to shoot holes in it. There is an art in knowing when to stop: when enough is enough. At the SFO, we had a threshold for case-acceptance of £1 million. To charge specimen counts representing lesser amounts was felt to be letting the side down. People might criticise us for using our expensive resources to investigate relatively small cases, or, if they were straightforward to present, cases that were not complex enough. The police urged us to stop when we could prove one or two “good” charges, irrespective of the amounts involved and I was attracted to this argument. Keep it simple, must be good advice. We had a number of cases involving multiple victims who wanted their money back. If their losses did not form part of the charges, the prosecutor could not ask for a restitution order. The pressure on us to include every loser was overwhelming. We had to resist, for fear of making the case unmanageable, too diffuse and too long. This sort of pressure is hard to withstand. The investigator’s sympathies are with the victims and the selection of a cross-section of them to demonstrate the pattern of criminality in the case is subjective and, in the eyes of the losers, unfair. The investigator must be mindful of competing pressures: to do a thorough, yet a realistic job. There is no merit in a case which takes seven years to investigate, takes nine months to be tried before a court and results in acquittals all

round because the jury as so jaded at the end that they give the benefit of any doubt to the defendants. And we had one or two of those when I was Director of the SFO!

To conclude:

As an investigator, your aim at all times must be to be thorough, professional, on top of your material and above all to preserve your independence and your integrity. These attributes are not easily achieved. You will face pressure from your superiors to do a quicker job; perhaps to cut corners, or to have regard to external factors which you know you should leave on one side. It takes great strength of character to resist pressures of this kind, to discuss them with your managers and those commissioning the investigation; to stand up to the siren, or, more often, strident voices telling you to stop your investigation for reasons outwith the merits of the case or to continue when you know you are not going to produce a viable case to take further. Your task is one of the most important in the criminal justice system and to the effectiveness of civil and regulatory justice. It calls for extensive and expensive training, for expertise in some of the most difficult and specialised fields. It calls for qualities that few of us possess. You, who are doing this job day in and day out, deserve our thanks and congratulations.

Franz Brüner knew a thing of two about the pressures on the investigator. Before he joined OLAF, he was responsible for some of the trickiest investigations and prosecutions, both in Germany, where he was responsible for the prosecution of members of the notorious Stasi of eastern Germany and then in Bosnia-Herzegovina. His integrity and his commitment to fighting fraud and corruption were never questioned. He was a beacon to those who follow in his footsteps. We who worked with him were fortunate and honoured to have known him.