
Introduction

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The academy has been slow, if not reluctant, to recognise the importance of studies related to the commission and consequences of economically motivated crime. Of course, the significance of misconduct in regard to economic activity has long been recognised by those concerned with promoting prosperity and stability. Some of the earliest legal systems have rules that relate to conduct which today we might characterise as economic crime. Bribery is often condemned in early legal systems, and as soon as markets develop we find examples of laws designed to ensure the proper flow of goods to market and that other manipulative practices are forbidden. However, there has always been a potentially difficult relationship between the laudable wish to see business and trade expand, driven by the desire for profit, and the distaste of unmitigated greed. It has taken societies a very long time to resolve the boundaries of what is acceptable and what might damage the longer term public interest. We also find a tension in some cases between the proper role of law in curbing conduct which is regarded as so damaging that the public interest justifies the use of the mechanisms of the criminal justice system and other situations, where there is proper concern for the expectations of those engaged in the relevant transaction. A good example of this is the attitude of English law to what we would today have little difficulty in stigmatising as the abuse of insider dealing.

The use for one's own or another's advancement of information obtained in privileged circumstances is not always condemned. Indeed, there are arguments that those who have a responsibility to protect the economic interests of another, such as a trustee, should not allow their possession of such information to operate to the detriment of those whose interests they are required to advance. None the less, for reasons largely associated with the need, in the public interest, to promote and maintain confidence in the integrity and, thus, the fairness of financial markets, insider dealing has been a specific and serious criminal offence in the UK since 1980. However, in the civil law the mere fact that one party to a transaction has superior knowledge, even if this is improperly obtained, does not necessarily have implications for the transaction in hand. Hence, the reluctance in most common law systems to accord the 'victim' of insider dealing a remedy. Indeed, it may be argued that in the context of a market transaction the 'innocent' party was a willing trader at the relevant market price and, if we are looking for victims, it is really the market itself or the person – usually a company – that 'owned' the relevant information or at least had the right to expect that it would not be misused. Perhaps, given the complexities of law, it is understandable that the main criminologists, economists and social and business scientists have tended to steer clear from such issues.

The study of a body of law relating to economically motivated misconduct has still to be recognised as a discrete subject area by the academy. The fact that it involves a

mix of civil and criminal law, with an ever increasing contribution from regulatory law and practice, has not helped within the context of traditional law schools. This is sadly illustrated by the surprisingly small number of academicians that attend the annual symposium on economic crime in Cambridge, which to some extent is the inspiration for this book. The symposium, now in its thirty-third year, attracts well over 1,600 specialists from around the world. As we have already hinted, given the topic is seen as a difficult one for traditional lawyers, with very few exceptions the criminologists have fought shy of it. Indeed, a few years ago one of the world's leading institutes in Cambridge went on record as saying that it was not interested in economic crime as a topic for research and development. Even more surprisingly, given the implications that attempts to control financial misconduct have in terms of legal, regulatory and reputation risk for those who run businesses, the business schools have also been most diffident in regarding economic crime as a subject worthy of their attention. Given the impact that, in particular, regulatory sanctions have had on financial institutions, this is indefensible. None the less, those that do attempt to consider from an intellectual standpoint the various issues relating to the incidence, prevention and control of economically motivated crime, and especially financial crime, are few in number seemingly in every jurisdiction.

This is not to say that those who practise law, accountancy and compliance, or who are more directly involved in enforcement and/or supervision, cannot and do not make a very real contribution to the discussion and study of these issues. Indeed, it is arguable that their contribution is all the more significant because it is based on real experience and incorporates practical relevance. Hence, it should not surprise those who open the covers of this work to find that almost every contributor, no matter what their academic credentials might indicate, are or have been privileged to work in the real world. It is the hope of many of us that bringing together what some might consider an eclectic collection of material will further stimulate thought and perhaps aid those who wish to spend more time on the intellectual analysis and development of this topic. Whether the academy will welcome this remains to be seen! What is increasingly clear is that those who make, develop and implement policy relating to these issues will welcome more thought and discussion, and perhaps even constructive criticism.

This work is not about economic crime as such, but rather a sub-category, namely financial crime. In practice, little hangs on definition, possibly apart from designing university courses and the order of material in books such as the present. It is reasonably accurate to say that all financial crimes are economic crimes in so far as they will be motivated by the prospect of economic advantage, but not all economic crimes could sensibly be described as financial crimes. It is always possible to find the exception – the computer hacker who violates a computer simply as a game, or the employee who destroys the value of proprietary information out of vengeance – but by and large most financial crimes will be committed to gain or protect an economic advantage. This is so even in the case of terrorist related finance. In the context of this work on financial crime, in a rather inexact manner, we attempt to refer to those economically motivated abuses and crimes which occur primarily in a financial setting. Of course, in placing such activity in its usual context, and in particular when considering its control and interdiction, then it is often that we return, inevitably, to a

wider view. Therefore, we make no apology for the fact that a proportion of this work would be equally at home in a collection of material devoted to the discussion of economic crime.

We have attempted to be as catholic as possible in the range of offences and forms of misconduct that we discuss and to do this as widely as possible in terms of different legal systems and traditions. Economic crime does impact on the security and stability of all states, but its implications can, in different ways, be more serious for developing, transition and especially small states. Therefore, we have included material which relates to developmental issues and, in particular, to vulnerable states. We have also placed emphasis on financial crimes that are essentially facilitative of other criminal conduct. Corruption is not an end in itself. Officials are bribed to advance an illicit or improper interest. Those who engage in money laundering do so to hide the proceeds of other crime or facilitate the continuation of a criminal enterprise. These facilitative financial crimes are treated in some depth and breadth given their practical significance in terms of risk and control.

Mention has already been made of the role played in fighting misconduct through regulatory intervention by non-traditional law enforcement agencies and, in particular, financial regulators. Possibly, this aspect to the control of financial crime has the highest profile given the dramatic fines and penalties that are being imposed by regulators, especially in the USA and UK, for misconduct in relation to the observance of economic sanctions and failures in their compliance systems on banks and other financial institutions. However, the use of essentially injunctive civil enforcement actions against those engaged in other forms of financial crime and fraud has a long history in the USA and has proved to be relatively effective. We consider the use of civil enforcement, particularly in the context of issues such as market abuse, not only as an alternative to traditional law enforcement action, but also in aid of it. For similar reasons, we also include material relevant to the role of the civil law in cases of fraud and other types of misconduct where a compensatory or restitution remedy is appropriate. Too many discussions relating to the control of fraud and financial crime fail to give proper attention to the significance of both civil enforcement and civil liability. In terms of risk exposure, those running financial institutions are more likely to be concerned about these issues than about the often-unlikely prospect of a criminal prosecution. For similar reasons, we also include a significant amount of material on governance, compliance and audit. Systems designed to prevent financial crime, or at least minimise its consequences, are of perhaps even greater importance than attempting to shut the stable door after the horse has bolted.

In advising on the selection of material for this book, I would like to express appreciation to Mr Saul Froomkin OBE, QC, Sir Kenneth Warren and Dr Ye Feng. Saul is a former Director of Criminal Law of Canada and Attorney General of Bermuda and, perhaps for our present purposes, more importantly, the chairman of the annual Cambridge symposium on economic crime for 32 of the last 33 years. Sir Kenneth Warren, as one of the most influential chairmen of the House of Common's Select Committee on Trade and Industry, focused on a number of issues relating to the dark side of business and the City and in the deliberations of his committee raised, often for the first time, many of the issues addressed in this work. Dr Ye Feng was until very recently Director General of the Supreme Peoples Procuratorate of China and Secretary

General of the International Association of Anti-Corruption Authorities and Vice Chairman of the International Association of Prosecutors. More than any other official, Ye Feng has opened the legal door to China and has laid the foundations for a level of international co-operation and mutual assistance that even ten years ago would have been thought impossible. We would also like to express deep appreciation for all the help and assistance given to us in the planning and editing of this work by Ms Ingrida Kerusauskaite, of the Centre for Development Studies of the University of Cambridge, and Ms Li Hong Xing, of BPP University. Without their constant advice and support, the many diverse strands of this book would never have been brought to the order that they have.

Given the diversity of material in this work and the number of jurisdictions that are covered, it would be very brave to assert the law in all respects is accurate as of a certain date. All that I can say is that we have attempted to ensure that the law and its analysis are as accurate and timely as is practicable in a publication of this nature.