



Secretary of State for Trade and Industry

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The Rt Hon Sir Michael Havers QC MP
Attorney General
Royal Courts of Justice
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Prime Minister
Any thoughts you
would like to feed into
Mr Howard's meeting with
the A.G. N.C.W
22.4

Dear Attorney,

FINANCIAL SERVICES BILL : STATUS AND POWERS OF THE DESIGNATED AGENCY

WILL REQUEST IF REQUIRED

Thank you for your letter of 21 April. I am grateful for your support for my proposal to be able to transfer to the Agency in full the Secretary of State's investigation powers. But you and the Prime Minister have expressed reservations about making it possible to transfer prosecution powers to the Agency.

It may be helpful if I spell out more fully what we have in mind in relation to prosecutions. First, I should make clear that we are only concerned with the designated agency, which will be a body exercising statutory powers and functions under the Bill. We are not concerned with transferring prosecution powers to The Stock Exchange or to the other bodies which hope to become self-regulating organisations. Although it would be possible under the Bill to have more than one designated agency, now that the Securities and Investments Board and the Marketing of Investments Board Organising Committee have decided to merge our confident expectation is that there will be only one agency.

Our proposals therefore envisage in practice that in England and Wales prosecutions for offences under the Bill would only be undertaken by the Secretary of State, the DPP and the agency. The DPP would continue to handle the more serious cases, as at present, but the Secretary of State could share part of his prosecution powers with the agency. He would of course be under no obligation to transfer any prosecution function to the agency, and would only share it to the extent that he was satisfied with the agency's

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ability to carry out the function satisfactorily. Thus the transfer might only relate to prosecutions for certain offences, such as the offence of carrying on investment business without authorisation (Clause 4) or the offence of supplying false or misleading information to the agency (Clause 156(1)). These offences are relatively straightforward to prosecute and relate directly to maintaining the integrity of the authorisation system. The provisions in the Bill would also enable him to impose conditions and restrictions on the agency's exercise of the powers. That could - and I think would - include a requirement that the Secretary of State would be able to step in and take over an individual case.

We could also require for certain offences or for certain offenders that the agency should seek the Secretary of State's consent in individual cases. We would not however want case by case consent to apply to all agency prosecutions because that would tend to duplicate effort. Once the agency had demonstrated its capability in a particular area we would want to leave that area to them, subject to the ability to call in individual cases if that seemed necessary.

I would naturally wish to consult you and colleagues on framing appropriate requirements when we come to prepare the delegation order for the agency after Royal Assent. I am sure it would be possible to reach agreement on sensible arrangements for agency prosecutions, which could be varied in the light of experience and the agency's developing expertise.

An alternative approach would be to set limits in the Bill on the extent to which the prosecution function would be transferred, but that would reduce flexibility and would I believe make the package of proposals more difficult to sell to those of our critics who consider that the agency would be best placed to undertake prosecutions.

The Securities and Investments Board has already begun to recruit in-house lawyers, and I am confident that as it builds up expertise in prosecutions, which is bound to be a gradual process, it will be able to do a more effective job because of the closer contact it will have with investment businesses, the knowledge and experience of its practitioners and the additional resources which it will be able to command. I do not underestimate the difficulty of recruiting and retaining within the Government Legal Service prosecutors of the quality and experience required for this specialised area.

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The Agency would be answerable to the Secretary of State and his ability - in consultation with you - to vary the requirements on agency prosecutions will ensure that he is answerable to Parliament for prosecution policy including promoting consistency of treatment. He would not however be answerable for the agency's decision to prosecute in individual cases except in those areas where he stipulated that his consent to individual prosecutions was required.

You also raise the question of separating the investigation and prosecution functions. Roskill saw advantages in combining these functions in serious fraud cases, and we see similar advantages in the financial services area. We consider that they will improve the speed and effectiveness of the regulatory system. The Agency will often have to conduct the investigation and decide whether regulatory action - in addition to or instead of prosecution - is needed. We want to avoid a second investigation by the DTI with a view to prosecution which would duplicate effort. If the agency were to prosecute too little or too often we could retrieve the functions for the Secretary of State.

Not good analysis N.C.U.

The Prime Minister has also questioned whether it is appropriate to give a private sector agency a prosecution role. Many offences are unrestricted, so that prosecutions may be mounted by any private individual. The Royal Society for the Protection of Animals, the National Society for the Prevention of Cruelty to Children, the Royal Society for the Protection of Birds and members of the National Viewers and Listeners Association are examples of private sector bodies which do exercise the right to bring private prosecutions. Moreover, the fact that the agency will be exercising statutory functions makes it different from a straightforward private sector body.

There is a growing view that if the system is to be fully effective the agency should have the power to prosecute (as the Bank of England has under the Banking Act). If we resist that argument on the grounds that the agency is a private sector body the pressure to turn it into a public sector statutory commission will intensify.

The possibility of Agency prosecution is an integral part of the package which would ensure that we and our backbenchers present a united front against the attempts of the Opposition to overturn the basic approach we have adopted in the Bill.

Perhaps the best way forward would be for Michael Howard, who has taken the Bill through Committee, to discuss these issues with you; I understand a meeting has now been arranged for this Thursday.

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I am copying this to the Prime Minister and the other recipients of your letter.

Yours sincerely,

M.R. Gilbertson

P PAUL CHANNON

[Approved by the Secretary of State and signed in his absence]

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