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ISSUES PAPER

# REGULATORY ENFORCEMENT AND CORPORATE OFFENCES

(LRC IP 8 - 2016)



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ



## About the Commission

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 200 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at [lawreform.ie](http://lawreform.ie). Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. The *Fourth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in October 2013 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's Access to Legislation project makes legislation in its current state (as amended rather than as enacted) more easily accessible to the public in three main outputs: the Legislation Directory, the Classified List and the Revised Acts. The Legislation Directory comprises electronically searchable indexes of amendments to primary and secondary legislation and important related information. The Classified List is a separate list of all Acts of the Oireachtas that remain in force organised under 36 major subject-matter headings. Revised Acts bring together all amendments and changes to an Act in a single text. The Commission provides online access to selected Revised Acts that were enacted before 2006 and Revised Acts are available for all Acts enacted from 2006 onwards (other than Finance and Social Welfare Acts) that have been textually amended.

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The Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

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Mr Justice John Quirke, former Judge of the High Court

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**Full-time Commissioner:**

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## Overview

This Issues Paper forms part of the Commission's *Fourth Programme of Law Reform*.<sup>1</sup> It addresses a wide range of questions concerning two related matters. The first is whether the supervisory and enforcement powers of the State's main financial and economic regulators are adequate or need to be supplemented by, for example, civil financial sanctions and more effective co-ordination between regulators. The second is whether there are gaps in the criminal law that do not deal sufficiently with serious wrongdoing by corporate bodies, in particular regarding current fraud legislation and the general rules for attributing criminal liability to corporate bodies.

The broad context for this Issues Paper can be traced to the financial and economic collapse that emerged in 2008. A number of studies discussed below have identified failings in regulatory supervision and enforcement in the years preceding the collapse. The close relationship between regulatory law and criminal law also brings into focus the effectiveness of existing criminal offences and the ways in which they might affect how companies behave and are regulated. Significant reforms to both the regulatory framework and criminal law have been enacted since 2008 but important areas remain to be addressed. This Issues Paper identifies a number of these on which the Commission now seeks views. Many of these can be linked to the financial and economic collapse of 2008, but a number potentially have a wider application beyond financial regulation, including those concerning fraud offences and the attribution of criminal liability to corporate bodies. To that extent, this Issues Paper addresses future risks as well as risks already identified as arising from the financial collapse of recent years.

The Issues Paper contains 12 issues on which the Commission seeks views. Issues 1 to 6 concern the supervisory and enforcement powers of financial and economic regulators, while Issues 7 to 12 concern criminal law and related matters.

### Issue 1

considers the supervisory and enforcement powers of financial and economic regulators, and asks whether – and if so, how – a **standard set of powers** should be created for some or all such regulators.

### Issue 2

examines the power that some financial and economic regulators have to impose **civil financial sanctions** as a response to non-compliance with the law and as an alternative to criminal prosecution. It seeks views as to whether civil financial sanctions should be more widely available to regulators as an enforcement tool.

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<sup>1</sup> Law Reform Commission *Report on Fourth Programme of Law Reform (LRC 110-2013)* Project 1.

### Issue 3

examines the use of **negotiated compliance agreements**, which are also available to some regulators, by which civil litigation by the regulator (or a criminal prosecution for non-compliance with the law, usually involving a minor infringement) can be avoided if a corporate body agrees to specific terms, including preventative measures to ensure future compliance. The Commission asks whether such agreements should be more widely available.

### Issue 4

examines **deferred prosecution agreements (DPAs)**, which are widely used in the United States, and a judicially-supervised version of which was introduced in the UK in 2013. The Cartel Immunity Programme operated jointly by the Competition and Consumer Protection Commission and the Director of Public Prosecutions under competition law has some of the features of DPAs. The Commission asks whether DPAs should be available in other contexts, and if so what oversight protections should be put in place.

### Issue 5

examines matters concerning **co-ordination and co-operation between regulators**, notably where their statutory functions overlap. The Commission asks what improvements can be put in place to ensure the efficiency and effectiveness of concurrent or overlapping jurisdictions between financial and economic regulators, including the form that co-operation agreements take; whether there should be a lead agency in such cases; the extent to which information should be shared between regulators; and how inspectors from different regulators might co-ordinate their enforcement activities.

### Issue 6

considers possible reforms to improve the efficiency and effectiveness of the **appeals process from financial and economic regulators**, focusing on adjudicative decisions of regulators that can have a high market impact. This includes decisions to grant or remove a licence, or authorisation, of a regulated entity to operate in a regulated sector, or to impose civil financial sanctions. The Commission seeks views on whether a single appeals process, such as to the Commercial Court in the High Court, would be suitable for this purpose, or whether specialised appeals bodies should continue to have a role.

### Issue 7

considers the general test for **determining or attributing the criminal liability of corporate bodies**. The Commission explores whether existing tests are adequate and asks whether a generally applicable test based primarily on an organisational approach to corporate decision-making – which also takes account of the acts of senior corporate decision-makers – should be adopted, and if so what form that should take.

### **Issue 8**

considers the related question of the two main models for determining the **personal criminal liability of senior corporate decision-makers** – the more widely-applicable model based on a test of the “consent, connivance or neglect” of the decision-maker, and the second, found in the *Companies Act 2014*, of the “officer in default.” The Commission asks whether either or both of these models should be adjusted (for example, whether the “consent, connivance or neglect” formula should relate to the substantive offence to which it refers) and whether there is a case for a single test.

### **Issue 9**

examines whether there should be a general **defence of due diligence** or “reasonable precautions” available to corporate criminal offences, or whether some offences should, on public policy grounds, remain absolute in nature. The Commission seeks views on this, including whether obtaining professional advice, including legal advice, should be taken into account in determining whether a corporate body or its decision-makers have exercised due diligence.

### **Issue 10**

examines whether there is a gap in the law on **fraud offences**. The discussion covers the common law offence of conspiracy to defraud and the fraud-related offences in the *Criminal Justice (Theft and Fraud Offences) Act 2001* and the *Companies Act 2014*. The Commission asks in this respect whether there is a need to enact offences along the lines of US mail fraud and wire fraud offences.

### **Issue 11**

examines whether an **offence of reckless trading** should be enacted. Such an offence would criminalise corporate activity that involves reckless disregard as to whether the activity causes a loss. It would impose a lower threshold than applies to fraud-related offences, which require actual knowledge and intention to defraud.

### **Issue 12**

examines the current legislation on the allocation of the **court of trial for corporate offences**. Where a corporate criminal offence requires a jury trial, most trials must be held in the Circuit Criminal Court, though some competition law jury trials are reserved for the Central Criminal Court (the High Court). The Commission seeks views as to whether there should be more flexibility for the transfer of these trials between the Circuit Criminal Court and the Central Criminal Court, for example where a case is complex or concerns alleged systemic economic damage.



## Background

1. The financial crisis that emerged in 2008 had its roots in financial, regulatory and fiscal policies across the world's leading economies, many of which were replicated in Ireland. However, some aspects of the crisis experienced in Ireland reflect purely domestic policies, practices and circumstances. The crisis has led to enormous long-term financial, reputational and social costs: the 2008 bank guarantee and subsequent bailout alone have most recently been estimated by the former Governor of the Central Bank of Ireland to have imposed a net cost of €40 billion.<sup>1</sup> Numerous reports by experts and inquiries have been undertaken in order to identify causes of the crisis and to recommend ways to address them. Some, such as the Report of the Oireachtas Committee of Inquiry into the Banking Crisis,<sup>2</sup> are awaited. Among those already published, a number of matters have been consistently identified as causing or contributing to the crisis. Some of the key findings of these reports form the basis for a number of the questions in this Issues Paper as to whether Irish law is adequately equipped to deal with the types of behaviours that corporate bodies – including many outside the financial sector – engaged in up to and even after the financial crisis. Two commonly identified factors are particularly relevant to this Issues Paper:
  - the policies and practices of regulatory authorities concerning enforcement and the enforcement measures available to them, and
  - corporate governance standards and practices among regulated entities.
2. Many of the questions raised in this Issues Paper will therefore be directly relevant to the Central Bank as the regulator of financial services in Ireland, and to corporate bodies in the financial services sector. The Paper will also be of relevance to other financial and economic regulators, a number of whom have previously raised the need to review the scope of their statutory powers.<sup>3</sup>

<sup>1</sup> Oireachtas Committee of Inquiry into the Banking Crisis, evidence of Prof. Patrick Honohan, 15 January 2015.

<sup>2</sup> This Committee was established under the *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013*. At the time of writing the Committee has concluded public hearings and is expected to present its final report by end January 2016. See <http://inquiries.oireachtas.ie/banking/>.

<sup>3</sup> In addition to the powers of the Central Bank as the regulator of financial services, the Issues Paper raises questions of relevance to the Commission for Communications Regulation, the Commission for Energy Regulation, the Competition and Consumer Protection Commission, the Health Products Regulatory Authority, the Broadcasting Authority of Ireland and the Office of the Director of Corporate Enforcement. These bodies made submissions to the Commission in the consultative process leading to the preparation of the *Fourth Programme of Law Reform* and many have also been involved in other related processes such as the development of the Government's White Paper on Crime and its 2013 Policy Statement on Sectoral Economic Regulation, *Regulating for a Better Future*.

## The Financial Crisis in Ireland: Corporate Criminal Liability and Regulatory Failure

3. The Government commissioned two preliminary reports<sup>4</sup> and established a Commission of Investigation into the Banking Sector<sup>5</sup> to explore the causes of the banking crisis, to restore international confidence in the Irish banking system and to prevent a recurrence. The Regling and Watson Report concluded that the fiscal policy adopted “heightened the vulnerability of the economy” and that counter-cyclical budgets could have moderated the boom and created a “cushion” for the recession.<sup>6</sup> The Honohan Report found that the failure of financial regulation was “clearly of a systemic nature rather than related to any one individual.”<sup>7</sup>
4. The 2011 *Report of the Commission of Investigation into the Banking Sector*, the Nyberg Report, found that a systemic banking crisis had occurred due to insufficient knowledge, analysis and foresight and people merely remaining silent about their concerns,<sup>8</sup> as well as the prevalence of “herding”<sup>9</sup> and “groupthink”.<sup>10</sup> It found evidence that conforming to team values was expected, and that acceptance of silo strategies and views of banking institutions as a “family,” may have hindered critical thinking.<sup>11</sup>
5. While the banking crisis in Ireland cannot be seen in isolation from what was happening elsewhere in the world at the same time, there is consensus that it was in many ways home-made.<sup>12</sup> Predicated on a “plain vanilla property bubble”<sup>13</sup> which was financed by the banks using wholesale market funding,<sup>14</sup> the banking crisis in Ireland was not directly caused by the kinds of complex financial instruments that caused of the concurrent economic crisis in the United States.

<sup>4</sup> The first of these, the Regling and Watson Report, examined the macro-economic developments internationally and in Ireland, as well as monetary and fiscal policies in the period leading up to the 2008 crisis. The second, the Honohan Report (Governor of the Central Bank, *The Irish Banking Crisis Regulatory and Financial Stability Policy 2003–2008*), was a preliminary investigation into the performance of the respective functions of the Central Bank and the Financial Regulator over the period from the establishment of the Financial Regulator in 2003 to the end of September 2008. Both are available at [www.bankinquiry.gov.ie/Preliminary\\_Reports.aspx](http://www.bankinquiry.gov.ie/Preliminary_Reports.aspx).

<sup>5</sup> The Commission was established under the *Commissions of Investigation Act 2004*. The terms of reference were set out in the *Commission of Investigation (Banking Sector) Order 2010* (SI No.454 of 2010) as amended by the *Commission of Investigation (Banking Sector) (Amendment) Order 2010* (SI No.590 of 2010).

<sup>6</sup> Regling and Watson Report at 5.

<sup>7</sup> Honohan Report, paragraph 1.8.

<sup>8</sup> Nyberg Report, *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland: Report of the Commission of Investigation Into the Banking Sector in Ireland* (2011), paragraph 1.5.2.

<sup>9</sup> “Herding” is defined in the Nyberg Report as “the willingness of investors and banks to simultaneously invest in, lend to and own the same type of assets, accompanied by insufficient information gathering and processing”. (Nyberg Report, paragraph 1.6.3).

<sup>10</sup> “Groupthink” is defined as when “people adapt to the beliefs and views of others without real intellectual conviction. A consensus forms without serious consideration of consequences or alternatives, often under overt or imaginary social pressure.” (Nyberg Report, paragraph 1.6.5).

<sup>11</sup> Nyberg Report, at paragraph 2.11.1.

<sup>12</sup> Regling and Watson Report at 5.

<sup>13</sup> *Ibid* at 6.

<sup>14</sup> Nyberg Report, para 5.3.1.

6. Nyberg observed that corporate governance in Irish banks up to and including 2008 was not lacking or poorly structured, but rather gradually weakened over time as controls were relaxed to facilitate growth. Groupthink resulted in the suppression of contrarian views that advocated for more prudent and risk-averse policies, since it was widely felt that following such measures would make banks less competitive in a fiercely competitive market. The widely held belief in a “soft landing” was, according to Nyberg, a consequence of groupthink. Nyberg concluded that, although it seemed to be almost unbelievable, there was a “general denial of the extent of accumulated risk until the very end.”<sup>15</sup>
7. Both the Honohan and Nyberg Reports referred to the Financial Regulator’s policy of principles-based or “light-touch” regulation, which relied mainly on enforcement through moral suasion. With the benefit of hindsight, they found this be “based on unduly positive assumptions concerning the behaviour of financial service providers.”<sup>16</sup> In practice, enforcement through moral suasion involved negotiating with financial institutions when non-compliance was detected. However, negotiations were not backed up by credible threats of more serious enforcement action when non-compliance continued or re-occurred.<sup>17</sup> There was a fear that “attaching conditions to licences and similar measures might attract adverse publicity and discourage promotion of the Irish financial sector.” Supporting this largely trust-based model of enforcement was “the view that those running the banks and building societies were honourable persons striving to do their best to comply [with regulatory principles] as well as the various rules, codes and regulations”.<sup>18</sup>
8. The Honohan Report described the type of regulatory supervision of banks in Ireland prior to 2008 as being “focused on verifying governance and risk management models rather than attempting an independent assessment” of actual risks that were accumulating. Determining whether banks had appropriate governance structures and risk management systems therefore became detached from regulatory monitoring of the effectiveness of those structures and systems.<sup>19</sup> Hindsight showed that important elements of those systems and structures were defective. The consequence was “a much greater accumulation of risk than the bankers had envisioned”. The absence of robust challenge by the Financial Regulator to poor governance structures and risk management systems, in particular concerning the security underlying large developer loans, meant that “regulators did not realise just how vulnerable the lenders were to property price declines.” The Honohan Report concluded that the Financial Regulator’s reliance on principles-based regulation, and practice of basing risk assessments on the systems and structures in place in banks,

15 Nyberg Report, paras. 2.11 and 4.9.4.

16 *Ibid* 59, [4.49].

17 *Ibid.* 91, para 5.2.14.

18 Honohan Report 55–56, [4.37]–[4.38].

19 *Ibid* 8, [1.9–1.10].

led to a failure to grasp the scale of the potential exposure “[e]ven when confronted with evidence that the banks themselves had insufficient information.” While the Honohan Report attributed primary responsibility for the financial crisis to the directors and senior managements of certain banks, this failure of regulation was a serious example of what happens when regulation and the enforcement of the applicable legislation do not take place as they should.<sup>20</sup>

## Legal Responses During and After the Banking Crisis

9. Although there were some deficits in the legal framework prior to 2008, the problems that arose in the banking sector in 2008 were generally not caused by an absence of law. Instead, the Honohan Report found that failure to enforce the laws that existed at the time was a more significant causal factor. The Report stated that the laws and powers available at the time were sufficient “to impose tougher requirements on credit institutions in order to choke off the boom”.<sup>21</sup> For example, since 1992 it has been an offence for a credit institution to fail to manage its business in accordance with sound administrative and accounting principles and to fail to put in place and to maintain internal control and reporting arrangements and procedures to ensure that the business is so managed.<sup>22</sup> Where the offence had been committed with the consent, connivance or neglect of its directors or managers, they too could be held criminally liable.<sup>23</sup> In addition, there were in force at the time rules on quantitative credit limits. If these had been enforced, they could have imposed effective limits on lending, thereby slowing down the property bubble.<sup>24</sup> In addition to the *Central Bank Acts* and *Companies Acts* in force at the time, other laws in place prior to 2008 included the *Asset Covered Securities Act 2001* and the *European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992* (as amended)<sup>25</sup> which respectively concerned risk weightings and capital requirements for residential mortgages and speculative property development loans.

<sup>20</sup> Honohan Report [1.6-1.11]. See also Donnelly, *The Law of Credit and Security* (Roundhall 2011) 92, para 4-11.

<sup>21</sup> Honohan Report, [7.2].

<sup>22</sup> Regulations 16 and 33 of the *European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992* (S.I. No.395 of 1992), replaced by Regulation 52 of the *European Union (Capital Requirements) Regulations 2014* (S.I. No.158 of 2014).

<sup>23</sup> Regulation 36 of the *European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992* (S.I. No.395 of 1992), replaced by Regulation 150 of the *European Union (Capital Requirements) Regulations 2014* (S.I. No.158 of 2014).

<sup>24</sup> Honohan Report [7.18]. See section 23 of the *Central Bank Act 1971*, which provides that the Central Bank of Ireland has the power to require banks to maintain specific ratios between assets and liabilities. This provision did not become a designated enactment subject to the Central Bank’s administrative sanctions procedure until 2010: see section 14 of, and Schedule 1, Part 1, Item 82 to, the *Central Bank Reform Act 2010*.

<sup>25</sup> S.I. No.395 of 1992, as amended. The 1992 Regulations implemented, among other matters, capital requirements under Directive 89/646/EEC, as amended, which with other Directives was consolidated into Directive 2000/12/EC. The 2000 Directive was later replaced by Directive 2006/48/EC, which came into effect in 2009 and was implemented by the *European Communities (Directive 2006/48/EC) (Central Bank Acts) (Amendment) Regulations 2009* (S.I. No.512 of 2009) and the *European Communities (Capital Adequacy of Credit Institutions) Regulations 2006* (S.I. No.661 of 2006). The 1992 Regulations, as amended, were revoked and replaced by the *European Union (Capital Requirements) Regulations 2014* (S.I. No.158 of 2014), which implemented Directive 2013/36/EU, the 2013 Capital Requirements Directive: see fn33, below.

10. In the context of principles-based regulation, 9 general principles for financial services providers were developed but these were not put into an enforceable code, nor were they followed up in any other meaningful way.<sup>26</sup> Had they been enforced, they might have had some effect on the implementation of banks' corporate governance structures and risk management systems.<sup>27</sup> In 1995 the Central Bank issued its *Licensing and Supervision Requirements and Standards for Credit Institutions*, an enforceable corporate governance code. Between 2003 and 2008, unsuccessful attempts were made to update and modernise this code to make it relevant to the behaviours of banks. An attempt was also made, again without success, to obtain discretionary power to seek directors' compliance statements.<sup>28</sup> More successful was an updating of the fitness and probity pre-screening requirements for directors and managers, though these were not put on a statutory footing until 2010 with the enactment of the *Central Bank Reform Act 2010*.<sup>29</sup>
11. Since 2008, there have been a number of legislative responses to the banking crisis.<sup>30</sup> Reform of the law regulating banks and financial services institutions has been a key feature of the State's overall response. Principal among these are the *Central Bank Reform Act 2010*, which aims to reform the culture within corporations by requiring pre-screening fitness and probity tests for senior executive positions, and the *Central Bank (Supervision and Enforcement) Act 2013* which, among significant new powers, expands the Central Bank's power to issue directions to regulated institutions relating to specific aspects of how they conduct their businesses; and which also provides for redress schemes in the event of governance failures.<sup>31</sup> These reforms complement EU-initiated legislative responses to the international economic crisis, such as the Single Supervisory Mechanism (SSM) which gives a central supervisory role over credit institutions to the European Central Bank,<sup>32</sup> and the *European Union (Capital Requirements) Regulations 2014*<sup>33</sup> which set out revised capital ratio requirements and also contain detailed internal governance requirements for financial institutions. These responses impose more defined and structured risk-appetite requirements than previously existed. In addition, these legislative reforms are supported by the Central Bank's *Corporate Governance Code for Credit Institutions and Insurance Undertakings 2013*, which contains detailed requirements concerning internal corporate governance, including the roles of board members in regulated entities, the appointment of and roles of Risk Officers and the

26 Honohan Report [4.9].

27 Honohan Report, 46, fn. 40.

28 *Ibid.* [4.16–4.25].

29 Section 21 of the *Central Bank Reform Act 2010*.

30 See generally Donnelly, *The Law of Credit and Security* (Roundhall 2011), Chapter 2.

31 For an example of such a redress scheme, see the 2014 Settlement Agreement Between the Central Bank and Ulster Bank, discussed in Issue 2, below.

32 See Regulation No.1024/2013 and the *European Union (Single Supervisory Mechanism) Regulations 2014* (S.I. No.495 of 2014).

33 S.I. No.158 of 2014, which implemented Directive 2013/36/EU, the 2013 Capital Requirements Directive. The 2014 Regulations also revoked and replaced the *European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992* (S.I. No.395 of 1992) (as amended) and the *European Communities (Capital Adequacy of Credit Institutions) Regulations 2006* (S.I. No.661 of 2006), which had implemented pre-2013 capital ratio requirements: see fn25, above.

internal governance of risk appetite. Non-compliance with the 2013 Code can lead to the use of all or any of the Central Bank's enforcement powers, including administrative sanctions, criminal prosecution and the suspension or withdrawal of banking or insurance licences.<sup>34</sup>

12. At the same time as the post-2008 financial services legislation was being introduced, the Oireachtas also completed a large-scale reform of company law. One of the benefits of that project was the consolidation of over 400 separate corporate criminal offences into a single piece of legislation, the *Companies Act 2014*. An analysis of the 2014 Act indicates that calls for increased sanctions<sup>35</sup> for corporate crime may have influenced the reforms that it introduced. For example, the 2014 Act has a four-tier system of offences, the highest tiers of which can lead to prosecution on indictment and correspondingly significant sanctions. In addition, the 2014 Act provides for three "super offences" related to market conduct, for which the maximum penalties (following conviction on indictment) include fines ranging from €1 million to €10 million and/or imprisonment for up to 10 years.<sup>36</sup> It can be argued, therefore, that legislative responses to the financial crisis have already sought to decrease the likelihood of future misbehaviour by corporations and the individuals who work in them.
13. Reforms to criminal procedure were also enacted with the intention of aiding the investigation and prosecution of corporate crime.<sup>37 38</sup>

### **The Case for Further Law Reform**

14. The behaviour in the financial services sector up to and during the financial crisis shows that when relevant legislation is not enforced, serious problems can result. Lessons from the failures in financial regulation can be learned and applied to regulatory enforcement in other sectors of the economy.

<sup>34</sup> See para 3.7 of the Code.

<sup>35</sup> McGrath "Sentencing White-Collar Criminals: Making the Punishment Fit the White-Collar Crime" (2012) 22(3) ICLJ 72.

<sup>36</sup> The offences are market abuse (section 1368 of the 2014 Act), the prospectus offence (section 1356) and the transparency offence (section 1382).

<sup>37</sup> For example, section 15 of the *Criminal Justice Act 2011* provides that a member of the Garda Síochána may apply to the District Court for an order directed to "a person" to produce documents or provide information in connection with the investigation of a number of so-called "white collar" offences listed in the Schedule of the 2011 Act.

<sup>38</sup> A number of prosecutions under existing law are pending at the time of writing. These trials involve various charges including the common law offence of conspiracy to defraud, offences under the Companies Acts and offences under the *Criminal Justice (Theft and Fraud) Offences Act 2001*.

15. A number of commentators, including those consulted in relation to the Commission's *Fourth Programme of Law Reform*,<sup>39</sup> have questioned whether the existing regulatory enforcement powers and criminal laws are adequate to deal with the behaviours that caused or contributed to the financial crisis.<sup>40</sup> For example, in its 2013 *Interim Report on the Committee's Examination of Bank Stabilisation Measures*, the Oireachtas Public Accounts Committee noted the lack of provision for reckless trading for financial services and called for examination of the need for "a provision which would provide for presumptive liability or presumptive sanctions for directors of failed financial institutions". The Committee also suggested that current systems, structures and procedures for investigating directors suspected of corporate wrongdoing should be reviewed and streamlined, and that this Commission should review relevant aspects of the law in respect of enforcement against individuals.<sup>41</sup> In 2014, the Free Legal Advice Centre (FLAC) argued that not enough has been done to address the issue of reckless lending on the part of financial institutions. It suggested that "there is little to prevent many of the irresponsible lending practices which contributed to bringing Ireland to its economic knees from re-occurring in the future".<sup>42</sup> In response to the financial crisis, the Central Bank of Ireland has used its regulatory powers to address risks related to lending, including the imposition of lending limits and publishing an updated *Consumer Protection Code 2012*. Nevertheless, the question remains whether further reform of the criminal law is required in connection with corporate or individual behaviour that might broadly be described as "reckless trading."
16. In approaching this question the Commission believes it is essential that the criminal law should be used to address only the most serious forms of wrongdoing and that civil and administrative measures are more appropriate for less serious problems.<sup>43</sup> In its 2010 *Consultation Paper on Criminal Liability in Regulatory Contexts*, the Law Commission of England and Wales took the view that the criminal law should be used only when the conduct in question "involves a harm-related moral failing."<sup>44</sup> This was informed by the "harm principle" described in the 19<sup>th</sup> Century by John Stuart Mill in *On Liberty*, which asserts that the only justification for interference with a person's liberty is to prevent harm to others; therefore, only acts that are "injurious to others"

39 For example, the Office of the Director of Corporate Enforcement (ODCE) has acknowledged that there is much "public concern about the relative dearth of 'white collar' crime prosecutions generally": Office of the Director of Corporate Enforcement *Submission on White Collar Crime* (2010) (submitted to the Department of Justice and Equality in 2010, and subsequently submitted to the Commission during the consultation process leading to the preparation of the Commission's *Fourth Programme of Law Reform*).

40 See also Department of Justice and Equality, *Organised and White Collar Crime: Overview of Written Submissions Received*, Discussion Document No.3 (2011), available at [www.justice.ie](http://www.justice.ie).

41 Public Accounts Committee *Interim Report on the Committee's Examination of Bank Stabilisation Measures* (2013). The report also refers to the Irish law being weak on enforcement, and then cites as an example the lack of a reckless trading offence and other provisions. It is unclear therefore whether the report is recommending that enforcement mechanisms be examined in addition to new offences. This project in the Commission's *Fourth Programme of Law Reform* has within its scope both regulatory enforcement mechanisms and an examination of possible new offences.

42 Free Legal Advice Centres "Redressing the Imbalance: A study of legal protections available for consumers of credit and other financial services in Ireland" (FLAC 2014) at 173.

43 See also Campbell, Kilcommins and O'Sullivan, *Criminal Liability in Ireland* (Clarus Press 2010) at 24.

44 Law Commission of England and Wales, *Consultation Paper: Criminal Liability in Regulatory Contexts* (LCCP 195-2010) at 68.

should attract punishment.<sup>45</sup> For that reason, the Law Commission of England and Wales provisionally recommended that only behaviours that are in themselves morally wrong should be classed as criminal, and that, because of the serious implications for a defendant of a criminal conviction, the criminal law should be reserved for acts that cause harm. It also noted that the use of criminal law to address less serious behaviours is unlikely to be a deterrent and may cause the criminal law to fall into disrepute.<sup>46</sup> On those grounds, it suggested that civil penalties might be introduced as part of a hierarchy of sanctions in regulatory contexts. These could in turn be underpinned by criminal offences. During the consultation phase leading to the preparation of its *Fourth Programme of Law Reform*, this Commission received a number of submissions on this point. It takes the opportunity in this Issues Paper to explore some alternatives to criminal prosecution in the regulatory context, including deferred prosecution agreements and negotiated compliance agreements.

17. In light of criticism about the failure to enforce effectively financial services legislation in the years leading up to 2008, the Commission also considers it desirable to review the manner in which regulation as a whole is structured in Ireland. Strong cooperation between regulatory bodies with concurrent jurisdiction could strengthen the overall effectiveness of regulation in Ireland, while also creating a failsafe should any particular regulator fail, for whatever reason, adequately to enforce the law. The Commission believes there is scope for reform of how Irish regulators coordinate some or all of their activities, whether in regard to supervision, investigation or enforcement. Similarly, in light of the significant variations between the powers assigned to different regulatory bodies, the argument has been made that standardisation of common regulatory powers may result in consistent practice across sectoral divides concerning regulatory enforcement procedures.<sup>47</sup> It is therefore worthwhile to consider whether common regulatory enforcement powers should be standardised and codified.

<sup>45</sup> Mill, *On Liberty* (Longman, Roberts & Green, 1869). The harm principle was rejected in Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) who advocated that the basis for the criminal law was morality. Nevertheless, McAuley & McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 71, argue that the harm principle rather than the morality argument has “won the verdict in the court of contemporary academic opinion.”

<sup>46</sup> Law Commission of England and Wales *Consultation Paper: Criminal Liability in Regulatory Contexts* (LCCP 195-2010) at 69.

<sup>47</sup> Forfás Sectoral *Regulation: Study to Identify Changes to Sectoral Regulation to Enhance Cost Competitiveness* (2013) at 80: “[t]he current regulatory sanctioning system, including both criminal sanctions and non-criminal sanctions, is a system that has developed over time and as such there are variations between the powers assigned to the various regulators. It is not clear that differences in enforcement regimes were developed in response to differing sectoral characteristics. There is, therefore, merit in bringing consistency into the sanctioning toolkits across the system.”

## ISSUE 1

# STANDARDISING REGULATORY POWERS

- 1.01 This section of the Issues Paper considers similarities and differences between the types of power that regulators can use to bring about compliance with regulated standards and to deal with breaches of them. It then asks whether – and if so, how – a standard set of powers should be created for some or all regulators.

### Types of Enforcement Powers

- 1.02 A useful starting point is to consider what is sometimes referred to as the Enforcement Pyramid.



Figure 1: Enforcement Pyramid (adapted from *McRory Regulatory Justice: Making Sanctions Effective*(2006))

- 1.03 As illustrated in Figure 1, this shows the types of measures or approaches that are commonly used by regulators. At the base of the pyramid are the most frequently used measures – the so-called “soft powers” of education, persuasion and other ways of seeking voluntary compliance. Further up are less frequently used “hard” powers. These involve increasing degrees of intrusion into regulated entities’ business and coercion of their actions. At the middle level are powers typically used to correct errors and to bring defaulters back into compliance. At the peak are the most coercive measures, such as civil sanctions, criminal punishment including fines or imprisonment, and (where relevant) licence revocations.

- 1.04 Ideally, a credible threat of “hard” action should help to make the “soft” powers at lower levels more effective. Conversely, the more effective the “soft” powers are, the less frequently it will be necessary to deploy the “hard” ones.<sup>1</sup>

### Different legislation, different powers

- 1.05 The laws that give Irish regulators their legal mandates generally reflect the general format of the Enforcement Pyramid. However, there is no uniform template for regulatory legislation in Ireland. In part, this reflects the individual characteristics of the sectors that regulators oversee. The measures required in a specialised area such as financial regulation, for example, are different from those required in the telecoms sector by the Commission for Communications Regulation. On the other hand, many of the functions performed by regulators, particularly those related to inspection and enforcement, involve similar legal and administrative issues. For example, it is common in regulatory legislation to give powers to a regulator or its authorised officers to enter premises, to inspect documents, to require persons to provide information, and to interview persons.<sup>2</sup> However, the terms of the legislation that confer these powers can vary from one regulator to another<sup>3</sup> and even as between different legislative provisions that apply to a single regulator.<sup>4</sup> In much the same way, regulatory legislation commonly contains provisions that allow the regulator to apply for a search warrant. These are rarely used provisions that are typically included to cover cases that do not fall under authorised officers’ rights of entry and inspection, such as where the information being sought is held in a dwelling rather than a business premises.<sup>5</sup>

<sup>1</sup> See generally Macrory *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)), Chapter 2 “Underlying Principles for Regulatory Sanctions”.

<sup>2</sup> See section 24 of the *Data Protection Act 1988*, section 11 of the *Electricity Regulation Act 1999* and section 42 of the *Aviation Regulation Act 2001*, all of which are phrased in broadly similar terms but with differences as to the places that can be entered and searched, the types of documents or information that can be retrieved or the persons who can be interviewed.

<sup>3</sup> For example, both the Competition and Consumer Protection Commission (CCPC) and the Commission for Communications Regulation (ComReg) have responsibilities for enforcing provisions of the *Competition Act 2002*, in ComReg’s case as they relate to the telecommunications sector only. Under section 37 of the *Competition and Consumer Protection Act 2014*, authorised officers of the CCPC must obtain a warrant before they may exercise their statutory powers to enter and search premises and to seize documents or information in respect of a contravention of the 2002 Act. In contrast, section 39(3) of the *Communications Regulation Act 2002* permits ComReg’s authorised officers to exercise such powers without first obtaining a warrant, even when they seek to do so for the purposes of ComReg’s functions under the *Competition Act 2002*.

<sup>4</sup> For example, sections 26–28 of the *Central Bank (Supervision and Enforcement) Act 2013* contain detailed provisions that give authorised officers powers to enter and search premises, to inspect and copy records, to question certain persons and to apply for search warrants. In contrast, Regulation 123 of the *European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011* (S.I. No.352 of 2011) provides simply that “The Bank shall have all supervisory and investigatory powers that are necessary for the exercise of their functions”, including “at least”, to access documents and information and inspect premises.

<sup>5</sup> See, for example, section 39(5) of the *Communications Regulation Act 2002*. In its *Report on Search Warrants and Bench Warrants* (LRC 115-2015), the Commission identified more than 300 statutory provisions creating similar but not identical procedures for obtaining and executing search warrants and recommended that these should be replaced by a single generally applicable Search Warrants Act.

- 1.06 The diversity of these provisions suggests that regulatory legislation has been drafted and enacted on a one-off basis. These differences could make it difficult for regulators to cooperate in investigations because circumstances that give an officer of one agency authority to enter premises and to inspect or retrieve records may not cover an officer of another agency that has an interest in the matter. Even where only a single regulator is involved, the multiplicity of statutory provisions could have an inhibiting effect on decisions to prosecute or take enforcement action against offenders. A joint submission to the Commission by four regulatory agencies argued that the lack of standard set of procedures for regulators has led to the absence of “a reliable set of precedents that can apply to enforcement powers exercised by all agencies”. As a result, they stated, “courts have to apply a case-by-case approach which is neither efficient not ultimately useful.”<sup>6</sup>
- 1.07 The interventions available to regulators and the penalties that can be imposed on offenders also differ from one piece of legislation to another. As is the case with other powers, these differences are due in part to the roles of the regulators and the characteristics of the sectors for which they are responsible. However, some commentators have argued that supervisory and enforcement measures available to some or all regulators could be broadened. Measures suggested have included a number that are currently available to the Central Bank of Ireland, such as power to issue binding codes of practice,<sup>7</sup> fitness and probity regimes,<sup>8</sup> civil administrative or financial sanctions<sup>9</sup> and negotiated compliance agreements.<sup>10</sup> If such measures were to be made more widely available, the concerns expressed above about uniformity of inspections and search powers would also arise: creating a number of similar but not identical regulatory powers could undermine the effectiveness of the regulators that seek to exercise them.

### Standardising powers

- 1.08 Problems arising from regulators having inconsistent statutory powers are not unique to Ireland. Australia and the United Kingdom have adopted similar approaches to resolving them.
- 1.09 In Australia, the *Regulatory Powers (Standard Provisions) Act 2014* created a standardised legislative framework for regulatory powers, including inspection and investigation, civil sanctions, infringement notices, enforceable undertakings and injunctions. The 2014 Act is intended to reduce the time and resources required to draft regulatory enforcement legislation by having a standardised set of enforcement

<sup>6</sup> Joint submission by the Commission for Communications Regulation, the Competition Authority (now the Competition and Consumer Protection Commission), the Commission for Energy Regulation and the Irish Medicines Board (now the Health Products Regulatory Authority) to this Commission in the consultation process leading to the development of the *Fourth Programme of Law Reform*.

<sup>7</sup> Section 117 of the *Central Bank Act 1989*.

<sup>8</sup> Part 3, Chapter 2 of the *Central Bank Reform Act 2010*.

<sup>9</sup> Part IIIC, Chapter 2 of the *Central Bank Act 1942*. Civil financial sanctions are discussed in greater detail in Issue 2, below.

<sup>10</sup> Section 33AV of the *Central Bank Act 1942*. Negotiated compliance agreements are discussed in greater detail in Issue 3, below.

provisions that can be incorporated by reference, where appropriate, into both new and existing legislation. This is intended to ensure that “functions and powers that are frequently used by regulatory agencies are carried out under uniform provisions”.<sup>11</sup> The 2014 Act is not intended to standardise all regulatory powers, as some regulators will still require stand-alone powers that are particular to their responsibilities or sector, and that are not be appropriate for other regulators.

1.10 A similar approach in relation to enforcement and sanctions was taken by the UK in the *Regulatory Enforcement and Sanctions Act 2008*. The 2008 Act created a standard set of provisions that can be invoked by named regulators. The measures include powers to issue stop notices (that is, orders to cease a specified activity until a non-compliance is remedied), enforcement undertakings (similar to a negotiated compliance agreement) and civil financial sanctions.

1.11 A number of regulators<sup>12</sup> have suggested that the efficiency and effectiveness of regulation in Ireland could be improved by creating a standard set of regulatory powers that could be used by some or all regulators. Among the powers that have been suggested for inclusion in such a set are:

- inspection and investigation powers:
  - power of entry to premises,
  - power to require the production of, and to inspect, copy and remove documents or information,
  - power of access to computers and storage devices,
  - power to summon persons to attend and answer questions,
  - power to interview staff and other persons associated with regulated entities,
  - power to apply for and execute search warrants;
- enforcement powers:
  - fitness and probity regimes,
  - binding codes of conduct,
  - civil financial sanctions,
  - negotiated compliance agreements.

11 Biddington and Ferris “Regulatory Powers (Standard Provisions) Bill 2012” Parliament of Australia Library, Law and Bills Digest Section 2013 Bills Digest No. 99 (2012).

12 See Joint submission by the Commission for Communications Regulation, the Competition Authority (now the Competition and Consumer Protection Commission), the Commission for Energy Regulation and the Irish Medicines Board (now the Health Products Regulatory Authority), to the Commission in the consultation process leading to the development of the *Fourth Programme of Law Reform*. A submission by the Broadcasting Authority of Ireland was to the same effect.

**QUESTION 1**

1(a) Do you think that a single set of statutory regulatory powers would improve the efficiency or effectiveness of financial and economical regulation?

1(b) If so, what powers should be standardised? To which regulators should be made available? What, if any, difficulties might this approach give rise to?

1 (c) Do you believe that the efficiency and/or effectiveness of regulation could be improved in some other way?



## ISSUE 2

# CIVIL FINANCIAL SANCTIONS

- 2.01 Civil financial sanctions are a subset of the wider category of administrative sanctions. They are distinguished from criminal financial sanctions (fines) on the grounds that they are imposed by means of civil proceedings, and subject to civil standards of proof – that is, a “balance of probability” standard rather than the “beyond reasonable doubt” standard required in criminal cases. Broadly speaking, administrative sanctions are imposed by regulators rather than courts,<sup>1</sup> though they are often subject to some form of appeal to or review by a court. They can include measures such as fixed or variable monetary sanctions, stop notices, enforcement undertakings or supervised compliance regimes.<sup>2</sup> Monetary administrative sanctions have been variously described as “administrative fines”, “civil fines”, “civil penalties” and “financial penalties.” The use of the term “fine” in the civil context is, however, misleading because this is more properly associated with criminal sanctions. It has, however, proven difficult to settle on an umbrella term for the types of sanctions discussed in this section.<sup>3</sup> In this Issues Paper, the Commission has used the term “civil financial sanctions” to make clear that they are to be distinguished from fines imposed on foot of a criminal conviction.
- 2.02 Civil financial sanctions can be an effective means of responding to conduct that involves a breach of legislation but for which criminal prosecution would be too harsh a response. They are not intended to replace criminal enforcement of the law, but to complement it. However, it has been argued that they may involve a lenient alternative to criminal punishments that allow corporate bodies to treat the cost of financial sanctions simply as part of the price of doing business.<sup>4</sup> Therefore, to be effective, their maximum statutory levels need to be sufficiently high to deter non-compliance by signalling that the costs of infringement exceed those of compliance.<sup>5</sup> They must also, as discussed below, be proportionate to the non-compliance to which they are applied. In cases where the maximum civil financial sanction is not high enough to reflect a suitable sanction for non-compliance, the most appropriate enforcement action will be criminal prosecution.<sup>6</sup>

1 Lynott and Cullinane “Administrative Sanctions” (2010) 1 Irish Planning and Environmental Law Journal 12.

2 See, for example, the standard measures available under the UK’s *Regulatory Enforcement and Sanctions Act 2008*, sections 39-50.

3 de Moor-van Vugt, “Administrative Sanctions in EU Law” (2012) 5 Review of European Administrative Law 5, 12.

4 Coglianese and Ors, “The Role of Government in Corporate Governance” (2004) Regulatory Policy Program, Center for Business and Government, John F. Kennedy School of Government, Harvard University.

5 Elderfield, “Opening Remarks by Deputy Governor (Financial Regulation) Matthew Elderfield to Central Bank Enforcement Conference” (Central Bank Enforcement Conference, Dublin, 11 December 2012).

6 de Moor-van Vugt, “Administrative Sanctions in EU Law” (2012) 5 Review of European Administrative Law 5, 37.

## Civil Financial Sanctions in Ireland

- 2.03 Economic regulators across the EU<sup>7</sup> and in other jurisdictions<sup>8</sup> use civil financial sanctions. In Ireland, the 1999 *Report of the Working Group on the Establishment of a Single Financial Regulatory Authority*<sup>9</sup> recommended civil financial sanctions as a suitably proportionate response to many breaches of financial services legislative requirements. This was on the ground that other regulatory measures, such as the suspension of a licence, withdrawal of an authorisation or disqualification of senior managers, could have a disproportionately harsh effect on the corporate entity or the individual concerned.<sup>10</sup> In response, in 2004 the Oireachtas inserted a new Part IIIC into the *Central Bank Act 1942*,<sup>11</sup> which includes significant civil financial sanctions under the title Administrative Sanctions Procedure.<sup>12</sup> Since 2013, the maximum civil financial sanctions are €1 million for individuals or, for corporate bodies, the greater of €10 million or 10 percent of turnover for the previous complete financial year.<sup>13</sup> In some other cases, civil financial sanctions arise from the implementation of EU law,<sup>14</sup> such as under the *European Union (Capital Requirements) Regulations 2014*<sup>15</sup> and the *European Union (Single Supervisory Mechanism) Regulations 2014*.<sup>16</sup>
- 2.04 The largest civil financial sanction imposed under Part IIIC of the *Central Bank Act 1942* was €3.5 million, which was paid by Ulster Bank Ltd for a failure of its IT systems in 2012 that deprived 600,000 customers of online or ATM access to accounts for 28 days. The Central Bank concluded that governance and risk management failures in Ulster Bank had contributed to the IT failure, in breach of Ulster Bank's obligations to have in place effective risk management governance under the *European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992*.<sup>17</sup> Ulster Bank Ltd was required to undertake a programme of

7 See for example, in the UK, section 123 of the *Financial Services and Markets Act 2000* or section 39 of the *Regulatory Enforcement and Sanctions Act 2008*. For financial sanction in Europe, see de Moor-van Vugt, Fanagan and Joyce, "A Study on the Use of Administrative Sanctions for Environmental Offences in Other Comparable Countries and Assessment of Their Possible Use in Ireland" (Environmental Protection Agency, 2009).

8 In Australia, see the discussion in Australian Law Reform Commission, *Federal Civil and Administrative Penalties* (2010). In the United States, see 29 USC §1853.

9 *Report of the Implementation Advisory Group on a Single Regulatory Authority for Financial Services* (McDowell Group Report) (1999).

10 McDowell Group Report, Sections 7.5 and 7.6.

11 Section 10 of the *Central Bank and Financial Services Authority of Ireland Act 2004* inserted Part IIIC into the *Central Bank Act 1942*.

12 See generally Central Bank of Ireland *Outline of the Administrative Sanctions Procedures* (2014), <https://www.centralbank.ie/regulation/processes/Enfl/asp/Documents/Outline%20of%20Administrative%20Sanctions%20Procedure%202014.pdf>.

13 Sections 33AQ(4) and 33AS(1) and (2) of the *Central Bank Act 1942*, as amended by the *Central Bank (Supervision and Enforcement) Act 2013*.

14 Civil financial sanctions that would otherwise conflict with the Constitution may be enacted pursuant to Article 29.6 of the Constitution where required to give effect to measures necessitated by EU law. See McDowell "Non-Criminal Penalties and Criminal Sanctions in Irish Regulatory Law" in Kilcommins and Kilkelly (eds) *Regulatory Crime in Ireland* (FirstLaw/Lonsdale 2010) 141. This is without prejudice to those civil financial sanctions that have a purely domestic law origin, such as those in Part IIIC of the *Central Bank Act 1942* as inserted by the 2004 Act, discussed above.

15 S.I. No.158 of 2014, which implemented Articles 65 and 66 of Directive 2013/36/EU, the 2013 Capital Requirements Directive.

16 S.I. No.495 of 2014, which gave effect to the administrative arrangements required by Regulation No.1024/2013, the Single Supervisory Mechanism Regulation.

17 S.I. No.395 of 1992 (as amended), since revoked and replaced by the *European Union (Capital Requirements) Regulations 2014* (S.I. No.158 of 2014).

**Box 1: Civil Financial Sanctions Broadcasting Act 2009****RTE: “Prime Time Investigates – Mission to Prey”, 2011**

In May 2011, RTE broadcast an investigative documentary that was highly defamatory of a named person. RTE later characterised the broadcast and the decisions leading to it as “one of the most significant errors made in its broadcasting history”.

The Broadcasting Authority of Ireland determined that RTE had breached its statutory obligations of fairness and to respect individual’s privacy. It imposed a financial sanction of €200,000 under section 54 of the 2009 Act. It stressed that this was to assure audiences of the BAI’s concern to maintain high standards in broadcasting and that lapses in them, particularly by a public service broadcaster, would be resolved promptly.

remediation in respect of its IT systems. It was also required to publicise and implement a redress scheme, in accordance with the *Central Bank (Supervision and Enforcement) Act 2013*, to recompense its customers and which cost approximately €59 million.<sup>18</sup>

- 2.05 At the date of publication of this Issues Paper (January 2016) two challenges to inquiries under Part III C of the 1942 Act are before the courts, one of which has been rejected and the other is awaiting hearing in the High Court.<sup>19</sup> The outcome of these cases will be considered by the Commission in preparing its final Report on this project.
- 2.06 Apart from financial services regulation, civil financial sanctions are provided for in legislation concerning: taxation, the regulation of property services, communications and broadcasting. The Revenue Commissioners can directly impose civil financial sanctions under the *Taxes Consolidation Act 1997*. The sanction for fraudulently making incorrect tax returns, for example, is not a criminal offence but a civil financial sanction of twice the amount of the tax owed plus a penalty payment of €315.<sup>20</sup> That penalty increases to between €1,500 and €3,000 for corporate entities. If unpaid, recovery of the monetary sanction is through civil proceedings in the High Court.<sup>21</sup> The Broadcasting Authority of Ireland can apply to the High Court to confirm

<sup>18</sup> Central Bank of Ireland “Settlement Agreement between the Central Bank of Ireland and Ulster Bank Ireland Limited” available at <http://www.centralbank.ie/publications/Documents/Publicity%20statement%20for%20UBIL.pdf>. The contraventions in this case occurred before the increased limits inserted by the Central Bank (*Supervision and Enforcement) Act 2013* came into effect, so that the civil sanction paid by Ulster Bank Ltd was the maximum permissible under the pre-2013 provisions, subject to a discount for settlement.

<sup>19</sup> See *Fingleton v Central Bank of Ireland* [2016] IEHC 1, and *Purcell v Central Bank of Ireland and Ors* The Irish Times, 16 January 2016.

<sup>20</sup> Section 1053 of the *Taxes Consolidation Act 1997*. See also Revenue Commissioners “Notes for Guidance – Taxes Consolidation Act 1997 – Finance Act 2014 Edition – Part 47” (2014).

<sup>21</sup> Sections 1054 and 1061 of the *Taxes Consolidation Act 1997*.

the imposition of a civil financial sanction of up to €250,000 on a broadcaster that has breached certain provisions of the *Broadcasting Act 2009*.<sup>22</sup>

- 2.07 A sanction similar to that in the *Broadcasting Act 2009* is included in the *Property Services (Regulation) Act 2011*. This allows the Property Services Regulatory Authority, on completion of an investigation, to impose a civil financial sanction of up to €250,000 which takes effect when confirmed by the High Court.<sup>23</sup>

## Constitutional Issues

- 2.08 Ireland has been the subject of criticism for being out of step with its European counterparts by failing to provide for civil financial sanctions in its competition legislation<sup>24</sup> and electronic communications legislation.<sup>25</sup> Concerns about the constitutionality of these measures, specifically in relation to the right to a fair trial under Article 38.1, have inhibited the Oireachtas. These concerns led the Oireachtas to provide for the confirmation of civil financial sanctions by a court of competent jurisdiction when the *Central Bank and Financial Services Authority of Ireland Act 2004* inserted the power to impose civil financial sanctions into Part IIIC of the *Central Bank Act 1942*.<sup>26</sup> Similar concerns led the Oireachtas to drop proposals to include civil financial sanctions measures in sea-fisheries legislation in 2006<sup>27</sup> and competition legislation in 2011.<sup>28</sup>
- 2.09 Article 38.1 of the Constitution protects the fundamental right to a fair trial in criminal proceedings. It has been argued that very high civil financial sanctions could be regarded as being punitive, thereby requiring a court trial and the procedural safeguards associated with criminal proceedings. However, despite this, the Supreme Court has held in *McLoughlin v Tuite*<sup>29</sup> that financial penalties under taxation legislation can be civil in nature and enforceable in the civil courts. In that case, the Court assessed the legislative basis of a revenue penalty against the indicia of a criminal offence identified by the Supreme Court in *Melling v Ó Mathgamhna*.<sup>30</sup> It found that the imposition of a penalty alone, even a penalty intended to deter or

22 See sections 55 and 56 of the *Broadcasting Act 2009*. For Box 1, see Broadcasting Authority of Ireland, "Statement of Findings Issued Pursuant to Section 55(2) of the *Broadcasting Act 2009*", 4 May 2012, at [http://www.bai.ie/wordpress/wp-content/uploads/20120504\\_StatementofFindings\\_vFINAL\\_50.pdf](http://www.bai.ie/wordpress/wp-content/uploads/20120504_StatementofFindings_vFINAL_50.pdf).

23 Sections 68 and 69 of the *Property Services (Regulation) Act 2011*.

24 European Commission "Communication from the Commission to the European Parliament and the Council. Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives" (2014).

25 Joint submission by the Commission for Communications Regulation, the Competition Authority (now the Competition and Consumer Protection Commission), the Commission for Energy Regulation and the Irish Medicines Board (now the Health Products Regulatory Authority) to this Commission in the consultation process leading to the development of the *Fourth Programme of Law Reform*. The failure to act against non-compliant financial service providers using the available civil financial sanctions measures until after 2008 drew criticism in the Nyberg Report, at para. 4.3.3.

26 Vol. 585 Dáil Éireann Debates Cols 1437-1438, *Central Bank and Financial Services Authority of Ireland Bill 2003*: Report Stage (19 May 2004).

27 Vol. 615 Dáil Éireann Debates, *Sea-Fisheries and Maritime Jurisdiction Bill 2005*: Report Stage (22 February 2006).

28 Vol. 754 Dáil Éireann Debates, *Competition (Amendment) Bill 2011*: Report Stage (8 February 2012).

29 *McLoughlin v Tuite* [1989] IR 82.

30 In *Melling v Ó Mathgamhna* [1962] IR 1, at 25, Kingsmill Moore J identified these indicia as: (a) an offence against the community rather than particular individuals, (b) the imposition of a penalty and (c) whether an element of intention or knowledge (*mens rea*) was required. Lavery J [1962] IR 1, at 9 also identified the relevance of procedural elements such as arrest, searches and remand.

sanction non-compliance, was not sufficient in itself to create a criminal offence. Thus, unless the specific terms of the legislation creating the sanction reflect the indicia of a criminal offence as identified by Kingsmill Moore J in *Melling v Ó Mathghamhna*, financial penalties enforced through civil proceedings need not infringe Article 38.1.<sup>31</sup>

- 2.10 In *Registrar of Companies v Anderson*<sup>32</sup> the Supreme Court again considered the relationship of civil financial sanctions to the criminal law. The case concerned whether an increased fee for late lodgement of annual returns under the *Companies Act 1963* constituted a criminal penalty so that a prosecution for failure to file those returns was barred on the grounds that it would amount to double jeopardy. The Supreme Court found unanimously that that was not the case. The Court held that administrative sanctions such as late lodgement fees had a legitimate purpose in providing an incentive for prompt filing of returns and were self-evidently in the interests of good and efficient administration. The Court also noted that the higher fees were fixed and not subject to discretionary application. They were a foreseeable, objective and automatic consequence of late filing. Thus, charging the higher fee did not have the characteristics of a criminal prosecution, and therefore no issue of double jeopardy arose.
- 2.11 Article 6 of the European Convention on Human Rights guarantees persons of the right to a fair trial in the determination of their civil rights and obligations or of any criminal charge against them. This may give rise to a concern where measures such as civil financial sanctions are imposed by regulatory bodies rather than courts. In interpreting Article 6, however, the European Court of Human Rights has tended to the view that it is for each State to determine whether proceedings should be classified as criminal or otherwise. The central issue is whether the procedural and substantive protections assured by Article 6 are provided by the court or tribunal.<sup>33</sup> A body such as a regulator that imposes civil financial sanctions is unlikely to breach Article 6 provided it can assure the required fairness and procedural safeguards.<sup>34</sup>
- 2.12 The proportionality of civil financial sanctions is also relevant. In *O’Keeffe v Ferris*<sup>35</sup> the Supreme Court upheld the constitutionality of sanctions under section 297(1) of the *Companies Act 1963*, which permitted civil liability to be imposed through civil proceedings on persons who were found to be involved in fraudulent trading through a company (a comparable provision for civil liability in respect of reckless trading

31 See also Corrigan, *Revenue Law* (Roundhall 2000) 380, para 5–155. In *The People (DPP) v Redmond* [2001] 3 IR 390 the Court of Criminal Appeal held that the penal element of a taxation assessment could be taken into account as a mitigating factor when imposing a penalty under a criminal charge that arose from the same facts as those that led to the assessment.

32 [2004] IESC 103, [2005] 1 IR 22.

33 See *Engel v The Netherlands* (1976) 1 EHRR 647.

34 See Woods and Macrory “Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach”, Centre for Law and the Environment, University College London (2003) 34 at [6.18]. See also Rozakis, ‘The Right to a Fair Trial in Civil Cases’ (2004) 4 *Judicial Studies Institute Journal* 96.

35 *O’Keeffe v Ferris* [1997] 3 IR 463.

was inserted as section 291A of the 1963 Act by the *Companies Act 1990*.<sup>36</sup> The liability imposed was determined by the extent of the company's loss rather than by the amount of the gain or advantage received by the wrongdoer, and the Court accepted that this gave it a punitive character. However, the Court found the provisions did not meet all the criteria identified by Kingsmill Moore J in *Melling v Ó Mathgamhna* and therefore did not amount to a criminal offence. It noted that issues related to fraud and penal measures such as punitive or exemplary damages were well-established in the civil law. Importantly in this context, it stressed the importance of proportionality of the sanctions – the financial penalty faced by a former director did not exceed the loss suffered by the insolvent company. Similarly, in *Registrar of Companies v Anderson*,<sup>37</sup> the Supreme Court observed that an administrative sanction that was excessive and disproportionate to the administrative objective to be achieved might amount to a criminal penalty. It therefore appears that proportionate civil financial sanctions that are imposed subject to appropriate procedural safeguards and standards of fairness may be constitutionally permissible.

- 2.13 EU case law on the proportionality of civil financial sanctions in competition law is well developed. These precedents provide useful benchmarks for any civil financial sanctions regime.<sup>38</sup> Proportionality requires that the maximum statutory amount of any civil financial sanction should be imposed only in the most grave circumstances. In keeping with this, the civil financial sanctions in Part IIIC of the *Central Bank Act 1942* are subject to a limiting clause which provides that a sanction must not "cause a corporate entity to cease business or cause an individual to be adjudicated bankrupt".<sup>39</sup> A challenge to the amount of a sanction imposed under Part IIIC of the 1942 Act on grounds that it was excessive might succeed on the particular facts of the case, but it might not render unconstitutional the statutory civil financial sanctions provisions generally.
- 2.14 It has also been suggested that it would be impermissible to create a new parallel civil financial sanction for behaviour that has already been designated a criminal offence in legislation. In this regard, the Divisional High Court held in *The State (Murray) v McRann*<sup>40</sup> that where conduct has both criminal and non-criminal sanctions, the non-criminal sanction could validly be applied without the matter being considered a criminal one for the purposes of Article 37.1 and, by extension, Article 38.1.<sup>41</sup> This analysis was approved by the Supreme Court in *Melton Enterprises Ltd v Censorship of Publications Board*<sup>42</sup> and is consistent with the decision in *Registrar of Companies v Anderson*,<sup>43</sup> discussed above.

36 Sections 297 and 297A of the 1963 Act were replaced by section 610 of the *Companies Act 2014*, which provides for civil liability for debts or liabilities arising from fraudulent and reckless conduct.

37 [2004] IESC 103, [2005] 1 IR 22, at 26.

38 de Moor-van Vugt "Administrative Sanctions in EU Law" (2012) 5 Review of European Administrative Law 37.

39 Sections 33AS(1) and (2) of the 1942 Act.

40 [1979] IR 133.

41 [1979] IR 133 at 135. See also *Keady v Commissioner of An Garda Síochána* [1992] 2 IR 197, at 209-210.

42 [2003] 3 IR 623.

43 [2004] IESC 103, [2005] 1 IR 22.

## Procedures by which Civil Financial Sanctions Can be Imposed

- 2.15 Article 34.1 of the Constitution makes clear that, in general, the administration of justice in the State is the responsibility of courts presided over by judges.<sup>44</sup> However, Article 37.1, reflecting the needs of any modern state, provides for “limited functions and powers of a judicial nature, in matters other than criminal matters” to be exercised in settings other than courts by suitably authorised persons.<sup>45</sup> Article 37.1 was specifically drafted to ensure that administrative bodies such as the Land Commission<sup>46</sup> could carry out their functions without fear that their decisions would be challenged under Article 34.1.<sup>47</sup> As the imposition of civil financial sanctions could, arguably, be regarded as “functions and powers of a judicial nature”, Article 37.1 is relevant to the procedures by which those sanctions may be imposed.
- 2.16 The courts have not yet considered the compatibility of Article 37.1 with the imposition by regulatory authorities of civil financial sanctions. Article 37.1 requires those powers to be limited<sup>48</sup> and not involve criminal matters.<sup>49</sup> Their use by regulatory bodies might, of course, be characterised as being purely administrative in nature.<sup>50</sup> When exercising such administrative powers, the regulatory body must “act judicially”,<sup>51</sup> notably by complying with constitutional requirements of fair procedures and by ensuring that the powers are exercised in a proportionate manner and not arbitrarily.
- 2.17 Distinctions might be drawn between, on the one hand, financial sanctions that are imposed directly by a regulator, such as those in Part IIIC of the *Central Bank Act 1942*,<sup>52</sup> and, on the other hand, those that are recommended by a regulator and confirmed by a court, such as those in section 46 of the *Communications Regulation*

44 Article 34.1 provides: “Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

45 In *Madden v Ireland*, High Court, 22 May 1980 McMahon J stated: “Experience has shown that modern government cannot be carried on without many regulatory bodies and those bodies cannot function effectively under a rigid separation of powers. Article 37 had no counterpart in the Constitution of Saorstát Éireann and in my view introduction of it to the Constitution is to be attributed to a realisation of the needs of modern government.”

46 This was even though, in *Lynham v Butler*(No 2) [1933] IR 74, the Supreme Court had held that the Land Commission was not exercising any power of a judicial nature.

47 Casey *Constitutional Law in Ireland* 3rd ed (Roundhall Sweet & Maxwell 2000), p.254 commented: “Article 37.1 is obviously the constitutional foundation for the many statutes devolving judicial powers, such as those establishing the Censorship of Publications Board, the social welfare appeals system, the Employment Appeals Tribunal and others.”

48 The meaning of “limited” in this context was interpreted authoritatively by the Supreme Court in *In re Solicitors Act 1954* [1960] IR 239, at 264: “If the exercise of the powers and functions is calculated ordinarily to affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as ‘limited.’”

49 For the purposes of Article 37, a criminal matter was considered by Finlay P in *The State (Murray) v McRann* [1979] IR 133 at 135 to be “construed as a procedure associated with the prosecution of a person for a crime... The essential ingredient of a criminal matter must be its association with the determination of the question as to whether a crime against the State or against the public has been committed.” This was approved by the Supreme Court in *Melton Enterprises Ltd v Censorship of Publications Board* [2003] 3 IR 623.

50 *Lynham v Butler* (No.2) [1933] IR 74 at 105; *McDonald v Bord na gCon* (No.2) [1965] IR 217.

51 *In re Solicitors Act 1954* [1960] IR 239.

52 The Central Bank of Ireland decides, on foot of an investigation, to impose a civil financial sanction and the regulated entity can choose to pay the sanction without appealing the decision. The regulated entity can also choose to appeal to the Financial Services Appeal Tribunal and then the High Court. In the event that a regulated entity does not appeal and does not pay the sanction, or loses an appeal to the Financial Services Appeals Tribunal and does not pay the sanction, the Central Bank of Ireland cannot autonomously enforce the sanction until it is confirmed by an order of a court of competent jurisdiction. See section 33AW of the *Central Bank Act 1942*.

*Act 2002*.<sup>53</sup> The procedure under sections 54 and 55 of the *Broadcasting Act 2009* is a hybrid of the two, as a broadcaster can choose to submit to the regulator's procedure.<sup>54</sup> In cases involving the "striking off" of professional persons by a disciplinary body, the need for a court to confirm that body's recommendation has been critical to determining whether it was acting within the constraints outlined by Kingsmill Moore J in *In re Solicitors Act 1954*.<sup>55</sup> However, the distinction between the two approaches may not be particularly significant as the courts have a clear role to play in all such procedures that currently exist under Irish law. A financial institution against which the Central Bank orders a civil financial sanction can choose to pay without appealing the decision. It can also choose to appeal to the Financial Services Appeals Tribunal and then the High Court. If it does not appeal and does not pay the sanction, or loses an appeal to the Financial Services Appeals Tribunal and does not pay the sanction, the Central Bank cannot autonomously enforce the sanction until it is confirmed by an order of a court of competent jurisdiction.<sup>56</sup> In addition, the courts maintain a supervisory jurisdiction in which any affected person or corporate body can seek judicial review of a regulator's acts or decisions in order to ensure the regulator respects the law.<sup>57</sup> This supports the view that the determinations of regulators, even when deciding to impose sanctions, can be presumed to respect the limits of Article 37.1.

- 2.18 If, as argued above, both these approaches observe the requirements of Articles 34, 37 and 38, the question arises whether one is preferable to the other or more suitable for certain regulators or circumstances. Are there justifications for these differences in any given financial or economic sector or should all civil financial sanction provisions be standardised to involve the same procedure?

## Conclusion

- 2.19 In conclusion, civil financial sanctions are an established feature of regulatory enforcement in some regulated financial and economic sectors in Ireland. It may be argued that they provide advantages over criminal prosecution, on the ground that they can place less pressure on the resources of regulators and prosecutors, as well as permitting a more proportionate response to infringements. Although concerns have been raised in relation to their adequacy, effectiveness and constitutionality, it would appear possible to design a civil financial sanction regime that is sufficiently strong to deter non-compliance while respecting the constitutional requirements. The

<sup>53</sup> Section 46, as inserted by section 13 of the *Communications Regulation (Amendment) Act 2007*, permits ComReg to apply to the High Court for a restraining order against an undertaking that overcharges consumers. Under section 46(6), it may request the Court to impose a "financial penalty" of an amount that ComReg proposes. The Court may award a greater or lesser penalty (or none) as it sees fit.

<sup>54</sup> In default of such a choice, the regulator can apply to the Court have a finding of non-compliance confirmed and a financial sanction imposed. A similar "opt-in" approach is available under section 33AR of the *Central Bank Act 1942*: a regulated financial service provider that acknowledges committing a contravention can consent to the Central Bank dispensing with a full inquiry and either limiting the inquiry to determining the sanction to be imposed, or simply imposing a sanction without a hearing.

<sup>55</sup> [1960] IR 239. See *M v Medical Council* [1984] IR 485; *K v An Bord Altranais* [1990] 2 IR 396.

<sup>56</sup> Section 33AW(2) of the *Central Bank Act 1942*.

<sup>57</sup> See *Tormey v Ireland* [1985] IR 289.

Commission therefore seeks views as to whether civil financial sanctions should be used more widely as a means of regulatory enforcement in Ireland.

## QUESTION 2

- 2(a) What do you think are the strengths and weaknesses of civil financial sanctions? Do they help to ensure regulatory compliance? Should existing civil financial sanctions under Irish law be modified in any particular way to better serve the purpose of regulation in financial services or any other sector?
- 2(b) Do you think that legislation that does not already provide for civil financial sanctions should be amended to include them? Are there any areas of regulation that do not currently have civil financial sanctions where they would be appropriate? Are there circumstances in the regulation of financial services in which civil financial sanctions would not be appropriate?
- 2(c) Do you have any other observations on the appropriateness of civil financial sanctions or the purposes for which they might be used?



## ISSUE 3

# NEGOTIATED COMPLIANCE AGREEMENTS

- 3.01 Most regulatory legislation authorises regulators to use both civil actions and criminal prosecutions to ensure compliance, to remedy breaches of regulated standards and to punish offences. Having recourse to the constitutional power and authority of the courts is important for the State and its agencies to achieve the aims of regulation, but it comes at a price. Litigation is costly, not just in terms of money, but also in time, resources and the efforts of regulators and their staff. Criminal prosecutions place a heavy burden of proof on regulators and prosecutors and may not resolve the underlying non-compliance.<sup>1</sup> In both civil and criminal cases, the overall cost of proceedings can be out of proportion to the wrong being addressed or to the benefits gained from a successful verdict. A similar need to balance the potential costs and benefits of litigation applies to the persons and corporate bodies who are subject to a regulator's action. Coming to an agreement before issuing civil or criminal proceedings can therefore work to the advantage of regulators as much as of regulated persons and corporate bodies.
- 3.02 Agreements to settle anticipated civil or criminal litigation are particularly useful to regulators where the intention is to correct non-compliance rather than to punish or seek compensation. Even where a breach is punishable as a strict liability offence, conviction may not remedy the underlying cause of non-compliance. As prosecutors, regulators have discretion as to whether to prosecute and may prefer to seek a voluntary resolution of the cause of the offence. An example of this can be seen in the practice that the Office of the Director of Corporate Enforcement (ODCE) has developed of negotiating voluntary agreements to rectify and remediate certain infringements of company law. Agreements under this arrangement include follow-up provisions that allow the ODCE to seek evidence of rectification and to issue warnings of sanctions that may be sought if a default continues or reoccurs. In this way, steps such as seeking High Court orders or commencing criminal prosecution can be reserved for the most serious cases rather than being used as the default enforcement options. Between 2012 and 2014, the ODCE used this approach to secure voluntary rectification in 414 cases where suspected infringements of rules concerning directors' loans had been reported or come to its attention. In this way, the ODCE secured repayments or reductions of loans totalling €183 million without needing to use more resource-intensive or formal enforcement measures.<sup>2</sup>

<sup>1</sup> In its 2013 *Report on Mandatory Sentences* Chapter 1, the Commission identified the objectives of punishment, deterrence, reform and rehabilitation, reparation and incapacitation as providing a comprehensive basis for analysing the purposes of criminal sanctions. The measures available to regulators lend themselves to a similar analysis.

<sup>2</sup> Source: Office of the Director of Corporate Enforcement *Annual Reports* (2012-2014).

- 3.03 The ODCE's approach relates to matters that can be prosecuted as criminal offences and, not being based on a specific statutory mechanism, relies on the ODCE's discretion as a prosecutor. Other regulators can use statutory mechanisms to address non-compliances that might otherwise lead to civil or criminal court actions. The statutory provisions authorising these arrangements can give binding legal effect to arrangements that might otherwise be voluntary, and can help ensure that the agreement helps to achieve its regulatory objective.

**Box 2: Competition Act 2002, section 14B Agreement**

Under the Competition Act 2002, the first and only section 14B agreement to date was concluded between Double Bay Enterprises Ltd, trading as Brazil Body Sportswear, and the Competition Authority (now the CCPC) on 14 November 2012. The agreement related to the pricing of FitFlop footwear products. The Competition Authority (now the CCPC), on foot of an investigation which it had conducted, concluded that Brazil Body Sportswear had contravened section 4 of the Competition Act 2002. Rather than pursuing enforcement by civil litigation, the Competition Authority agreed to a set of compliance commitments put forward by Brazil Body Sportswear and which then formed the basis of the section 14B agreement. The Competition Authority applied to the High Court and, on 18 December 2012, the terms of the agreement were made a Rule of Court.

- 3.04 Section 14B of the *Competition Act 2002*<sup>3</sup> is an example of such an approach. It gives to the Competition and Consumer Protection Commission (CCPC) and the Commission for Communications Regulation (ComReg) a statutory mechanism to negotiate agreements with undertakings that are suspected of breaching competition law. When the regulator suspects that an undertaking has breached the *Competition Act 2002*, it can enter into an agreement whereby the undertaking, without admitting liability, agrees to cease the behaviour in question or to act in a particular manner. In return, the regulator agrees not to initiate civil proceedings under section 14A of the *Competition Act 2002*, thus avoiding the significant cost and deployment of resources involved in enforcement through court action. If the undertaking breaches the agreement, section 14B allows the regulator to apply to the High Court for an order requiring compliance with the agreement. A breach of that order constitutes a contempt of court, which could ultimately be punished by committal and attachment of persons or the sequestration of assets. Because the undertaking will have chosen to enter the compliance agreement, a contempt hearing would relate to the breach of the terms of the order, not the merits of the competition and economic issues that

<sup>3</sup> As inserted by section 5 of the *Competition (Amendment) Act 2012*.

gave rise to it. Box 2 outlines the use by the CCPC of a Section 14B agreement in 2012, which appears to be the only occasion when it has used these powers.<sup>4</sup>

- 3.05 Section 33AV of the *Central Bank Act 1942*<sup>5</sup> is similar in many respects to section 14B of the 2002 Act. It empowers the Central Bank to enter into settlement agreements with financial service providers (whether individuals or corporate bodies) suspected of breaching certain provisions of the financial services legislation. The agreements are published and can include provisions for remedial action and for the implementation of sanctions. This mechanism is intended to be used as an alternative to (or, if commenced, to settle) inquiries under Part IIIC of the 1942 Act rather than civil or criminal court proceedings. In 2013 provisions similar to those in section 14B of the *Competition Act 2002* were added to improve the enforceability of settlement agreements.<sup>6</sup> If a financial service provider breaches an agreement, the Central Bank can apply to the High Court for an order directing it to comply.
- 3.06 Between 2006 and 2014, the Central Bank entered into 83 settlement agreements with financial services providers.<sup>7</sup> In contrast, the CCPC has used its powers under section 14B only once, as briefly outlined in Box 2.
- 3.07 These two approaches are examples of alternatives to enforcement proceedings. However, their effectiveness depends on a credible threat of escalation to court action. In other words, if there is no real likelihood of enforcement proceedings being commenced, there is little incentive for a person or corporate body to negotiate an agreement. These agreements may therefore be an effective enforcement response only to infringements of regulatory legislation where enforcement proceedings are a realistic consequence of non-cooperation. The Commission seeks views as to whether these arrangements may be appropriate for more widespread use.

4 Agreement between the Competition Authority and Double Bay Enterprises Limited, 14 November 2012, <http://www.tca.ie/images/uploaded/documents/2012-11-19%20BBS%20TCA%20Signed%20Agreement%20FINAL.pdf>.

5 Inserted by section 10 of the *Central Bank and Financial Services Authority of Ireland Act 2004*.

6 Section 33AV(3A) and (3B) of the *Central Bank Act 1942*, inserted by section 54(1)(a) of the *Central Bank (Supervision and Enforcement) Act 2013*.

7 Source: Central Bank of Ireland *Annual Reports* (2006-2014).

### QUESTION 3

- 3(a) Do you think that statutory settlement agreements resembling those in the Central Bank Act 1942 and the Competition Act 2002 or a non-statutory approach used by the ODCE are effective enforcement tools? Should either or both of these approaches be adapted for more widespread use? Are there other models of settlement agreement that should be considered? What are the advantages and disadvantages of these approaches?
- 3(b) For which offences or regulatory requirements would settlement agreements be most appropriate?

## ISSUE 4

# DEFERRED PROSECUTION AGREEMENTS

- 4.01 Deferred prosecution agreements (DPAs) are a long-standing feature of US financial regulation<sup>1</sup> and, since 2014, are also available under UK criminal law.<sup>2</sup> DPAs are negotiated agreements between a prosecutor and person – frequently a corporate body – that is alleged to have committed a criminal offence. Unlike the negotiated compliance agreements discussed in Issue 2, DPAs involve a suspension of criminal, rather than civil, proceedings. In contrast to the non-statutory approach used by the ODCE (discussed in Issue 3, above), they are usually regulated by legislation and can relate to criminal offences generally, including those under financial and economic regulatory legislation.
- 4.02 Under a DPA, the corporate body typically agrees to cooperate in an investigation of the offence, signs up to a supervised compliance programme and pays a financial penalty. In return, the prosecutor agrees to defer criminal prosecution for a specific period. If the corporate body does not adhere to the conditions of the DPA, the prosecutor can elect to proceed with criminal prosecution at any time. The process does not usually involve an admission of liability, though facts disclosed and evidence gathered under the terms of the DPA may be used in any criminal prosecution that results from a breach by the corporate body of the terms of the DPA. If the corporate body complies with all the terms of the DPA while it applies, the prosecutor will drop all charges and agree not to proceed with a criminal prosecution for the alleged offence. In this way, the DPA can achieve important goals of a criminal conviction – namely, rehabilitation and sanction – without the risks and commitment of resources involved in a trial, while the corporate body avoids the reputational loss and other consequences that may result from a formal criminal conviction.<sup>3</sup>
- 4.03 The success of a DPA requires a credible threat of successful criminal prosecution in default of compliance with the DPA itself. Such a threat incentivises the company to adhere to the terms of the DPA. For similar reasons, DPAs should be available at an early stage of investigations so as to give offenders an inducement to cooperate.

1 Illovsy "Corporate Deferred Prosecution Agreements" [2006] *Criminal Justice* 36, 36.

2 Under section 45 of the UK *Crime and Courts Act 2013*.

3 Rakoff "The Financial Crisis: Why Have No High-Level Executives Been Prosecuted" *New York Review of Books*, 9 January 2014. See also Markoff "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century" (2013) 15 *University of Pennsylvania Journal of Business Law* 797, 800.

## DPAs in Ireland

- 4.04 DPAs similar to those in the USA and UK do not exist in Irish law. However, their central element – a prosecutor’s discretion as to whether or not to prosecute – is well recognised in Irish law.<sup>4</sup> This discretion is at the heart of arrangements such as the non-statutory arrangement used by the ODCE discussed in Issue 3, the Juvenile Diversion Programme for young offenders operated by An Garda Síochána under the *Children Act 2001* and the Cartel Immunity Programme operated by the CCPC and the DPP.<sup>5</sup>
- 4.05 The Cartel Immunity Programme is intended to address coordinated anti-competitive behaviour of the type prohibited by section 6(2) of the *Competition Act 2002* and is similar to programmes operated by other competition authorities across the EU.<sup>6</sup> Persons or undertakings involved in such activities can apply to the CCPC for immunity from prosecution for cartel offences arising from breaches of section 6. The CCPC will recommend that the DPP grant immunity if the applicant is the first to apply in respect of the cartel and if they cooperate fully, supply all requested information and assistance to the investigation, and maintain secrecy. Breaches of these conditions may result in withdrawal of the immunity.

## DPAs in the United States

- 4.06 DPAs emerged in the 1930s in the United States as a feature of the juvenile justice system. Since then they have been developed as an alternative to criminal prosecution of corporate bodies. Though there are some examples of DPAs being used to respond to individual criminal liability,<sup>7</sup> since the early 1990s DPAs have been overwhelmingly associated with criminal liability of corporate bodies. The criminal conviction of Enron’s accounting firm, Arthur Andersen LLP, and its subsequent collapse in 2002<sup>8</sup> was seen to have not only seriously affected the commercial viability of the Arthur Andersen but to also have had grave consequences for thousands of innocent employees and third parties. Concerns that the reputational damage and consequential effects of a criminal conviction could amount, in effect, to a corporate death penalty resulted in a great increase in the number of DPAs entered into by US prosecutors in the years after 2003. However, recent empirical research

4 The decision to prosecute is based on multiple considerations including whether prosecution is in the public interest, the strength of the evidence, whether there has been a delay since the offence was committed and special factors that may apply where extradition is required. See Director of Public Prosecutions *Guidelines for Prosecutors* (2010), available at <https://www.dppireland.ie/filestore/documents/GUIDELINES - Revised NOV 2010 eng.pdf>.

5 See generally Competition and Consumer Protection Commission “Cartel Immunity Programme” (2015) available at <http://www.ccpc.ie/sites/default/files/documents/2015-01-20%20Revised%20CIP%20Final.pdf>.

6 European Competition Network Model Leniency Programme (2012), available at [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf). A significant difference between this model and the Irish CIP is that the Irish CIP offers only immunity from prosecution, while the model programme also contemplates ‘leniency’, for example, reduced penalties.

7 US Securities and Exchange Commission Press Release (12 November 2013) “SEC Announces First Deferred Prosecution Agreement with Individual” available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540345373>.

8 Uhlmann “Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability” (2013) 72 Maryland Law Review 1295, 1309-1315.

into the effects of criminal prosecutions on the 'mortality' of corporations indicates that the 'Arthur Andersen effect' may be overstated, as criminal convictions in practice do not automatically result in the collapse of a corporate entity.<sup>9</sup> It is significant that in 2015 the US Justice Department issued a memorandum to federal prosecutors stressing the importance of holding to account the individual officers who are responsible for corporate wrongdoing, rather than settling for general settlements (including DPAs) with the corporation.<sup>10</sup>

- 4.07 DPAs do not have a statutory basis in the US. Instead, they have been developed as a policy provision in the US Attorneys' Manual.<sup>11</sup> Prosecutors have discretion to negotiate and agree DPAs to prevent the possible collateral consequences of a corporate criminal conviction disproportionately affecting the commercial viability of a corporate body or unfairly affecting innocent third parties. The US Attorney's Manual gives little guidance on a standard or consistent approach to the use of DPAs across the US. The general lack of transparency around their discretionary nature has led commentators to express concern.<sup>12</sup>
- 4.08 US law gives limited scope for judicial scrutiny or oversight of the terms of individual DPAs. The federal *Speedy Trial Act 1974* stipulates time limits for commencing criminal proceedings and includes a deferral for written agreements such as DPAs where they have been approved by the Court.<sup>13</sup> This does not give a court wide powers of review over the terms of the agreement, but there is evidence of some US judges probing the limits of their power to establish more robust oversight of DPAs.<sup>14</sup>
- 4.09 A practice related to but distinct from the use of DPAs is obtaining consent judgments. In these cases, judges have begun to scrutinise the terms of the agreements and have rejected some on public policy grounds.<sup>15</sup> Consent judgments are usually sought by the Securities and Exchange Commission (SEC), while DPAs are usually sought by US Justice Department prosecutors. Once the SEC becomes aware of fraudulent or deceptive practices within a securities market, it can choose judicial or administrative means to initiate proceedings. If it chooses the judicial forum, the

9 Markoff "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century" (2013) 15 University of Pennsylvania Journal of Business Law 797 at 828.

10 Memorandum on Individual Accountability for Corporate Wrongdoing, Deputy Attorney General S Quillian Yates, US Department of Justice, 9 September 2015, available at <http://www.justice.gov/dag/file/769036/download>.

11 United States Attorneys' Manual *Principles of Federal Prosecution of Business Organizations* section 9-16.325 (2008) "Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and Extraordinary Restitution" and section 9-28.1000 (2008) "Collateral Consequences".

12 UK Ministry of Justice "Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements" (2012) Consultation Paper CP9/2012 18, para 63.

13 18 USC § 3161(h)(2).

14 Warin "2014 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements" [2015] Harvard Law School Forum on Corporate Governance and Financial Regulation <http://blogs.law.harvard.edu/corpgov/2015/01/18/2014-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements>.

15 Groff "Is Too Big to Fail Too Big to Confess?: Scrutinizing the SEC's 'No-Admit' Consent Judgment Proposals" (2013) Boston College Law Review 1727, 1737.

SEC often presents a consent judgment to the Court.<sup>16</sup> The terms of consent judgments can be similar to those of DPAs,<sup>17</sup> and both might be used in a single case. However, the effectiveness of one does not depend on the other. Because DPAs typically escape judicial review<sup>18</sup> and do not depend on the courts for their enforcement, judicial scrutiny of consent judgments that mirror the terms of DPAs can give some insight into judicial attitudes to the terms on which prosecutors seek settlements.<sup>19</sup> US federal judges have limited power to examine whether a consent judgment is fair, reasonable and adequate,<sup>20</sup> and courts were criticised for simply “rubber-stamping” these decrees.<sup>21</sup> Some judges have, however, rejected consent judgments on grounds of public policy even where the settlements mirror the terms of parallel DPAs. This suggests that the absence of formal and robust judicial oversight in the DPA process in the US has become an issue.<sup>22</sup>

- 4.10 There is a perception that how US prosecutors have used DPAs has favoured the interests of big business rather than those of justice.<sup>23</sup> If concerns about the potential consequences of conviction cause prosecutors to favour DPAs over trials, large corporations may enter DPA negotiations with the upper hand.<sup>24</sup> Commentators have noted a correlation between decreasing numbers of criminal prosecutions for large corporations and increasing numbers of DPAs.<sup>25</sup> In addition, it appears that only one prosecution has been brought to date for failure to adhere to the terms of a DPA.<sup>26</sup> This undermines any threat of criminal prosecution as an incentive to comply with the DPA. Moreover, DPAs may have failed to achieve the kind of meaningful structural or ethical reforms that they were intended to bring about.<sup>27</sup> If the effect of DPAs is to displace rather than complement criminal sanctions, there must be a concern is that the penalties paid under DPAs will be treated simply as a business overhead and that ‘engaging in criminal activity becomes just another dollars-and-cents decision’<sup>28</sup> for companies.

16 *Ibid*, 1731-1732.

17 Naoufal “Is Judge Rakoff Asking for Too Much? The New Standard for Consent Judgment Settlements with the SEC” (2012) *American University Business Law Review* 183, 185-186.

18 Hubbell, “Judge Rakoff v the Securities and Exchange Commission: Are ‘Neither Admit Nor Deny’ Settlement Agreements in Securities Cases in the Public Interest?” (2014) 15 *Transactions: Tennessee Journal of Business Law* 373, 394, explains how DPAs and NPAs typically escape judicial review and do not call upon the courts for enforcement.

19 Macchiarola “‘Hallowed by History, but Not by Reason’: Judge Rakoff’s Critique of the Securities and Exchange Commission’s Consent Judgment Practice” (2012) 16 *Cuny L Rev.* 51, 76-77.

20 Neumann “Neither Admit Nor Deny: Recent Changes to the Securities and Exchange Commission’s Longstanding Settlement Policy” (2015) 40 *J. Corp. L.* 793, 798.

21 Groff “Is Too Big to Fail Too Big to Confess?: Scrutinizing the Sec’s ‘No-Admit’ Consent Judgment Proposals” (2013) *Boston College Law Review* 1727, 1746.

22 Barkow and Cipolla, “Increased Judicial Scrutiny of Deferred Prosecution Agreements” *New York Law Journal*, 20 August 2013.

23 Uhlmann “Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability” (2013) 72 *Maryland Law Review* 1295, 1315

24 Wilmarth “Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street” (2013) 81 *University of Cincinnati Law Review* 1283, 1375-1377.

25 Markoff “Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century” (2013) 15 *University of Pennsylvania Journal of Business Law* 797, 807.

26 UK Ministry of Justice “Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements” (CP9/2012) 17 fn. 22.

27 Rakoff, “Justice Deferred Is Justice Denied” *New York Review of Books*, 19 February 2015, reviewing Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Belknap Press/Harvard University Press 2015).

28 Eliason “We Need to Indict Them” *Legal Times*, 22 September 2008.

## DPAs in the United Kingdom

- 4.11 DPAs were introduced into UK law by section 45 the *Crime and Courts Act 2013*. The 2013 Act reflects concerns raised in 2010 by Thomas LJ in the sentencing hearing in *R v Innospec Ltd*,<sup>29</sup> which involved bribery and related charges. An arrangement had been agreed between the defendant and prosecutors in the UK and US on the level of a fine and payment in settlement of civil actions. At the sentencing hearing, Thomas LJ expressed strong disapproval of the arrangement, which he considered inadequate in the context of the facts of the case, and inconsistent with the courts' primary responsibility for determining the levels of fines in such cases. The court nonetheless reluctantly approved the agreed fine but added that a civil settlement "that glossed over criminality" was "inconsistent with basic principles of justice".
- 4.12 Reflecting the concerns expressed in *Innospec*, judicial oversight is an integral and very prominent aspect of the DPA process enacted in the UK *Crime and Courts Act 2013*. There is no obligation on the prosecutor to offer a DPA as an alternative to criminal prosecution, nor is the alleged wrongdoer obliged to accept one.<sup>30</sup> However, once an agreement in principle is reached that a DPA would be acceptable to both parties, the prosecutor must apply to the Crown Court for a declaration that entering into the DPA is "likely to be in the interests of justice" and that the proposed terms are "fair, reasonable and proportionate".<sup>31</sup> The court must give reasons for its decision to permit the continuation of negotiations, or as the case may be not to permit them, though all aspects of this preliminary hearing are conducted in private. If the court approves the application to enter into a DPA, the prosecutor and alleged offender enter further negotiations to flesh out the agreement in accordance with the provisions of the 2013 Act and present the agreed terms to the Crown Court for approval. In this second hearing, the Court gives reasons for approval or refusal of the DPA by reference to the interests of justice and the agreement's fairness, reasonableness and proportionality.<sup>32</sup> The terms of the DPA must be made public.<sup>33</sup>
- 4.13 If, during a DPA's period of validity, the alleged offender fails to comply with its terms, the prosecutor may apply to the court for a determination that, on the balance of probabilities, the terms of the agreement have been breached.<sup>34</sup> A finding of a breach enables the prosecutor to elect to prosecute the alleged offender for the original criminal charge.

<sup>29</sup> *R v Innospec Ltd* [2002] EW Misc. 7 (EWCC).

<sup>30</sup> Michael Bisgrove and Mark Weekes, "Deferred Prosecution Agreements: A Practical Consideration" (2014) 6 *Criminal Law Review* 416, 420.

<sup>31</sup> Section 45 of and Schedule 17(7) to the UK *Crime and Courts Act 2013*.

<sup>32</sup> Schedule 17(8)(1) to the UK 2013 Act.

<sup>33</sup> Schedule 17(8)(7) to the UK 2013 Act

<sup>34</sup> Schedule 17(9) to the UK 2013 Act.

- 4.14 The first DPA under these arrangements was approved by the English High Court (Leveson P) in 2015 in *Serious Fraud Office v Standard Bank Plc.*<sup>35</sup> The case involved a South African bank prosecuted under the UK *Bribery Act 2010* for failure to prevent bribery in the course of dealings with a non-UK government body. In return for suspension of the indictment, the bank agreed to pay financial penalties, compensation and costs, as well as cooperating with the UK Serious Fraud Office and undergoing a review of its anti-corruption practices. The English High Court recognised that the bank had engaged early and cooperated fully with the UK authorities. It also noted that “the criminality potentially facing Standard Bank arose out of the inadequacy of its compliance procedures and its failure to recognise the risks inherent in the proposal” rather than from the commission of an offence of bribery.<sup>36</sup> The Court also noted that “no allegation of knowing participation in an offence of bribery” was alleged by the SFO against the bank (or any of its employees), and that the offence was “limited to an allegation of inadequate systems to prevent associated persons from committing an offence of bribery”.<sup>37</sup>
- 4.15 The Crown Prosecution Service (CPS) and Serious Fraud Office (SFO) have published a statutory Code of Practice to provide guidance to prosecutors making a decision between criminal prosecution and DPAs.<sup>38</sup> This, as well as the CPS’s Code for Prosecutors, stresses the importance of the public interest as a consideration. Factors that weigh against the use of a DPA include the alleged offender’s prior conduct or non-compliance and the harm caused by it. Favourable consideration can be given to matters such as voluntary reporting to authorities, cooperation with them and actions taken to remedy breaches.

## Conclusion

- 4.16 For the reasons discussed above, it must be assumed that any arrangement for DPAs in Ireland would require judicial oversight. To incentivise compliance with the DPA, offenders must be in no doubt that breach of its terms will result in enforcement action. As the penalty for failing to comply is the resumption of criminal prosecution, legislating for DPAs in Irish law would involve serious consideration of issues arising under Article 38.1 of the Constitution. The US model, in which DPAs are subject to little or no judicial oversight, would be difficult to reconcile with the constitutional requirements for the administration of justice in criminal matters under Article 38.1. The UK’s statutory system, in which judicial oversight is an integral part of the process and financial sanctions are imposed as orders of the court, would appear a preferable model. Bearing this in mind, the Commission seeks views as to whether DPAs are appropriate for this jurisdiction.

<sup>35</sup> *Serious Fraud Office v Standard Bank Plc: Deferred Prosecution Agreement* (Case No: U20150854), English High Court, Queen’s Bench Division (Leveson P), 30 November 2015.

<sup>36</sup> *Ibid*, at para. 14.

<sup>37</sup> *Ibid*, para. 11.

<sup>38</sup> UK Crown Prosecution Service and Serious Fraud Office “Deferred Prosecution Agreements Code of Practice” (2014).

**QUESTION 4**

- 4(a) Do you think that deferred prosecution agreements are appropriate in the context of corporate criminal liability in Ireland? Would either of the models adopted in the United States or the United Kingdom be appropriate models to follow? Would Irish law require any significant modifications or limitations?
- 4(b) For which crimes do you think DPAs would be appropriate? If they were to apply to both summary offences and indictable offences, do you think it would be appropriate for a regulator to negotiate a DPA, or should this be reserved exclusively to the DPP?
- 4(c) What conditions or limitations do you think should be imposed on the terms of DPAs?



## ISSUE 5

# COORDINATION OF REGULATORS

- 5.01 This section of the Issues Paper outlines approaches under which regulators may co-operate to improve their efficiency or effectiveness or deal with concurrent or overlapping jurisdictions. It concludes by identifying issues raised by those approaches.

### The nature of regulation

- 5.02 Regulation involves the intervention by the State (or, in some cases, a supranational body such as the EU) in economic activity as a means of modifying behaviour to attain desired policy goals.<sup>1</sup> In Ireland the EU's Single Market led to increased competition in markets that had been subject to protectionist mechanisms, monopolies or dominance by state-controlled enterprises. Also, over time, policy makers became more concerned with the interests of consumers, workers, the environment, and in preventing market disruption. Market regulation has been the preferred means of control for unacceptable risks in critically important markets, for overseeing transitions to competitive markets, and to manage networked industries, where choices can be constricted. In other spheres of activity - such as consumer protection, workplace health and safety or corporate governance standards - regulation is intended to ensure that policies and standards mandated by the State or EU are upheld in the face of commercial pressures or unequal bargaining positions.
- 5.03 Irish policy makers have favoured using regulatory agencies that are separate from central or local government authorities. These are seen as being more clearly independent and able to draw on and foster technical expertise specific to the sectors that they regulate.<sup>2</sup> Regulation by state agencies has come to play a large part in shaping Irish economic activity, and significant parts of Ireland's infrastructure operate in regulated sectors.<sup>3</sup> It is for this reason that coordination of those regulatory functions is important.<sup>4</sup>

1 Freiburg *The Tools of Regulation* (Federation Press, 2010), at 3ff.

2 Some regulatory activity is conducted by government departments, local authorities or even private non-statutory bodies (such as the Advertising Standards Authority of Ireland).

3 Forfás *Sectoral Regulation: Study to Identify Changes to Sectoral Regulation to Enhance Cost Competitiveness* (2013), at 14.

4 Brown and Scott "Regulation in Ireland: History, Structure, Style and Reform" UCD Geary Institute Discussion Paper Series (2010), pp.10-11, cite studies showing that, between 1990 and 2010, the number of agencies in the State whose principal function is regulation of economic activity more than doubled from 40 to over 80. This excludes bodies such as government departments and local authorities.

### **The need for reform – Ad hoc regulatory development and overlapping remits**

- 5.04 The financial crisis that emerged in 2008 highlighted deficiencies in both the policy and execution of regulation. Apart from failures of regulation in the financial sector, the growth in the number and remit of regulatory agencies has provoked criticism of the uncoordinated way in which agencies were established and their functions subsequently expanded.<sup>5</sup> These changes have led to overlaps in regulators' mandates, particularly as between sectoral regulators and regulators that hold broad cross-sectoral remits.
- 5.05 The powers given to regulators can also give rise to overlaps. Regulators in Ireland are usually established by legislation and have authority to function in at least two of the three following areas:
- formulating goals for defined markets or types of activity, or making rules and setting standards,
  - monitoring, gathering information, inspecting, auditing and evaluating defined subjects, and
  - enforcement by administrative decisions, sanctions and civil or criminal court actions.
- 5.06 As a consequence, a single set of circumstances can raise issues of relevance to several regulators. The example in Box 3 illustrates the potential for regulatory overlaps.<sup>6</sup>

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<sup>5</sup> Economist Intelligence Unit, *Review of the Regulatory Environment in Ireland*, (Department of the Taoiseach, 2009), at 33.

<sup>6</sup> This is derived from a scenario proposed by the ODCE in its 2010 submission on White Collar Crime to the Department of Justice and Equality.

**Box 3: Regulatory overlaps**

Directors of an insurance broking company divert some of its receipts to accounts hidden from its auditors and the Revenue Commissioners. The company becomes insolvent and liquidators uncover the malpractice.

- The Revenue Commissioners may invoke powers under the Taxes Consolidation Act 1997 to investigate and seek civil or criminal penalties.
- The Central Bank may seek civil penalties under Part IIIC of the Central Bank Act 1942 as well as declaring the directors unfit to engage in financial services.
- The ODCE may seek to press charges for offences under the Companies Act 2014 (for example under section 286 for failure to ensure the company keeps adequate accounting records). Pending convictions, it may also move to have the directors disqualified under the 2014 Act.
- The DPP may press charges related to money laundering or fraud

The example in Box 3 illustrates the extent of potential overlaps in the scopes of regulators' responsibilities and the powers used to enforce them. This suggests that there is scope for regulators to improve their efficiency and effectiveness by combining or sharing resources related to some of these functions.<sup>7</sup>

**Dealing with Overlaps: the Lead Agency Approach**

- 5.07 In its 2010 submission to the Department of Justice on corporate crime,<sup>8</sup> the ODCE proposed the use of a lead agency and combining investigation resources. This was on the ground that there should be a common legal basis permitting one primary regulatory body to take the lead role in investigating a set of events relevant to different legislative codes in agreement and in cooperation with other relevant regulatory bodies. Two examples of differing uses of the lead agency approach are outlined below:

**The ComReg - CCPC Approach**

- 5.08 The main precedent for the use of the lead agency approach in Irish legislation is in the relationship of the Commission for Communications Regulations (ComReg) to the Competition and Consumer Protection Commission (CCPC).<sup>9</sup> The CCPC has responsibility for the regulation in general of competition law in Ireland, including

<sup>7</sup> Department of the Taoiseach *Regulating for a Better Future: A Government Policy Statement on Sectoral Economic Regulation* (2013), Section 3.3.

<sup>8</sup> ODCE Submission on White Collar Crime, submission to the Department of Justice (2010) para. 62.

<sup>9</sup> Under the *Competition Act 2002*.

powers to enforce competition law by seeking criminal sanctions.<sup>10</sup> ComReg regulates postal and electronic communications and manages the allocation of the radio frequency spectrum.<sup>11</sup> In addition, ComReg is empowered to investigate suspected breaches of competition law relating to electronic communications and related services.<sup>12</sup>

5.09 Since both of these bodies have potentially overlapping mandates in relation to breaches of competition law, something akin to a lead agency approach was adopted to deal with this.<sup>13</sup> Under this approach ComReg is required to notify the CPCC before exercising any of its competition functions and any suspected breach of competition law. The CPCC, in turn, must notify ComReg of any suspected breaches of competition law relating specifically to the telecommunications sector. To avoid duplication of enforcement, it is also provided that telecommunications undertakings that are prosecuted by one regulator for a competition law offence are not liable to be prosecuted by the other for the same offence.<sup>14</sup>

5.10 Should conflict arise as to which body is competent in a given circumstance, either may refer the dispute to the Minister for Jobs, Enterprise and Innovation, whose determination of the matter is final.<sup>15</sup> Using this mechanism, a lead agency is determined.

This mechanism highlights a number of aspects of the lead agency approach:

- the need to define the sector or policy areas (in that case, competition in the telecommunications sector) within which the lead agency approach should apply,
- the need for agencies to exchange information so that they can cooperate, avoid duplication of work and ensure consistency in their decisions,
- the need for a means of resolving disagreements over which agency should take the lead,
- the need to avoid repeated prosecution of regulated entities for the same offence.

5.11 An additional issue to which regard must be had is how such an arrangement interacts with EU regulatory regimes - such as the Single Supervisory Mechanism (SSM) for credit institutions. Both the CCPC and ComReg have competition law responsibilities under EU law as well Irish domestic law, and must respect those obligations in any arrangement involving cooperation with other agencies.

<sup>10</sup> The CCPC's statutory remit under sections 6-8 of the *Competition Act 2002* extends to giving it power to enforce and prosecute breaches of EU competition rules. This EU remit was increased by Regulation (EC) No.1/2003 giving it power as a national competition authority to grant exemptions for certain mergers and concentrations.

<sup>11</sup> Section 10 of the *Communications Regulation Act 2002* provides that ComReg's functions include investigating complaints from businesses or consumers regarding the supply of and access to electronic communications services

<sup>12</sup> *Communications Regulation (Amendment) Act 2007*.

<sup>13</sup> Sections 47A-6 of the *Competition Act 2002*, as inserted by section 31 of the 2007 Act.

<sup>14</sup> Section 47F of the 2002 Act.

<sup>15</sup> Section 47E of the 2002 Act. In making this determination, the Minister must consult the Minister for Communications, Energy and Natural Resources and take account of any representations made by the regulators.

## A UK Approach

- 5.12 In the UK, sectoral regulators in areas such as utilities, transport and railways, communications and health services have competition law enforcement powers that are attuned to their respective sectors.<sup>16</sup> The UK Competition and Markets Authority (CMA) is responsible for general competition law enforcement.
- 5.13 In order to overcome inconsistency arising from overlaps of responsibility, the UK Government gave priority in this area to the CMA in the event of a conflict.<sup>17</sup> The rationale behind this approach is that while it was important for sectoral regulators to have and use, where appropriate, their other enforcement powers, detailed behavioural regulation could dampen innovation and deter competition, particularly if imposed or maintained for too long.<sup>18</sup> The UK approach operates by:
- requiring sectoral regulators to give priority to the use of competition law over other enforcement options,<sup>19</sup>
  - requiring every sectoral regulator to notify other regulators or the CMA if it proposes to exercise competition law power and considers that the other agencies may have concurrent jurisdiction,<sup>20</sup>
  - giving the CMA power to make a final determination of any dispute between regulators over which should have jurisdiction in a matter involving competition law enforcement,<sup>21</sup>
  - permitting regulators to agree to transfer responsibility for cases in which they have concurrent jurisdiction, and
  - allowing the CMA to take over any competition case from a sectoral regulator where it believes that doing so would promote competition for the benefit of consumers.<sup>22</sup>
- 5.14 The UK approach also requires agencies to share relevant information with each other and to avoid placing regulated entities in double jeopardy or initiating multiple enforcement actions for the same offence.

<sup>16</sup> In addition to their other sectoral regulatory powers.

<sup>17</sup> UK Department for Business, Innovation and Skills *Principles for Economic Regulation* (2011). This was a response to a 2011 consultation on the proposals that led to the UK *Enterprise and Regulatory Reform Act 2013*, in which the UK Government explained the policy behind giving priority to competition law enforcement over the use of sectoral powers. It noted that its *Principles for Economic Regulation* set out that competitive markets are “the best way in the long run to deliver high-quality and efficient infrastructure.”

<sup>18</sup> UK Department for Business, Innovation and Skills *Skills Growth, Competition and the Competition Regime: Government Response to Consultation* (2012), at paras 8.3-8.6.

<sup>19</sup> UK *Enterprise and Regulatory Reform Act 2013*, Schedule 14.

<sup>20</sup> Regulation 4 of the UK *Competition Act 1998* (Concurrency) *Regulations 2014* (SI No.536/2014).

<sup>21</sup> Regulation 5 of the UK 2014 Regulations.

<sup>22</sup> Regulation 8 of the UK 2014 Regulations (subject to a limited exception concerning health care services).

## **A US Approach**

- 5.15 In the US, the Criminal Enforcement and Financial Crimes Bureau of the New York Attorney General's Office was established in January 2014 to investigate and prosecute large-scale financial crimes. The Bureau's responsibilities include reviewing financial regulatory data. It has collaborative relationships with other law enforcement agencies including the New York Police Department, Homeland Security Investigations and the US Secret Service, which strengthens the New York Attorney General's ability to investigate and prosecute financial crimes.<sup>23</sup> Besides having its own investigative resources, the Bureau collaborates with and makes use of information supplied by US state and federal agencies as well as private bodies. It uses this information to identify suspicious activities, to track illicit funds and so to build cases against suspects and bring them to prosecution.

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<sup>23</sup> Source: <http://www.ag.ny.gov/bureau/criminal-enforcement-and-financial-crimes-bureau>.

**QUESTION 5**

- 5(a) Do you think there is a case for extending the use of the lead agency approach in Ireland?
- 5(b) To which, if any, policy areas or economic sectors do you think it should apply?
- 5(c) Do you consider that any particular policy area (e.g. competition, corporate governance etc) should be given priority?
- 5(d) How do you think the role of a lead agency should be defined, and who should have the final decision on the nature and extent of its involvement?
- 5(e) How, in your view, should a lead agency be selected?
- 5(f) Do you think one particular agency should be the default lead agency, or should the choice be open to variation depending on the circumstances?

**Co-operation Agreements**

- 5.16 Short of appointing a lead agency, regulators can avoid conflicts and improve coordination by means of co-operation agreements. These typically provide for the exchange of information, for co-operation in research, investigations or other matters of mutual concern, and means of dealing with conflicts arising from overlapping or concurrent jurisdictions. The clearest Irish examples of these arise under competition legislation.

5.17 The *Competition Act 2002* required the Competition Authority (which has now been consolidated with the Consumer Protection Agency to form the Competition and Consumer Protection Commission, CCPC) to enter into co-operation agreements with four sectoral regulators:

- the Broadcasting Authority of Ireland,
- the Commission for Energy Regulation,
- the Commission for Aviation Regulation and
- the Director of Telecommunications Regulations (now ComReg).<sup>24</sup>

5.18 The CCPC remains party to these agreements.<sup>25</sup> Section 34 of the *Competition and Consumer Protection Act 2014* provides that the co-operation agreements must:

- enable each party to furnish to the other information that it possesses that that other requires to perform its functions;<sup>26</sup>
- require the parties to consult each other before acting in cases where their mandates overlap, and enable one to forbear to perform its functions where the other is acting in relation to a matter; and
- ensure that no person is subjected to multiple civil or criminal enforcement proceedings by the parties arising out of the same circumstances.<sup>27</sup>

5.19 In the UK, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have complementary remits in relation to financial services. Each agency must consult the other before taking certain types of regulatory actions in relation to a dual-regulated person or firm.<sup>28</sup> They can also conduct joint investigations. A recent review of decision making by the two agencies recommended regular mutual exchanges of information, joint information requests where these affected dual-regulated entities, and transparency – so far as the requirements of an investigation permits – as to the scope and manner of their cooperation. The review suggests that this will help to prevent regulated entities from being unduly burdened by joint investigations.<sup>29</sup>

<sup>24</sup> Section 34 of the *Competition Act 2002*.

<sup>25</sup> Section 19 of the 2014 Act. The *Competition and Consumer Protection Act 2014* also changed the framework of co-operation agreements: the CCPC is now authorised (rather than obliged) to enter into co-operation agreements with named sectoral regulators.

<sup>26</sup> However, any disclosure of information under those agreements must still respect the constraints imposed by the disclosing regulators' statutory mandate.

<sup>27</sup> Section 34(3) of the 2014 Act.

<sup>28</sup> Section 415B of the UK *Financial Services and Markets Act 2000*, inserted by the UK *Financial Services Act 2012*.

<sup>29</sup> HM Treasury *Review of Enforcement Decision-Making at the Financial Services Regulators: Final Report* (2014).

## QUESTION 5

- 5(g) Do you think the existing arrangements for co-operation agreements have contributed to regulatory efficiency and to compliance?
- 5(h) Do you think that co-operation agreements are an effective mechanism for improving regulatory cooperation and outcomes?
- 5(i) If not, how, in your view, could they be improved?
- 5(j) Do you consider the lead agency approach to be preferable to co-operation agreements?
- 5(k) Do you think co-operation agreements should prioritise a particular cross-sectoral policy (e.g. competition or corporate governance) over other regulatory concerns?

**Sharing Information**

- 5.20 A featured in common to both the lead agency and co-operation agreement approaches is sharing information with other regulators. If an information sharing approach was used between regulators and authorities with overlapping interests, it could facilitate these bodies developing greater levels of co-ordination, producing efficiencies and greater effectiveness. This is so even if the information sharing was not introduced with one interested body being made the lead agency, or even if the bodies had a pre-existing co-operation agreement providing for how they should interact.
- 5.21 An issue that must be considered concerns the extent to which agencies may share information without breaching the terms of their statutory mandate or affecting the rights and interests of regulated entities or other persons. The statutory mandates of regulators in Ireland typically restrict the disclosure of information in their possession. Disclosure in breach of these requirements can result in criminal penalties. Obligations not to disclose are important because they preserve the trust of regulated entities and the general public regarding the confidentiality of information provided. These obligations can encourage voluntary co-operation with regulators.
- 5.22 However, the inability of regulators to communicate matters of common concern can lead to disastrous consequences, as observed in the financial collapse of 2008.<sup>30</sup> Some statutory provisions that define regulators' mandates provide for exceptions that allow the sharing of information with other authorities. Thus there is a general prohibition on disclosure of information obtained by the ODCE in the performance of

<sup>30</sup> Prof. Patrick Honohan, Governor, Central Bank of Ireland, evidence to Oireachtas Committee of Inquiry into the Banking Crisis, 15 January 2015 at sections 20 and 24, regarding the Financial Regulator and the Central Bank of Ireland as prudential regulator.

its functions, except in accordance with law.<sup>31</sup> However, the Director of Corporate Enforcement is permitted to disclose information to certain “competent authorities” for purposes that include criminal proceedings under the *Companies Acts*,<sup>32</sup> and to An Garda Síochána regarding information that relates to other offences.<sup>33</sup>

- 5.23 In addition, the CCPC, An Garda Síochána, officers of the Revenue Commissioners, and certain other agencies may disclose information that relates to a *Companies Act* offence or could materially aid the ODCE in investigating such offences, or certain cases relating to directors’ disqualification.<sup>34</sup>
- 5.24 There is also a general prohibition on disclosure of information received by the CCPC in the exercise of its functions.<sup>35</sup> However, disclosures are permitted to 16 specified bodies where the CCPC believes the information may relate to offences under legislation not coming within its remit.<sup>36</sup>
- 5.25 The *Criminal Justice Act 2011* imposes a general obligation on all persons, including regulators and their staff - notwithstanding provisions in their statutory mandate concerning confidentiality - to disclose to An Garda Síochána information that is material to preventing the commission of “relevant offences”<sup>37</sup>, or apprehending and convicting persons for them.<sup>38</sup>
- 5.26 A common feature of the provisions above is that they relate to disclosure of information concerning criminal offences. However, actual or threatened prosecution is usually a measure of last resort for regulators. Moreover, there are many

<sup>31</sup> Section 17(1) of the *Company Law Enforcement Act 2001*.

<sup>32</sup> Section 17(2) of the 2001 Act.

<sup>33</sup> Section 17(3) of the 2001 Act.

<sup>34</sup> Section 18 of the 2001 Act, as substituted by section 6 of the *Companies (Miscellaneous Provisions) Act 2013*.

<sup>35</sup> *Competition and Consumer Protection Act 2014*.

<sup>36</sup> Section 24 of the 2014 Act: the specified bodies include An Garda Síochána, the Revenue Commissioners, the ODCE, the Central Bank of Ireland and other sectoral regulatory agencies.

<sup>37</sup> Which include arrestable offences under banking and insurance statutes and the *Companies Acts*, money laundering and theft and fraud offences.

<sup>38</sup> Section 19 of the 2011 Act. The Commission understands that section of the 2011 Act does not appear to have been invoked by regulators since its enactment, and it may be that guidance is required as to its purpose and effect on information disclosed to regulators.

regulatory issues that have far-reaching consequences that might not constitute criminal offences or “relevant offences”. Without more permissive exemptions, the statutory prohibitions on disclosure may prevent regulators sharing information that could greatly assist other regulators in ensuring compliance in their respective fields of responsibility.

## QUESTION 5

- 5(l) Do you think that it would be desirable or feasible to permit regulators to share with other regulators information that they have received in confidence, if the information relates to matters other than criminal offences?
- 5(m) If so, in your view, what limitations and information governance rules should apply?
- 5(n) What information, do you think, should be allowed to be shared? e.g. identity and basic information supplied on first registration with a regulator, data supplied as part of normal regulatory returns, information supplied during consultations with regulators, information coming to light during supervision or investigation activities etc.

## Common Inspectorates

- 5.27 Regulators’ statutory mandates generally include the powers of inspection and investigation. These powers generally provide for the authority of a regulator’s authorised officers to enter and inspect premises, to interview certain persons, and to view and take copies of specified types of documents or records.
- 5.28 The Organisation for Economic Cooperation and Development (OECD) has suggested that efficiencies could be achieved by creating common inspectorates for multiple regulators and using shared information systems to avoid duplication of effort or inconsistencies in regulators’ approaches.<sup>39</sup>
- 5.29 In its 2010 submission on white collar crime, the ODCE made a similar proposal in relation to investigations, suggesting that the law should permit joint investigation teams to be established between any two or more law enforcement bodies, where each of them has a common interest in the investigation of a matter.<sup>40</sup>
- 5.30 Such an approach could create efficiencies that benefit both regulators and the entities that they regulate, such as reducing the number of inspections and

<sup>39</sup> OECD *Best Practices, Inspection and Enforcement* (2014) at pp.41-43.

<sup>40</sup> ODCE Submission on White Collar Crime, submission to the Department of Justice (2010).

regulatory submissions, creating a consistent data set that different agencies can use, and allowing for close co-ordination between agencies in enforcement actions.

- 5.31 A difficulty faced by this approach arises from the differing functions and powers given by legislation to different regulators. As a general principle, a regulator and its authorised officers may use their powers only for the purpose for which they were given by the Oireachtas. A regulator could not exercise its power to inspect premises or documents if the purpose of doing so was to further an investigation by some other regulator.
- 5.32 In addition, regulators are constrained as to how they may share information they receive in carrying out their functions. In some cases, regulators' mandates derive from the EU and cannot be altered by the Oireachtas. An authorised officer of one regulator may therefore be prohibited from sharing information with a colleague in another agency, even if that colleague has similar powers and could have obtained the information himself or herself.
- 5.33 Lastly, due to the differing, and perhaps uncoordinated development of, regulators' statutory mandates, the precise scope and power of individual agencies and their respective authorised officers can vary. As a result, an officer of one agency may have a right to enter premises, view a document or interview a person that a colleague in another agency may not. This may inhibit or even prevent agencies from inspecting or investigating in co-operation with others.

**QUESTION 5**

5(o) Do you think that regulators and their authorised officers should be able to work co-operatively in inspections and/or enforcement?

5(p) If so, how do you think their statutory mandates should be adapted?

5(q) Do you think that information obtained cooperatively should be available for use (whether in enforcement actions or otherwise) by other regulators?

5(r) What, if any, information governance rules do you think should apply?



## ISSUE 6

# JURISDICTION FOR REGULATORY APPEALS

### Introduction

- 6.01 As already discussed, there has been an ad hoc development of the regulatory system in Ireland.<sup>1</sup> As a result, the system of regulatory appeals in Ireland has also evolved in an ad hoc manner.<sup>2</sup> The decisions of regulatory bodies can have far-reaching effects on the rights of citizens, society, consumers, market players and impact on the markets themselves.<sup>3</sup> A predictable and consistent appeals process for regulatory decisions is therefore essential to ensure transparency and accountability in the regulatory system.<sup>4</sup> An effective review process ensures that regulatory bodies can apply and enforce their rules in a systematic and fair manner,<sup>5</sup> and can mitigate the costs resulting from regulatory error.<sup>6</sup>
- 6.02 This Issues Paper does not generally examine regulatory appeals in Ireland, but is confined to the adjudicative decisions of financial and economic regulators<sup>7</sup> that can have a high market impact, such as decisions to grant or remove a licence or authorisation of a regulated entity to operate in a regulated sector, or to impose civil financial sanctions. The lack of uniformity in regulatory appeals has been subject to a number of reviews.<sup>8</sup> These have identified difficulties and a number of potential reforms. These are reviewed briefly below in order to identify whether their proposals can be applied to the regulators and decisions that fall within the scope of this Issues Paper.

<sup>1</sup> Hogan and Morgan, *Administrative Law in Ireland* 4th ed (Roundhall, 2012), p.325.

<sup>2</sup> Department of the Taoiseach, *Government Statement on Economic Regulation* (2009) para 3.8; Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing 2009) 461; Forfás, *Sectoral Regulation: Study to Identify Changes to Sectoral Regulation to Enhance Cost Competitiveness* 82-83.

<sup>3</sup> Department of the Taoiseach, *Consultation Paper on Regulatory Appeals* (2006), p.3.

<sup>4</sup> Department of the Taoiseach, *Regulating Better* (2004), p.32: "If accountability is to be fully established, an innovative approach to regulatory appeals should be adopted to facilitate expedient, efficient and informed review of regulatory decisions." OECD, *Regulatory Reform in Ireland* (2001), p.24: such an appeals process is important to establish "a stable and accessible regulatory environment that promotes competition, trade, and investment, and helps ensure against undue influence by special interests."

<sup>5</sup> Forfás, "Sectoral Regulation: Study to Identify Changes to Sectoral Regulation to Enhance Cost Competitiveness" (2013), p. 82.

<sup>6</sup> Economist Intelligence Unit, *Review of Regulatory Appeals in Ireland* (2009): "Regulatory errors impose costs. The lack of an effective appeals mechanism is likely to be more costly than any delays caused by appeals. Any delay resulting from an appeal is temporary, whereas bad regulatory decisions impose on-going costs."

<sup>7</sup> Notably, the Central Bank, the Commission for Communications Regulation, the Commission for Energy Regulation, the Competition and Consumer Protection Commission, the Health Products Regulatory Authority, the Broadcasting Authority of Ireland and the Office of the Director of Corporate Enforcement.

<sup>8</sup> Department of Public Enterprise, *Governance and Accountability in the Regulatory Process: Policy Proposals* (2000); OECD, *Regulatory Reform in Ireland* (2001); Department of the Taoiseach, *Regulating Better* (2004); Department of the Taoiseach, *Consultation Paper on Regulatory Appeals* (2006); Economic Intelligence Unit, *Review of Regulatory Appeals in Ireland* (2009); OECD, *Better Regulation in Europe: Ireland* (2010); Forfás, *Sectoral Regulation: Study to Identify Changes to Sectoral Regulation to Enhance Cost Competitiveness* (2013); Department of the Taoiseach, *Regulating for a Better Future: A Government Policy Statement on Sectoral Economic Regulation* (2013).

## Current Regulatory Appeals Processes in Ireland

- 6.03 The *ad hoc* development of Ireland's regulatory system has resulted in a wide variety of processes and rules govern regulatory appeals, with each sector differing in the types of appeals permitted (if appeals are permitted at all), and the manner in which appeals are heard. These inconsistencies in procedures result in a less transparent regulatory environment.<sup>9</sup> A view has emerged that the current framework and processes for appeals in the Irish regulatory system is unsatisfactory, resulting in less than optimum confidence in the regulatory appeals process.<sup>10</sup>
- 6.04 There is no standard process or procedure for appealing a regulatory decision in Ireland. Depending on which regulatory body has made the decision that is being appealed, there are significant differences in the appeal processes available including:
- the remedies available - whether the appeal can allow for setting aside, varying or replacing the regulatory decision, or merely sending it back to the regulatory body for re-decision;
  - the types of matters which can be appealed - whether allowing appeals on the merit (a full re-hearing); or appeals regarding the fairness, correctness or proportionality of the process applied in making the decision;
  - the practice and procedure applicable on appeal - whether formal procedures apply, including the application of the rules of evidence that apply in courts, or reliance on a legal team or counsel, or less formal procedures, waiving certain rules of evidence, such as the rule against hearsay, or entities representing themselves;
  - the venue to which the appeal is made – whether appeals made to an appeals panel, or to a Court; or
  - in specific cases, whether an appeal is available at all - other than an appeal as to process through a High Court judicial review.

<sup>9</sup> Forfás, *Sectoral Regulation: Study to Identify Changes to Sectoral Regulation to Enhance Cost Competitiveness* (2013), p. 83. OECD, *Better Regulation in Europe: Ireland* (2010) 138, which found that the varying approaches to regulatory appeals led to inconsistencies, raising concerns about the fairness and transparency of the enforcement process.

<sup>10</sup> Economist Intelligence Unit, *Review of the Regulatory Environment in Ireland* (2009) 13.

## The Central Bank

The Irish Financial Services Appeals Tribunal (IFSAT) was established to hear and determine appeals of certain decisions of the Central Bank.<sup>11</sup> The Appeals Tribunal has jurisdiction to hear and determine appeals made by affected persons against appealable decisions of the Bank.<sup>12</sup> The Bank is the respondent to every appeal.<sup>13</sup> The Tribunal has control over its own procedures,<sup>14</sup> and in determining an appeal it can consider any relevant issue of fact or law.<sup>15</sup> The Tribunal has broad powers to affirm any appealed decision. It can also remit any appealable matter back to the Central Bank for reconsideration, together with any recommendation or direction of the Appeals Tribunal. It can also vary, substitute or set aside any appealable decision made by the Central Bank.<sup>16</sup>

The Appeals Tribunal may call witnesses and examine or cross-examine them on oath or by statutory declaration.<sup>17</sup> The Tribunal can also compel the attendance of the person before it, by way of summons.<sup>18</sup> It may award costs in relation to proceedings before it.

The Tribunal may also refer a question of law to the High Court.<sup>19</sup> A party may appeal a decision of the Tribunal to the High Court,<sup>20</sup> and the High Court may make such orders as it thinks appropriate including orders affirming, setting aside, or remitting the case back to the Tribunal. The determination of the High Court on appeal is final, subject to an appeal on a point of law to the Court of Appeal<sup>21</sup> (but only with the leave of either Court).<sup>22</sup>

This appeals process has been used on a number of occasions in relation to refusals to grant or renew licences or authorisations for regulated entities to participate in a financial sector regulated by the Central Bank.<sup>23</sup>

11 Section 57B of *the Central Bank Act 1942*, as amended.

12 Section 57G of the 1942 Act.

13 Section 57L of the 1942 Act.

14 Section 57V(1) and(7) of the 1942 Act. In particular, the Appeals Tribunal may require evidence or argument to be presented in writing and decide on the matters on which it will hear oral evidence or argument; require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases; authorise a document to be served outside the State; adjourn proceedings to any time and place (including to enable the parties to negotiate a settlement); at any stage dismiss proceedings if the applicant has withdrawn the application to which the proceedings relate; and at any stage dismiss proceedings that it considers to be frivolous or vexatious or otherwise misconceived or lacking in substance.

15 Section 57Z(1) of the 1942 Act.

16 Section 57Z(2)(d) and (2A) of the 1942 Act. Such appealable decisions include the application of civil financial sanctions by the Central Bank under Part III C of the 1942 Act: see the discussion in Issue 3, above.

17 Section 57 AF(1) of the 1942 Act.

18 Section 57AF(2)(b) of the 1942 Act.

19 Section 57AJ of the 1942 Act.

20 Section 57AK of the 1942 Act.

21 See section 7A(2) of the Courts (*Supplemental Provisions*) Act 1961, as inserted by section 8 of *the Court of Appeal Act 2014*.

22 Section 57AL of the 1942 Act.

23 See the following IFSAT decisions: *Collins (T/a Westgate Finance) v Central Bank of Ireland 009-1013*; *"X" v Irish Financial Services Regulatory Authority 003/2009*, 27 August 2009; *Westraven Finance Ltd t/a Brinkspeed v Irish Financial Services Regulatory Authority 001/2007*, 31 August 2007.

### **The Health Products and Regulatory Authority (previously, the Irish Medicines Board)**

The HPRA's principal function is to license the manufacture, preparation, importation, distribution and sale of medicines, medical devices and other health products.<sup>24</sup> The HPRA may grant, suspend, renew, amend or revoke a licence. It can refuse to grant a licence on any ground relating to the safety, quality, or efficacy of a medical or health product, class of products, or the manufacture or wholesale of such a product or class of products, but only after it has obtained advice on the matter from its Advisory Committee.<sup>25</sup>

A licence application is first considered by the HPRA's assessors or inspectors, who may propose a refusal of the application. Where an application is refused the applicant can appeal this decision to internal committees of the HPRA. After considering representations made, the HPRA decides whether to alter its decision. This decision is final, subject to being challenged in the High Court on judicial review.<sup>26</sup>

### **Commission for Energy Regulation (CER)**

CER is the State's energy regulator and is empowered to grant or refuse a licence to generate or supply electricity and gas.<sup>27</sup> A refusal of a licence may be appealed to an appeals panel.<sup>28</sup> The appeals panel has all the powers of the High Court to summons witnesses, administer oaths, and compel the production of documents.<sup>29</sup> The panel has the power to confirm, annul or vary the decision of CER. The decision of the panel is only subject to challenge by way of judicial review.<sup>30</sup>

<sup>24</sup> Section 4 of the *Irish Medicines Board Act 1995*.

<sup>25</sup> Section 9(8) of the 1995 Act, as amended by section 14 of the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

<sup>26</sup> Health Products Regulatory Authority, *Guide to Refusals and Appeals* (2013).

<sup>27</sup> Section 14 of the *Electricity Regulation Act 1999*.

<sup>28</sup> Sections 13(7)(c), 29, and 30 of the 1999 Act.

<sup>29</sup> Section 30(2) of the 1999 Act.

<sup>30</sup> Section 32 of the 1999 Act.

### Broadcast Authority of Ireland (BAI)

The Compliance Committee of the BAI<sup>31</sup> has the power to recommend that the BAI terminate or suspend certain contracts entered by the BAI on the basis of false or misleading information received prior to entering into the contract, or that the holder of the contract has failed to comply with a term of the contract. The BAI must act on the recommendation of the Committee, but may reduce the time recommended for a suspension, or suspend a contract rather than terminate it.<sup>32</sup> In respect of any decision to suspend or terminate a contract, the holder of the contract may appeal this decision to the High Court.<sup>33</sup>

- 6.05 The above examples represent four of the many variations of regulatory appeals in Ireland. Many of the reviews of regulatory appeals have suggested that a more uniform or standardised approach is required.<sup>34</sup> Attempts have been made to identify potential reforms for regulatory appeals in Ireland,<sup>35</sup> but no consensus has emerged on this.<sup>36</sup>

### Requirements of a Standardised Approach to Regulatory Appeals.

- 6.06 The Commission has identified several requirements which it believes should be kept in mind when considering, firstly, whether a standardised approach to the appeals of certain adjudicative decisions that are the focus of this Issues Paper should be adopted, and, secondly, what form such a standardised appeals process might take.

### Relevant Expertise

- 6.07 An essential aspect of the regulatory appeals processes must be access to sufficient expertise to enable understanding of, and competency to hear,<sup>37</sup> the complex issues which may arise during the course of the an appeal. A benefit of the current, *ad hoc*, system of appeals is that the many distinct appeals processes generally maintain an expertise in relation to the relevant regulated sector within.<sup>38</sup> The importance of this expertise has been recognised by the courts, and forms part of the reasoning behind their approach to defer to the expertise of decisions of specialist bodies that come before them, discussed further below.<sup>39</sup>

31 Established by section 6(b) of the *Broadcasting Act 2009*.

32 Section 51(1) of the 2009 Act.

33 Section 51(4) of the 2009 Act.

34 Forfás, *ibid*, p. 85; OECD *ibid*, p. 23; and EIU *Ibid*, p. 13.

35 See Department of the Taoiseach, *Consultation Paper on Regulatory Appeals* (2006).

36 Economist Intelligence Unit, *Review of the Regulatory Environment in Ireland* (2009) p.13 noted a lack of consensus in Ireland on the types of reform to be carried out to regulatory appeals.

37 Bar Council of Ireland, Submission on Regulatory Appeals, 31 October 2006, p.1.

38 Department of Public Enterprise, *Governance and Accountability in the Regulatory Process: Policy Proposals* (2000), p.21; Hogan and Morgan, *Administrative Law in Ireland*, 4th ed (Roundhall, 2012), p.289; Connery and Hodnett, *Regulatory Law in Ireland*, (Tottel, 2009), p.488.

39 For example in *Governey v Financial Services Ombudsman* [2013] IEHC 403, the High Court (Hedigan J) stated: "A notable characteristic that this type of appeal has in common with judicial review is the deference that this Court must accord to the FSO as a specialist expert Tribunal working within its own area of professional expertise. Thus, there may be a permissible error if it is

## Application of Fair Procedures

- 6.08 The procedures in regulatory appeals bodies are often more informal than those applied in courts. This can allow these panels to function in a flexible manner, for example, by allowing for the strict rules of evidence applied before the courts to be relaxed,<sup>40</sup> or for an appeal to be held in private. Though a more informal approach has frequently been applied by non-court regulatory appeals bodies, the procedures must always ensure that fair procedures are applied.<sup>41</sup>

## Independence

- 6.09 An appeals body must strike a balance between the interests of the entity who has been subject to a regulatory decision on the one hand, and the regulator who represents the public interest on the other.<sup>42</sup> Given the potential societal importance of adjudicative regulatory decisions, it is important that the appeals processes ensures independence and prevents problems such as “agency capture”<sup>43</sup> or bias due to familiarity with the parties involved in the process, in order to ensure a fair hearing and fair result. This, internal review of decisions, without further recourse to external independent review, has been criticised on the ground that it can undermine the accountability of a decision making process;<sup>44</sup> and that such internal review, by definition, cannot be completely independent of the relevant regulator.<sup>45</sup> The provision of, at the least, judicial review in the High Court, would help ensure independence.

## Mitigating “Regulatory Gaming” and Tactical Appeals

- 6.10 The tactical use of regulatory appeals processes has been recognised by the OECD<sup>46</sup> and the European Commission.<sup>47</sup> This behaviour can be described as “regulatory gaming” which involves the strategic use of the regulatory system in order to delay

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within jurisdiction insofar as it falls short of being one which is serious and significant. In determining factual matters, I can only quash the FSO’s decision if I am persuaded that he could not have reasonably come to his decision based on the facts he had before him.”

40 For example, the Irish Financial Services Appeals Tribunal (IFSAT) has control over its own procedures: see section 57V of the *Central Bank Act 1942*, as amended, discussed above.

41 In the Supreme Court decision *Kiely v Minister for Social Welfare* [1977] IR 267, at 81, Henchy J stated: “Tribunals exercising quasi-judicial functions are frequently allowed to act informally—to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like—but they may not act in such a way as to imperil a fair hearing or a fair result”.

42 See Hogan and Morgan, *Administrative Law in Ireland*, 4th ed (Roundhall, 2012), p.292, on the issue of independence.

43 *Ibid*, commenting that a body’s “own reputation and, indirectly, prosperity, may become tied up with the perceived performance of the field it is supposed to be regulating”.

44 Australian Law Reform Commission, *Principled Regulation Report* (Report 95, 2002), p.692.

45 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunal*, (Report 39, 1995), p.122.

46 OECD, *Regulatory Reform in Denmark* (2000) noting that “[t]he existence of the Board has provided a relatively cheap and easy way to delay the implementation of key decisions aimed at fostering competition”.

47 European Commission, *7th Report on the Implementation of the Telecommunications Regulatory Package* (2001), para. [4.2.1]: “It appears that incumbents have, as a matter of strategy, continued the practice of appealing systematically against NRA decisions.”

or frustrate the purpose of regulation.<sup>48</sup> The use of the appeals process to undermine effective regulation is clearly undesirable, and should be prohibited.

### **Clear and Identifiable Practice and Procedures**

- 6.11 In the interests of clarity and transparency, clear procedures and guidance should be in place in the operation of any regulatory appeals process.

### **Efficiency and Cost of Appeals Process**

- 6.12 The use of appeals panels and tribunals, rather than providing for appeals directly to the courts, derives from the perception that appeals to these bodies may be quicker and less expensive than initiating court proceedings.<sup>49</sup> The greater use of case management in the court system means, however, that the cost and delay associated with litigation has been, to some extent, reduced. In addition, the risk that high impact adjudicative decision made against a regulated entity will be appealed or judicially reviewed as a matter of course means that the provision of appeals panels may not result in the decision making process actually being quicker or less expensive.

### **Appeals on Merit or More Limited Appeals**

- 6.13 Although there are a variety of appeal processes in Ireland's regulatory structure, the most generally applicable review tool is a High Court judicial review. Any entity that has been subject to either a regulatory determination, or the determination of a regulatory appeals process, may bring judicial review proceedings in the High Court. This is limited to a review as to: whether procedural fairness was observed; whether there was a clear legal basis for the decision, and whether the decision was proportionate. This is sometimes referred to as an "appeal on process". Although the judicial review procedure has been criticised as costly and time-consuming,<sup>50</sup> it has been found to offer an adequate response in the case of "appeals on process".<sup>51</sup>
- 6.14 "Appeals on process" are to be distinguished from "appeals on merit" on which there is wide divergence in Ireland's regulatory system. Forfás, in its study on sectoral regulation, noted that "the approach taken to appeals on merit in Ireland is much more complicated and varied" than the relative straightforward nature of the judicial review process. This Issues Paper therefore focuses on whether a standardised regulatory appeals process can be developed for such "appeals on merit".
- 6.15 As noted above, depending on the regulatory appeals process in question the nature of the determination that can be made may be limited. For example, in the case of the

48 Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing 2009), p.462, n. 5. The risk of "regulatory gaming" was also observed in Department of Public Enterprise, *Governance and Accountability in the Regulatory Process: Policy Proposals* (2000), p.21: "Appeals on merit could also be used as a delay tactic to postpone the effective implementation of regulators' decision".

49 Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing 2009), pp.468 and 486. For discussion of the rationale behind the development of quasi-judicial adjudicative bodies in general, see Hogan and Morgan, *Administrative Law in Ireland*, 4th ed (Roundhall, 2012), p.287.

50 OECD, *Regulatory Reform in Denmark* (2000), p.15, noting that: "The costs in terms of money, time and risk may deter small regulatory cases of concern to individuals or less well off groups in society."

51 Forfás, *Sectoral Regulation: Study to Identify Changes to Sectoral Regulation to Enhance Cost Competitiveness* (2013), p.83.

Commission for Energy Regulation (CER), the appeals panel can conduct an appeal on the merits of the regulator's decision, and can replace or alter this decision. This to be contrasted with the more limited decision making powers of the Irish Financial Services Appeals Tribunal (IFSAT), in relation to decisions of the Central Bank, regarding which it merely has the power to affirm or remit the matter back to the Central Bank for reconsideration.<sup>52</sup>

- 6.16 The benefit of allowing an appeals body to carry out a full appeal on the merits is that it can shorten the appeals process and reduce costs, because it will prevent any further appeal of a remitted decision. Also, the ability to replace a first instance decision can ensure independence in the relevant regulatory process, although it is not clear that this is a necessary safeguard in the Irish regulatory system.<sup>53</sup> In addition, allowing an appeal on the merits ensures that regulators are held accountable for the substance of their decisions and provides for a degree of quality control.<sup>54</sup>
- 6.17 A disadvantage of a full appeal on the merits, which allows an appellate body to replace the decision of the regulator, is that it might encourage the use of the appeal process for "regulatory gaming." There is also a risk that appeals on the merits from the decisions of a regulator could result in an appeals body effectively supplanting or severely undermining the functioning of a regulator.<sup>55</sup> It is undesirable that appealing a regulator's decision becomes merely a matter of course for regulated entities. This is a particular risk in relation to the types of significant decisions that are the focus of this Issues Paper. If a regulated entity is a wealthy business, and is seeking authorisation to operate in a market that could provide for significant revenue, the appeal of any negative decision will likely be an automatic next step.<sup>56</sup> It should not be the case that an appellate body usurps the statutory functions of a regulator.
- 6.18 The courts have reacted to the potential undermining of the role of regulators by adopting a deferential approach to appeals from decisions of regulators which come before them. In order to safeguard the statutory function of the regulator, the courts generally do not take the view that an appeal from a decision of a regulator involves an appeal on the merits, but rather they focus on the application of the adjudicative process as a whole, and specifically whether the decision reached involved "a serious and significant error or series of such errors."<sup>57</sup> While the court is not confined to considering solely the issues that might arise if a decision was being challenged by

52 See the IFSAT's decision in *Westraven Finance Ltd t/a Brinkspeed v Irish Financial Services Regulatory Authority* 001/2007, 31 August 2007.

53 Department of the Taoiseach, *Consultation Paper on Regulatory Appeals* (2006), p.40: "it is not clear that a lack of independence on the part of regulators is perceived to be a significant problem in the Irish regulatory system".

54 Forfás, *Sectoral Regulation: Study to Identify Changes to Sectoral Regulation to Enhance Cost Competitiveness* (2013), p. 82.

55 Department of Public Enterprise, *Governance and Accountability in the Regulatory Process: Policy Proposals* (2000), p.21; Department of the Taoiseach, *Consultation Paper on Regulatory Appeals* (2006), pp.40-41.

56 Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing 2009), p.462.

57 *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323.

way of a judicial review,<sup>58</sup> the standard the courts apply to these appeals is close to that of a judicial review.<sup>59</sup>

## Different Approaches to Standardised Regulatory Appeals Processes The High Court.

- 6.19 In 2013, the Government *Policy Statement on Sectoral Economic Regulation* suggested that consideration be given to a single-step appeal to the High Court, or specifically to the Commercial Court, from decisions of a regulator.<sup>60</sup> There appear to be a number of benefits apparent from using this approach to appealing high market impact regulatory decisions of an adjudicative nature. It removes the possibility of the regulatory appellate body becoming merely a stepping stone to a further appeal before the courts. In addition, the Commercial Court operates a system of case management which acts against the inefficiencies traditionally associated with the court process.<sup>61</sup> The High Court Competition List, which already deals with appeals of competition-related regulatory decisions, operates a similar case management system.<sup>62</sup> Also, given the High Court's wide discretion in relation to awarding costs,<sup>63</sup> the Court would be in a strong position to disincentivise tactical appeals or "regulatory gaming".
- 6.20 Increasing time and cost efficiency of the courts through case management and accelerated court procedures,<sup>64</sup> as in the High Court Commercial and Competition Lists, removes the need to vest regulatory appeals functions in a non-court appeals body.<sup>65</sup> The court system is specifically arranged to ensure that it can apply law in an independent manner,<sup>66</sup> which, it has been suggested, non-court appeal mechanisms may not be.<sup>67</sup> The courts are also well attuned to ensuring that fair procedures are applied.
- 6.21 It has, however, been suggested that the courts are unsuited as the appellate body for complex regulatory decisions<sup>68</sup> on the basis that they have not indicated any

58 *Orange Communications Ltd v Director of Telecommunications Regulation (No.2)* [2000] 4 IR 159, at 184 (Keane CJ).

59 *Governey v Financial Services Ombudsman* [2013] IEHC 403, in which the High Court (Hedigan J) noted: "The appeal is thus not a de novo one [that is, a full re-hearing]. Whilst it is not a judicial review, it does bear many of its characteristics and on a scale between de novo and judicial review is far closer to judicial review."

60 Department of the Taoiseach, *Regulating for a Better Future: A Government Policy Statement on Sectoral Economic Regulation* (2013), p.11.

61 Department of the Taoiseach, *Consultation Paper on Regulatory Appeals* (2006), p.35: "Experience to date has suggested that appeals will not necessarily be heard more quickly than through the Courts".

62 Order 63B of *the Rules of the Superior Courts* 1986 (SI No.16 of 1986), as amended.

63 Order 99, Rule 1(1) of *the Rules of the Superior Courts* 1986, as amended.

64 Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing 2009), p.469.

65 Hogan and Morgan, *Administrative Law in Ireland*, 4th ed (Roundhall, 2012), p.287.

66 This is underpinned by, for example, the guarantee of judicial independence in Article 35.2 of the Constitution of Ireland.

67 Constitution Review Group, *Report of the Constitution Review Group* (1996), p.155, came to the conclusion that it was not feasible to ensure that bodies, other than courts, exercising judicial power be provided with a guarantee of independence in the performance of their functions.

68 Part of the basis for the courts' deferential approach to regulatory appeals, discussed above, is due to a recognition of the expertise and specialised knowledge available to the regulator: see *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323.

desire in case law to review the merits of decisions of regulatory bodies, which may be based in part on the courts' lack of expertise in areas such as economic policy.<sup>69</sup>

- 6.22 Specifically in relation to competition law, the 2000 *Report of the Competition and Mergers Review Group*<sup>70</sup> discussed whether the courts were unsuitable due to requirement to deal with issues of economic policy. The Group noted that courts are very well used to dealing with what is at times extremely complex technical evidence on a wide variety of topics and disciplines. The Group formed the view that the problems which arise from having to consider matters of economic policy based upon highly technical evidence might be mitigated by the appointment of an appropriate expert or assessor to render advice.
- 6.23 The courts have a long-standing discretionary power to supplement their own expertise through the appointment of an independent expert assessor to advise on specific areas in which the court may have insufficient expertise.<sup>71</sup> The Commission has previously recommended the use of court-appointed assessors in jury trials in criminal proceedings to assist the court, including the jury, to address any difficulties understanding complex evidence.<sup>72</sup> A similar use of expert assessors, where deemed required by a court in complex regulatory appeals would counteract any lack of expertise of the court.

In *Competition Authority v O'Regan and Others*<sup>73</sup> the High Court (Kearns J) appointed an independent economic assessor in a competition law case to assist the court. The assessor would attend as many hearings and submissions as might be necessary to assist the Court, both then and afterwards in properly understanding and clarifying where necessary the economic evidence given, to enable the Court to discharge its obligation to carry out a proper economic analysis in the case.<sup>74</sup>

- 6.24 The question therefore is whether a system of direct appeal to the High Court from high market impact regulatory decisions of an adjudicative nature would be beneficial. Another option would be to create a process of appeals to another court with appropriate jurisdiction, such as the Circuit Court, where appropriate.

<sup>69</sup> Bar Council of Ireland, Submission on Regulatory Appeals, 31 October, 2006, p.3.

<sup>70</sup> *Final Report of the Competition and Mergers Review Group* (2000), p.119.

<sup>71</sup> See section 59 of the *Supreme Court of Judicature (Ireland) Act 1877* and Order 36, rule 41 of the *Rules of the Superior Courts 1986*. This general discretionary power is supplemented by provisions that allow for the use of assessors in competition cases (Order 63B, rule 23 of the *Rules of the Superior Courts 1986*) and in admiralty cases (Order 64, rule 43 of the *Rules of the Superior Courts 1986*).

<sup>72</sup> Law Reform Commission, *Report on Jury Service (LRC 107 - 2013)* at paragraphs 10.28-10.31.

<sup>73</sup> [2004] IEHC 330, [2007] IESC, [2007] 4 IR 757.

<sup>74</sup> The High Court (Kearns J) noted the advisory nature of such an assessor's role: "As part of this remit, the court confirmed that if the assessor, in relation to any significant point of economic evidence, expressed or offered an opinion which was contrary to any initial assessment or preliminary view taken by the court, or put forward a view which had not been addressed in the submissions of the parties, then the court would in such circumstances reconvene to hear further submissions from the parties on any such view or opinion. Any decision or judgment on any portion of the economic evidence would at all times remain the decision of the court and not the assessor."

## The UK Competition Appeal Tribunal

- 6.25 An alternative approach to regulatory appeals is that adopted in the UK in relation to competition law matters. The UK Competition Appeal Tribunal (CAT), established under the UK *Enterprise Act 2002*, hears appeals from both competition and regulatory decisions. It has the status similar to a division of the English High Court, and its decision making powers are thus broad and its decisions are final.<sup>75 76</sup> Further, it provides for an expert panel that assists the judges appointed to CAT,<sup>77</sup> thereby ensuring that it has sufficient competence to hear complex competition law cases. Further, CAT has detailed rules on practice and procedure, similar to a court, which allow for certainty and uniformity in the manner in which appeals and other matters proceed.<sup>78</sup>
- 6.26 As noted, the CAT is in effect a division of the English High Court. The reason for this approach, rather than merely allowing regulatory appeals to be appealed directly to a designated High Court list, or division, or the Commercial Court, is that the CAT is a specialist body that has built up the requisite expertise by dealing with appeals from national regulatory authorities; it also provides for a hearing before both judges or senior lawyers, and experts in relevant fields.<sup>79</sup>

## Australian Administrative Appeals Tribunal

- 6.27 The Australian Administrative Appeals Tribunal (AAT), established under the Australian *Administrative Appeals Tribunal Act 1975*, conducts independent appeals on the merits of administrative decisions made under a wide range of Australian legislation. It reviews decisions made by Australian Government ministers, departments and agencies and, in limited circumstances, decisions made by state government and non-government bodies. The AAT's jurisdiction is set out in the 1975 Act, as amended.<sup>80</sup>

<sup>75</sup> Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing 2009), p. 484.

<sup>76</sup> The CAT has the standing of a court and its decisions are enforceable judgments and form legal precedent, and can include the awarding of damages or a fine against a regulated entity.

<sup>77</sup> Cases are heard before a CAT consisting of three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law, business, accountancy, economics and other related fields. The CAT's jurisdiction extends to the whole of the United Kingdom. See: <http://www.catribunal.org.uk/242/About-the-Tribunal.html>.

<sup>78</sup> See the UK *Competition Appeal Tribunal Rules 2015* (SI 2015 No.1648).

<sup>79</sup> Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing 2009), p. 486.

<sup>80</sup> The AAT can review decisions made under more than 400 Australian Acts and legislative instruments. The most common types of decisions reviewed relate to: child support; Commonwealth workers' compensation; family assistance, paid parental leave, social security and student assistance; migration and refugee visas and visa-related decisions; taxation; and veterans' entitlements. The AAT also reviews decisions relating to: Australian citizenship; bankruptcy; civil aviation; corporations and financial services regulation; customs; freedom of information; the National Disability Insurance Scheme; passports; and security assessments by the Australian Security Intelligence Organisation (ASIO). See <http://www.aat.gov.au/about-the-aat/what-we-do>

- 6.28 The AAT consists of a President, presidential members (including Judges and Deputy Presidents), Senior Members and Members. Through Senior Members and Members, the AAT incorporates expertise in the various regulatory areas over which it functions.<sup>81</sup>
- 6.29 The AAT has the power to affirm, vary, set aside, substitute, or remit a decision to the decision-maker for reconsideration. Proceedings of the Tribunal are conducted with as little formality and technicality, and as much expedition as possible.<sup>82</sup> A decision of the AAT can be appealed to the Australian Federal Court on a question of law only. The AAT approach provides for a readymade venue and framework of regulatory appeal that can be used by any statutorily designated regulatory sector.
- 6.30 The Bar Council of Ireland has suggested that a uniform appeals body of this nature would be of benefit.<sup>83</sup> However, in 2009 the Government decided against the establishment of a single regulatory appeals body because of efficiencies already achieved, the potential to appeal such decisions to the Commercial Court, and the differing appeals requirements mandated by EU law.<sup>84</sup>

## Conclusion

- 6.31 The Commission seeks views as to whether there is a need to reform the appeals processes in place in relation to the adjudicative decisions of financial and economic regulators that have the potential to have a high market impact, such as decisions to grant or remove a licence or authorisation of a regulated entity to operate in a regulated sector, or the imposition of civil financial sanctions. The Commission seeks views as to what form any such reform should take, for example, whether appeals should be direct to a court or a non-court appeals body; should the appeals be on merit, or something between process and merit, or confined to judicial review appeal on process.

<sup>81</sup> The President must be a judge of the Federal Court of Australia. All Deputy Presidents must be lawyers. Senior Members may be lawyers or have relevant specialist knowledge or skills. Members have expertise in areas such as accountancy, actuarial work, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, social welfare, taxation and valuation. See <http://www.aat.gov.au/about-the-aat/what-we-do>.

<sup>82</sup> Department of the Taoiseach, *Consultation Paper on Regulatory Appeals* (2006), p.25. Hogan and Morgan, *Administrative Law in Ireland*, 4th ed (Roundhall, 2012), p.228, noted that an appearance before an adjudicative body with a less formal approach can result in a less daunting experience than a day in court.

<sup>83</sup> Bar Council of Ireland, "Submission on Regulatory Appeals", 31 October, 2006, p.7.

<sup>84</sup> Department of the Taoiseach, *Government Statement on Economic Regulation* (2009) at para 2.18.

## QUESTION 6

- 6(a) Do you think that appeals of the decisions of the regulators that are the focus of this Issue should be made directly to the High Court?
- 6(b) If yes, do you think that any additional procedures are required to ensure that the High Court has sufficient expertise to hear such appeals? What, in your view, should these procedures comprise of?
- 6(c) Do you think that the Commercial Court or the High Court Competition List could be used to facilitate regulatory appeals? Would a system of appeal to another court of appropriate jurisdiction, such as the Circuit Court, provide an appropriate alternative?
- 6(d) Do you think that, rather than providing for appeals to the High Court, provision should be made for a single, uniform regulatory appeals body to which appeals from the decisions of the regulators that are the focus of this issue could be made?
- 6(e) If yes, what form do you think this body should take? Should this body replicate the UK CAT model, the Australian AAT model, or another approach?
- 6(f) What requirements or safeguards do you think should be provided for in any such body?
- 6(g) What types of decision making powers do you think such a body should have? Should the process be confined to allowing the appellate body only to either affirm or remit a decision? Or should the body have the power to replace such decisions? Should both approaches apply in different circumstances?
- 6(h) Do you think that an appeals body should have the ability to conduct a full appeal on the merits?



## ISSUE 7

# CORPORATE CRIMINAL LIABILITY

- 7.01 Corporate bodies are legal persons and can commit a wide variety of criminal offences,<sup>1</sup> ranging from summary offences through to indictable offences such as theft, fraud and homicide.<sup>2</sup>
- 7.02 It can be difficult to apply traditional principles of criminal liability to corporate bodies because those principles were developed with human beings – natural persons – in mind.<sup>3</sup> There is some uncertainty about the test, or tests, to be applied to determine how entities other than natural persons can be held to account for criminal offences.<sup>4</sup> A number of approaches have been developed in other jurisdictions to attribute criminal liability to corporate bodies; these are examined below with a view to clarifying how to attribute criminal liability to corporate bodies in the Irish context.<sup>5</sup> Three approaches are discussed: vicarious criminal liability, the identification doctrine and the organisational model of corporate liability.

### Vicarious Criminal Liability

- 7.03 A corporate body that is an employer can be criminally liable for the actions of its employees committed in the course of business. This is referred to as vicarious criminal liability. The law imposes vicarious liability primarily where an offence creates a strict obligation to which an employer must adhere.<sup>6</sup> As a general rule, vicarious liability is not imposed for offences that require proof of knowledge or

1 See Courtney *The Law of Private Companies*, 2nd ed (Butterworths 2002) at 175 and Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 910.

2 See *Report on Corporate Killing (LRC 77-2005)* paragraph 1.02; Gobert and Punch, *Rethinking Corporate Crime* at 8-9.

3 Gobert and Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge, 2011) at p.4.

4 Wells, "Containing Corporate Crime", in Gobert and Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge, 2011), at p.23: "The models of liability are routes to liability for offences—they are not the offences themselves. Corporate liability provides tracks that enable legal actors that are not human beings to be answerable for criminal offences."

5 It may also be necessary to take into account the criminal liability of unincorporated bodies such as partnerships, which do not have a separate legal personality under Irish law. Section 18(c) of the *Interpretation Act 2005* provides that where the term "person" is used in legislation, it can be taken to include not only a corporate body but also an unincorporated body of persons, as well as an individual. Section 4 of the 2005 Act provides that this applies unless a contrary intention appears in specific legislation that uses the term "person". Regarding the comparable position in England and Wales, the English Court of Appeal held in *R v L* [2008] EWCA Crim 1970, [2009] 1 All ER 786 that an unincorporated body could be liable to criminal prosecution separately from its members on that basis. In addition, legislation often expressly provides for the separate criminal liability of an unincorporated body as well as its individual members: see for example section 58(3) of the *Criminal Justice (Theft and Fraud Offences) Act 2001* and section 6 of the *Competition Act 2002*.

6 In the US, courts have used the related concept of *respondeat superior* to attribute to a corporate body liability for the actions of its employees. In *New York Central and Hudson River Railway v United States* 212 US 481 (1909) the US Supreme Court did not clearly delineate the scope of the liability. In *United States v Hilton Hotels Corporation* 467 F 2d 1000 (1972), the US Court of Appeals for the Ninth Circuit held that the doctrine justified conviction of a corporate body even when its employee's acts were neither condoned by nor for the benefit of the employer.

intention (*mens rea*)<sup>7</sup> because it is not considered appropriate that an employer should be criminally liable for an offence that required such knowledge or intention on the part of the offending employee. Vicarious criminal liability is commonly used in legislation enforced by regulatory bodies.<sup>8</sup>

- 7.04 Vicarious liability can be distinguished from direct liability in that vicarious liability imposes liability but not culpability, while direct liability is “founded on culpability as opposed to mere liability”.<sup>9</sup> However, some commentators disagree with the categorisation of offences as imposing vicarious liability, particularly where the offence can arise from acts that are within the scope of an employee’s duties. In those cases, it has been suggested that the true nature of the corporate body’s liability is a direct one to ensure that the legislation in question is complied with.<sup>10</sup>

### The Identification Doctrine

- 7.05 Unlike the vicarious liability model of attribution, which generally arises in strict liability or absolute liability<sup>11</sup> cases where knowledge or intention (*mens rea*) is not relevant, the identification doctrine attributes criminal liability directly to a company on the grounds that the knowledge or intention, as well as the decisions, acts or omissions that constitute a crime, can be identified as those of the corporate body itself.<sup>12</sup> The identification doctrine is premised on the view that certain individuals in a corporate body – generally one or more of its directors, senior management, or a dominant figure such as a majority shareholder – can be seen as “the directing mind and will”<sup>13</sup> of the corporate body.<sup>14</sup>

7 Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (2011), p.87, para [5.4]: vicarious liability can be incurred in the criminal law by way of statutory offences that impose an absolute duty on the employer, even where they have not authorised or consented to the act.

8 Wells, “Containing Corporate Crime”, in Gobert and Pascal (eds) *European Developments in Corporate Criminal Liability* (Routledge, 2011), at 25.

9 *Bilta (UK) Ltd (In Liquidation) v Nazir* [2015] UKSC 23, Lord Neuberger, para 14.

10 Pinto and Evans, *Corporate Criminal Liability* (Thomson, Sweet and Maxwell, 2003) p. 315

11 On the distinction between strict liability and absolute liability, see Issue 9, below.

12 Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations”, Prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business (Allens Arthur Robinson 2008), p.6.

13 *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (Viscount Haldane LC).

14 “The state of mind of these managers is the state of mind of the company and is treated by the law as such.” Denning LJ in *HL Bolton (Engineering) Co Ltd v TJ Graham & Co Ltd* [1957] 1 QB 159 at 172. Similar findings were made in *DPP v Kent and Sussex Contractors* [1944] KB 551 and *Moore v I Bressler Ltd* [1944] 2 All ER 515.

#### Box 4: An Evolving Approach to the Identification Doctrine

*Tesco Supermarkets Ltd v Natrass* (UK House of Lords, 1972): board directors of the Tesco supermarket company were its “mind and will” because of its organisation and management structure. A misleading advertisement placed by a local Tesco branch manager without the board’s knowledge or approval, and contrary to company policy, did not represent the company’s act.

*In re Supply of Ready Mixed Concrete (No.2)* (UK House of Lords, 1994): in breach of instructions from the board of directors, employees entered their company into agreements that breached binding undertakings not to engage in anticompetitive practices. Although they did so without the board’s knowledge or approval, the company was liable. To hold otherwise, the Court found, would allow the company to defeat the purposes of the UK’s competition legislation.

*Meridian Global Funds Management Asia Ltd v Securities Commission* (Commonwealth Privy Council, 1995): Employees of an investment firm failed to disclose promptly share purchases as required by New Zealand Stock Exchange legislation. The Court applied *Tesco Supermarkets*, and held that although the board was unaware of the failure, the company was liable because it was unrealistic to expect every share purchase to be approved by its board.

- 7.06 Determining whose act or state of mind is that of a corporate body is a central question when attributing criminal liability by means of the identification doctrine. The three leading UK decisions<sup>15</sup> outlined in Box 4, indicate an evolving approach, with the emphasis shifting from a focus on the overall direction and control of a company to identifying relevant corporate decision-makers by means of construction of applicable statutes in light of the relevant circumstances.
- 7.07 The identification doctrine has been applied by the courts in this jurisdiction on a number of occasions, though admittedly only in civil proceedings.<sup>16</sup> The identification doctrine has also been criticised because of its focus on the individuals who can be said to be the “directing mind and will” of the corporate body.<sup>17</sup> It can be difficult to identify particular persons who committed the wrongful act or had access to all

15 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; *In re Supply of Ready Mixed Concrete (No.2)* [1995] 1 AC 456; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

16 The doctrine was approved in this jurisdiction by the High Court in *Taylor v Smith* [1991] 1 IR 142, at 166, and applied by the Supreme Court in *Superwood Holdings plc v Sun Alliance & London Insurance plc* [1995] 3 IR 303. The doctrine was analysed by the High Court (Laffoy J) in *Fyffes plc v DCC plc and others* [2009] 2 IR 417, at 466, where the Court decided not to express a view on whether it was an appropriate doctrine to follow in this jurisdiction.

17 McAuley and McCutcheon, *Criminal Liability* (Round Hall, 2000) p. 395: “the effect of the decision in *Tesco* was to restrict identification to a small corps of directors and executives who occupy the most senior positions in the corporate hierarchy.”

relevant information.<sup>18</sup> It has been said that the identification doctrine “works best in cases where it is needed least (small businesses) and works worst in cases where it is needed most (big business).”<sup>19</sup> The evolving approach taken in the UK *Ready Mixed Concrete (No.2)* and *Meridian* decisions show that the identification doctrine is capable of developing beyond the confines of the “directing mind and will” focus. These decisions suggest that, in order for the purpose of governing legislation to be given effect, and for the legislation to be capable of properly attributing liability to a corporate body, it must be interpreted so as to provide for the attribution of liability to the corporate body through the acts or omissions of persons who are quite far removed from the decision-making apex of the corporate body.

- 7.08 In its 2010 *Consultation Paper on Criminal Liability in Regulatory Contexts*, the Law Commission of England and Wales provisionally recommended that the identification doctrine should not be used as the default doctrine of liability to be applied by the courts, and approved of the purposeful approach taken in the *Ready Mixed Concrete (No. 2)* and *Meridian* decisions. The Law Commission of England and Wales proposed that, although legislation can helpfully specify the category of persons whom can be taken to represent a corporate body for the purposes of an offence,<sup>20</sup> where legislation does not expressly specify persons who represent the corporate body, the courts should identify the underlying purpose of the legislation in question, on a case-by-case basis, and in the context of that purpose determine the correct basis upon which to hold the corporate body liable.<sup>21</sup>
- 7.09 In this Issues Paper the Commission seeks views as to whether the identification doctrine is a suitable model for attributing criminal liability to corporate bodies in Ireland.

## An Organisational Liability Model

- 7.10 The organisational model of criminal liability does not focus solely on the identification of a person who can be said to be the corporate body’s “directing mind and will”, but rather on whether corporate bodies have systems that permit or deter

18 Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations”, Prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business, (Allens Arthur Robinson 2008), para 1.1; Green, “Failing to Prevent Economic Crime - A New Offence?”, <http://www.barristermagazine.com/article-listing/current-issue/failing-to-prevent-economic-crime-%E2%80%93-a-new-offence.html>.

19 Gobert and Punch, *Rethinking Corporate Crime* (Butterworths, 2003) at 63.

20 See for example section 6(6) of the *Competition Act 2002*, which provides: “For the purpose of determining liability for an offence under subsection (1), any act done by an officer or an employee of an undertaking for the purposes of, or in connection with, the business or affairs of the undertaking shall be regarded as an act done by the undertaking.” See also *Criminal Code Australia*, s. 12, 3(6) which defines as “higher managerial agent” an employee any agent or officer having “duties of such responsibility that their conduct may fairly be assumed to represent the body corporate’s policy”. See also the American Law Institute’s *Model Penal Code* Article 2.07(4)(c).

21 Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts*, (2010), at para 1.67.

criminal wrongdoing.<sup>22</sup> Organisational liability sees corporate criminal wrongdoing as a failure of the organisation itself, a systemic problem.<sup>23</sup> Rather than the corporate body being liable as a result of the acts of individual offenders, this model attributes criminal liability by presenting evidence of corporate policies, procedures, practices and attitudes, deficient chains of command and oversight, and corporate cultures that tolerate or encourage criminal offences.<sup>24</sup> The organisational liability model assumes that a corporate body may acquire a character of its own that is distinct from the actions of individuals within it.<sup>25</sup>

- 7.11 Failures of systems and procedures within corporate bodies in the financial sector are generally agreed to have contributed significantly to the economic crash that emerged in 2008. Some commentators attribute the problems that arose in the financial sector more to failures of systems than to the behaviours of individuals.<sup>26</sup>
- 7.12 An organisational management approach has been central to the legislation on occupational safety and health for many years. The *Safety, Health and Welfare at Work Act 2005* requires all employers to have an internal, risk-based, safety management system that is based on typical corporate organisational arrangements, including the delegation of specific tasks to named persons.<sup>27</sup> Risk-based management systems have also become a feature of financial services legislation and associated Central Bank statutory codes.<sup>28</sup> These legislative provisions in turn reflect the literature on how successful modern corporate bodies actually operate.<sup>29</sup>

22 Wells, "Corporate Criminal Liability: Exploring Some Models" in Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (2010).

23 *Law Reform Commission, Report on Corporate Killing (LRC 77-2005)* (LRC 77-2005) at para 1.88.

24 Donaldson and Watters, "Corporate Culture as a Basis for the Criminal Liability of Corporations", prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business, (Allens Arthur Robinson 2008), p. 6.

25 McAuley and McCutcheon, *Criminal Liability* (Round Hall, 2000) p. 395

26 Punch, "The organisational Component in Corporate Crime", in Gobert and Pascal (eds) *European Developments in Corporate Criminal Liability* (Routledge, 2011), 102, at 107: The 2011 *Report of the Commission of Investigation into the Banking Sector in Ireland* (the Nyberg Report) found that a systemic banking crisis had occurred due to insufficient knowledge, analysis and foresight within financial institutions and that those who may have had concerns about lending practices and policies were not encouraged to speak out. The Nyberg Report illustrates that failures in systems and procedures within corporate bodies can contribute to a banking crisis.

27 Section 20 of the *Safety, Health and Welfare at Work Act 2005*, replacing and incorporating comparable provisions in section 12 of the *Safety, Health and Welfare at Work Act 1989* and Regulations 5 to 10 of the *Safety, Health and Welfare at Work (General Application) Regulations 1993* (SI No.44 of 1993). Failure to comply with these requirements is an offence: see section 77 of the 2005 Act.

28 See the Central Bank's *Corporate Governance Code for Credit Institutions and Insurance Undertakings 2013*, made under, *inter alia*, section 10 of the *Central Bank Act 1971* and section 24 of the *Insurance Act 1989*: see para 3.1 of the Code. Failure to comply with the requirements of the Code may give rise to: the imposition of an administrative sanction under Part III C of the *Central Bank Act 1942*, a criminal prosecution; the refusal to appoint a proposed director to any pre-approval controlled function where prescribed by the Central Bank under Part 3 of the *Central Bank Reform Act 2010*, and/or the suspension, removal or prohibition of an individual from carrying out a controlled function under Part 3 of the 2010 Act: see para 3.7 of the Code.

29 Among the leading international writers on management of recent decades are: Peter Drucker (often referred to as the father of modern management, whose works include *Concept of the Corporation* (1946) and *Drucker on Management* (1971)); Charles Handy (whose works include *Understanding Organisations* (1976) and *The Age of Unreason and Age of Paradox* (1980)); and Michael Porter (whose works include *Competitive Strategy* (1980) and *The Competitive Advantage of Nations* (1990)).

7.13 In its 2005 *Report on Corporate Killing*, the Commission recommended a model for attributing liability, albeit limited to corporate manslaughter, that involved some reference to the activities of senior managers but which consisted primarily of an organisational model for imposing corporate criminal liability. When determining whether a corporate body fell below the standard of care applicable in manslaughter, this would permit consideration of a comprehensive list of “corporate culture” factors, such as internal governance systems, as well as the role of “high-managerial agents.” The draft *Criminal Law (Corporate Manslaughter) Bill* appended to the *2005 Report* proposed the following factors to determine corporate liability:

- the way in which the corporate body’s activities are managed or organised by its high managerial agents;
- its procedural decision-making rules;
- the regulatory environment in which the corporate body operates, including any statutory duties to which it is subject;
- the allocation of responsibility within the corporate body;
- the training and supervision provided to employees;
- how the corporate body responded to previous incidents;
- the corporate body’s stated and actual goals;
- the adequacy of the corporate body’s communication systems, including those for communicating to others affected by its activities;
- the regulatory environment, including any relevant statutory duties;
- any assurance systems to which the corporate body has subscribed;
- whether the corporate body complied with any contract or licence made or granted under legislation.

7.14 The Commission’s draft Bill dealt specifically with manslaughter, where the basis for imposing criminal liability is gross negligence, which consists of falling far below the standard of care expected. The factors outlined above could be considered relevant to whether the corporate body had breached the standard of care and whether it fallen far below that standard. Some corporate offences, such as fraud-related offences, require proof of intention or knowledge so that the question in such offences focuses on the corporate body’s intention, not whether it has taken reasonable care. Other corporate offences, falling into the category of strict liability or absolute liability offences,<sup>30</sup> do not involve any assessment of the corporate body’s intention or knowledge. Thus, the list of factors set out in the Commission’s *2005 Report* above may need to be assessed in terms of whether they are entirely appropriate for all corporate offences, though they may be a useful starting point.

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30 On strict liability and absolute liability offences, see Issue 9, below.

## Organisational Model in the United Kingdom

- 7.15 The UK adopted the organisational liability approach in its *Corporate Manslaughter Act 2007*. Under the 2007 Act, in considering whether the evidence shows that the corporate body failed to comply with health and safety legislation relating to the alleged gross negligence on which a charge under the 2007 Act may be brought, the court must “consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure... or to have produced tolerance of it.”<sup>31</sup>
- 7.16 In 2010 the UK also introduced legislation that criminalises a company’s failure to prevent the commission of an offence. Section 7 of the UK *Bribery Act 2010* creates an offence that is committed when a company fails to prevent persons associated with it committing bribery. There is no need for the company to have knowledge of the bribery. As a defence, a company can prove that it had “adequate procedures” to prevent the criminal conduct. Section 7 was considered by the English High Court in *Serious Fraud Office v Standard Bank Plc* in the context of the judicial approval of the UK’s first deferred prosecution agreement (DPA) under the *Crime and Courts Act 2013* (considered further in Issues 4 and 9, above). A DPA was agreed, and approved by the court, regarding a prosecution of Standard Bank Plc under section 7 of the *Bribery Act 2010*. The English High Court noted that “the criminality potentially facing Standard Bank arose out of the inadequacy of its compliance procedures and its failure to recognise the risks inherent in the proposal” rather than from the commission of an offence of bribery.<sup>32</sup> The Court also noted that “no allegation of knowing participation in an offence of bribery” was alleged by the SFO against the bank (or any of its employees), and that the offence was “limited to an allegation of inadequate systems to prevent associated persons from committing an offence of bribery”.<sup>33</sup>
- 7.17 Based on an organisational liability model similar to that employed in the *Bribery Act 2010*, the UK is at the time of writing (January 2016) considering the creation of a new corporate offence of “failing to take reasonable steps to prevent tax evasion.” It is argued that the organisational model helps address difficulties in holding commercial organisations to account for the criminal acts or omissions of their agents, and incentivises companies to put in place adequate procedures and promotes corporate good governance.<sup>34</sup> However, in 2015 the UK Ministry of Justice announced that it did not intend to proceed to create a new offence of “failing to prevent economic crime”, which would also have been based on the model in section 7 of the *Bribery Act 2010*, because “there have been no prosecutions under the model *Bribery Act* [section 7] offence and there is little evidence of corporate economic

<sup>31</sup> Section 8(2)(3)(a) of the UK *Corporate Manslaughter and Corporate Homicide Act 2007*.

<sup>32</sup> *Serious Fraud Office v Standard Bank Plc: Deferred Prosecution Agreement* (Case No: U20150854), English High Court, Queen’s Bench Division (Leveson P), 30 November 2015, para.14.

<sup>33</sup> *Ibid*, para.11.

<sup>34</sup> HM Revenue & Customs, *Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion* (2015), paras. [2.18]-[2.19].

wrongdoing going unpunished.”<sup>35</sup> This announcement has been criticised because shortly after it was made a number of successful applications of section 7 of the *Bribery Act 2010* occurred in late 2015.<sup>36</sup> In addition to the *Standard Bank Plc* DPA discussed above, a civil settlement and payment of a fine was agreed between *Brand Rex Ltd* and the Scottish Crown Office and Prosecutor Fiscal Service for a contravention of section 7 by the company.<sup>37</sup> In addition, in December 2015, the first conviction under section 7 occurred when *Sweett Group Plc* pleaded guilty to the offence in the English Crown Court, following an investigation by the UK Serious Fraud Office.<sup>38</sup>

## Organisational Model in Australia

- 7.18 The Australian Criminal Code allows corporate culture factors to be considered when assessing whether a corporate body has committed an offence that requires knowledge, intention, or recklessness.<sup>39</sup> The Australian *Criminal Code Act 1995* provides a comprehensive example of the organisational liability model of attributing criminal liability to a corporate body.<sup>40</sup> The Code provides for a corporate body being directly liable for federal criminal offences<sup>41</sup> if its organisation, including its corporate culture, directs, encourages, tolerates or leads to commission of the offence. It allows a court to consider matters such as practices, training systems, procedures, and communication systems, with the aim of discovering whether the corporate body has permitted or authorised a criminal offence.<sup>42</sup>

35 Andrew Selous, Parliamentary Under-Secretary of the Ministry of Justice, statement on 28 September 2015, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-09-09/9735>.

36 See “Pressure growing on UK government to rethink policy on failure to prevent economic crime, says expert”, 18 December 2015, available at <http://www.out-law.com/en/articles/2015/december/pressure-growing-on-uk-government-to-rethink-policy-on-failure-to-prevent-economic-crime-says-expert/>.

37 Scottish Crown Office and Prosecutor Fiscal Service, *Glenrothes cabling company pays £212,800 after reporting itself for failing to prevent bribery by a third party*, media release on 25 September 2015, available at <http://www.crownoffice.gov.uk/media-site/media-releases/1144-glenrothes-cabling-company-pays-212-800-after-reporting-itself-for-failing-to-prevent-bribery-by-a-third-party>. In this case Brand Rex Ltd reported its own contravention of the requirement in section 7 of the 2010 Act by failing to prevent bribery by an independent installer of its products who improperly provided travel tickets to a customer. As the contravention had been “self reported” the Scottish Crown Office applied its “self-reporting initiative” which allowed for a civil settlement to be reached rather than proceeding with a criminal prosecution.

38 See Serious Fraud Office, *Sweett Group PLC pleads guilty to bribery offence*, Press Release on 18 December 2015, available at <https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/sweett-group-plc-pleads-guilty-to-bribery-offence.aspx>.

39 Section 12.3 of the *Australian Criminal Code Act 1995*.

40 Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations”, prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business (Allens Arthur Robinson 2008), p.4; Wells, “Corporate Criminal Liability: Exploring Some Models” in Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (2010), Appendix C, at 209 [C61]. The Australian organisational liability model is comprehensively explained by Wells at 209-212 [C60]-[C73].

41 Australia is a federal system in which the Commonwealth has legislative power only in respect of certain specified matters. These do not include general criminal law so that the majority of criminal law in Australia is State law. The Australian states and territories have generally followed the identification doctrine as developed by the UK courts, rather than an organisational model. See Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations”, prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business (Allens Arthur Robinson 2008), p.10, para 3.1.

42 Section 12 (2) of the *Australian Criminal Code Act 1995*.

- 7.19 The Code allows authorisation or permission of the offence to be inferred from features of corporate culture such as written rules that appear to authorise non-compliance or that fail to create a culture of compliance.<sup>43</sup>
- 7.20 There are no reported cases of the Code in operation, so it is not certain how the organisational liability model works in practice in Australian federal courts.<sup>44</sup> A criticism of it is that, in respect of offences based on intention, knowledge or recklessness, the Code reduces the threshold for considering what constitutes intent. The Code is intended to apply to offences that require proof of criminal intent rather than strict liability offences.<sup>45</sup> However, as a corporate body does not have a state of mind in the way that a human person does, it cannot make distinctions between intentional and reckless behaviour. The focus on corporate culture to prove offences could therefore be said to reduce the threshold of what a prosecution must prove.

### Combined Approaches to Attribution

- 7.21 The purpose of establishing a regime of criminal liability for corporate bodies is to achieve predictability in attributing accountability for criminal acts, and it has been noted that this does not require one model to be prescribed to the exclusion of all others.<sup>46</sup> In the UK the attribution of criminal liability to corporate bodies is generally determined on a case-by-case basis, using either the principles of vicarious criminal liability or the identification doctrine. Legislation such as the UK's *Bribery Act 2010*, discussed above, can specify that different approaches or a combination of approaches should be used to determine corporate criminal liability. In this regard, a statutory model could combine elements of vicarious liability and the identification doctrine with the organisational liability approach because the models are not

<sup>43</sup> Explanatory Memorandum, *Criminal Code Bill 1994* (Cth) 44: "For example, employees who know that if they do not break the law to meet production schedules (for example, by removing safety guards or equipment) they will be dismissed. The company would be guilty of intentionally breaching safety legislation."

<sup>44</sup> The "corporate culture" concept has been accused of "inherent ambiguity": Coffee "Corporate Criminal Liability: An Introduction and Comparative Survey" in Eser, Heine and Huber (eds) *Criminal Liability of Collective Entities* (Freiburg 1999) at 9. Sarre, "Penalising Corporate 'Culture'", in Gobert and Pascal (ed), *European Developments in Corporate Criminal Liability* (Routledge, 2011) 84, at 93, argues that even if no prosecutions are ever brought based on a company's deficient "corporate culture", it does not follow that the "corporate culture" initiatives can be judged a failure as the provisions have raised the importance of a corporate body's culture.

<sup>45</sup> "In speaking about this part I must stress that it is still open to the legislature to employ reverse onus of proof provisions or strict liability provisions where the normal rules of criminal responsibility are considered inappropriate. At the federal level this will need to occur in a number of important areas where corporations are the main players, such as environmental protection, where the potential harm of committing the offence may be enormous and the breach difficult to detect before the damage is done." Commonwealth of Australia, *Parliamentary Debates*, Senate, 30 June 1994 (Senator Crowley, Minister for Family Services) cited in Donaldson and Watters, "Corporate Culture as a Basis for the Criminal Liability of Corporations" Prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business (Allens Arthur Robinson, 2008) at fn [31].

<sup>46</sup> Donaldson and Watters, "Corporate Culture as a Basis for the Criminal Liability of Corporations", Prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business, (Allens Arthur Robinson 2008), p.63, para 25.2. This Report identified components of a standardised model of attribution of criminal liability to corporate bodies. These components include: whose fault the corporate liability is based on; what standard of liability is adopted; what relationship must exist between the individual and the corporate body for the corporate body to be held liable; and whether liability is general or specific.

necessarily mutually exclusive.<sup>47</sup> This was the approach used in the mixed model proposed in the Commission's 2005 *Report on Corporate Killing*, discussed above. The Commission seeks views on the appropriateness or suitability of each of the models examined above and on the potential use of combinations of them that would be appropriate in the Irish context.

#### QUESTION 7

- 7(a) Do you think that it would be appropriate or useful to enact a statutory provision to determine how criminal liability is attributed to corporate bodies based on any of the models of attribution described above: vicarious liability, the identification doctrine and the organisational model?
- 7(b) Q: If you favour the vicarious liability model, how do you think a test should be formulated and what category of persons do you think should be deemed to represent the corporate bodies for the purposes of an offence?
- 7(c) Q: If you favour the identification doctrine, how do you think a test should be formulated and what category of persons do you think should be deemed to represent the corporate bodies for the purposes of an offence?
- 7(d) Q: If you favour the organisational model, how do you think a test should be formulated and what factors do you consider should be included when assessing corporate culture? What do you think should be the standard of organisational liability in this model – “authorises or permits”, “negligently fails to prevent”, or some other formulation? Do you think that an organisational model should incorporate elements related to the activities of senior managers and officers?

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<sup>47</sup> *Ibid.* at para. 25.3.

## ISSUE 8

# LIABILITY OF CORPORATE OFFICERS

- 8.01 Personal sanctions act as a deterrent for persons in corporate bodies who might contemplate or disregard a known risk of acting illegally or causing the corporate body to act illegally.<sup>1</sup>
- 8.02 Attaching criminal liability to human persons for wrongful acts done by the corporate body is generally aimed at persons with a significant role in the corporate body and this is reflected in statutory provisions relating to such attribution of liability. The Commission has previously noted that the decisions of the company are deeply intertwined with the decisions, acts and omissions of its constituent human members.<sup>2</sup> A higher objective standard of behaviour is required of directors than was previously the case and the traditional approach to participation in a company has been superseded in accordance with changing societal expectations by a duty of active participation.<sup>3</sup>
- 8.03 In the *People (DPP) v Hegarty*<sup>4</sup> the Supreme Court made clear that the rationale behind a provision attaching liability to manager or officer of an undertaking that has committed certain offences is that, because human beings (natural persons) are directly instrumental in the actions of a corporate body, it is necessary to create offence against certain influential position holders within a company, namely, “those without whose involvement the offending conduct could not be endorsed or approved”.
- 8.04 Individual criminal liability for offences committed by a corporate body is most commonly provided for using a formulation that the criminal offence has been authorised, consented to, or is attributable to connivance or neglect (or wilful neglect) on the part of a director, manager or comparable officer of a corporate body.
- 8.05 Variations on this type of liability provision are contained in the legislation dealing with competition, corporate “white collar” offences, safety and health at work and theft and fraud:

1 See Foster, “Individual Liability of Company Officers” in Gobert and Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge, 2011) 114, at 116, citing Horrigan, Director of the National Centre for Corporate Law and Policy Research at the University of Canberra, who suggested that the foundational, primary concerns for directors are the issues of “personal sanctions and liabilities.”; See Issue 7 fn. (5) for a discussion of the criminal liability of unincorporated bodies, such as partnerships. The Commission acknowledges that unincorporated bodies such as partnerships can conduct themselves in a similar manner to incorporated bodies, and that there is therefore a need to consider how to attribute the liability of unincorporated bodies to individual officers or members of such a body.

2 Law Reform Commission, *Report on Corporate Killing, (LRC 77-2005)*, p.41.

3 Ahern, *Directors’ Duties* (Thomson Reuters, 2011) p.128: “It is now generally accepted that the traditional approach to participation has been superseded by a duty of active participation although its application in any case is a matter of degree.”

4 [2011] IESC 32.

Section 8(6) of the *Competition Act 2002* provides for the attribution of liability to an individual person for the offence of an undertaking, where the offending act was *authorised or consented to* by the relevant individual,<sup>5</sup>

Section 22 of the *Criminal Justice Act 2011* provides that where an offence under that Act (primarily corporate “white collar” offences) is committed by a body corporate and it is proved that the offence was committed with the *consent or connivance, or was attributable to any wilful neglect*, of a relevant person,<sup>6</sup> that person as well as the body corporate, shall be guilty of an offence;

Section 58(1) of the *Criminal Justice (Theft and Fraud) Offences Act 2001* provides that if an offence of a body corporate under the act is proved to have been committed with the *consent or connivance of, or to have been attributable to any neglect* on the part of a person,<sup>7</sup> that person as well as the body corporate is guilty of an offence;

Section 80(1) of the *Safety, Health and Welfare at Work Act 2005* provides that where the offence of an undertaking, under the act, has been authorised, or consented to by, or is attributable to *connivance or neglect* on the part of, a defined person,<sup>8</sup> that person as well as the undertaking shall be guilty of an offence.<sup>9</sup>

The *Companies Act 2014*, discussed below, provides an alternative “officer in default” approach for imposing criminal liability on an individual. This formulation is not seen in any other legislation.<sup>10</sup>

### Consent, Connivance and Neglect Model

- 8.06 Typically, a statutory provision permitting an individual within a corporate body to be considered criminally liable for the conduct of the corporation reads as follows:

5 That person being a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity.

6 That person being who was a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity.

7 That person being a director, manager, secretary or other officer of the body corporate, or a person purporting to act in any such capacity

8 That person being a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity,

9 Section 80(2) of the 2005 Act provides that in respect of a person employed by an undertaking whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity, it shall be presumed, until the contrary is proved, that the doing of the acts by the undertaking which constituted the commission by it of the offence concerned under any of the relevant statutory provisions was authorised, consented to or attributable to connivance or neglect on the part of that person.

10 Ahern, *Directors’ Duties* (Roundhall, 2009) p.327, describes how the “officer in default” provision in Irish legislation was first introduced in section 383 of the Companies Act 1963.

Where -

- a. *an offence under this Act has been committed by a corporate body,<sup>11</sup> and*
- b. *the offence is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect [alternatively, any wilful neglect] on the part of a person who was either:*
  - i. *a director, manager, secretary or other officer of the body corporate, or*
  - ii. *a person purporting to act in any such capacity,*

*that person, as well as the corporate body, is guilty of an offence and is liable to be proceeded against and punished as if he or she were guilty of the offence committed by the corporate body.*

8.07 The key elements in this model of liability are that the director, manager or officer:

- consented to the offence committed by the corporate body,
- connived in the offence committed by the corporate body, or
- engaged in “wilful neglect” (in some provisions) or “any neglect” (in other provisions) so that the offence committed by the corporate body may be attributed to this.

### **“Consent or connivance”**

8.08 For a person to be made criminally liable on the basis of “consent or connivance” there must be proof that he or she knew about the actions of the corporate body because in order to “consent” or “connive,” a person must first “know”. An individual consents to the commission of an offence when he or she is aware of what is going on, and agrees to it.<sup>12</sup> Consent can be established by inference as well as by proof of an express agreement.<sup>13</sup>

8.09 Connivance is tacit agreement to the commission of the offence. An individual who connives will be equally well aware of the commission of the offence as an individual who consents.<sup>14</sup> It encompasses “wilful blindness” on behalf of a person to a course of action or state of affairs. It may also occur through reckless conduct by knowing that there is a risk of offending but doing nothing about it.<sup>15</sup>

<sup>11</sup> In some instances the term “undertaking” is used (which often includes unincorporated bodies such as partnerships): see the *Competition Act 2002* (“a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service”) and the *Safety, Health and Welfare at Work Act 2005* (“a person being an individual, a body corporate or an unincorporated body of persons engaged in the production, supply or distribution of goods or the provision of a service (whether carried on by him or her for profit or not”).

<sup>12</sup> *Huckerby v Elliott* [1970] 1 All ER 189, at p. 191.

<sup>13</sup> *R v Chagot Ltd, Ruttle Contracting Ltd and Ruttle* [2008] UKHL 73, [2009] 2 All ER 645.

<sup>14</sup> *Huckerby v Elliott* [1970] 1 All ER 189, at 191.

<sup>15</sup> Law Commission of England and Wales, *Reforming Bribery* (LCCP No.185, 2007) p. 137 [9.28].

### “Wilful neglect”

- 8.10 The phrase “wilful neglect” applies to intentional inaction or omissions by an officer who knows (or is reckless as to the fact) that the consequences of his or her inaction will be a breach of criminal law by the corporate body. The phrase “wilfully” requires an understanding of the consequences of one’s actions in deliberately neglecting to do something which should have been done.<sup>16</sup> It requires knowledge that something or some requirement is being neglected.<sup>17</sup> As can be seen from the general format above, the relevant provision generally requires that the “wilful neglect” can be “attributable” to the commission of the offence by the corporate body. “Wilful neglect” is an intentional neglect of a duty whereas “neglect” of a duty without the descriptive “wilful” (discussed below) does not require awareness. The inclusion of “wilful neglect” does not add much to “consent or connivance” because it is similar to “connivance.”<sup>18</sup> However, should the prosecution choose to prove “wilful neglect” rather than relying on “connivance”, it will have to prove the additional requirement of causation.

### “Neglect”

- 8.11 “Neglect” differs in a significant respect from “wilful neglect” because a director or manager can be held criminally liable where he or she failed to carry out a duty but had no actual knowledge of (did not “consent to” or “connive at”) the offence committed by the corporate body. Thus “any neglect” involves an objective test that an accused has fallen below an identifiable standard of action. In addition, however, as with “wilful neglect,” the “neglect” must be attributable to, that is, led to the commission of the offence by the corporate body.<sup>19</sup>
- 8.12 The Law Commission of England and Wales, in a 2010 Consultation Paper, criticised the “neglect” standard on the basis that it results in undue harshness for a defendant because it may lead to criminal liability for “simple neglect.”<sup>20</sup> It may be noted, however, that an objective test of negligence forms the basis for gross negligence manslaughter; and that many of the corporate offences for which a director, senior manager or similar officer could face personal criminal liability are themselves often absolute liability offences, or strict liability offences (albeit a strict liability offence may attract a defence of due diligence, which may equate to an objective standard of reasonable care).<sup>21</sup> It is clear, nonetheless, that the objective nature of the “neglect” test results in the potential for more broadly applicable criminal liability than if the test were confined to “consent, connivance or wilful neglect”.

<sup>16</sup> Ormerod, *Smith and Hogan’s Criminal Law*, 12th ed, (Oxford University Press, 2011) pp.161-162.

<sup>17</sup> Law Commission of England and Wales, *Criminal Liability in Regulatory Contexts: Responses to Consultation Paper*, at p.248 [1.1338].

<sup>18</sup> *R v P Ltd and G* [2007] EWCA Crim 1937, [2008] ICR 96, at para. 12.

<sup>19</sup> UK Criminal Bar Association and Bar Council Submission to Law Commission on the Law Commission Consultation *Criminal Liability in Regulatory Contexts Responses*, at [1.1329] to [1.1349].

<sup>20</sup> Law Commission of England and Wales, *Consultation Paper: Criminal Liability in Regulatory Contexts*, [2010] p.144 [7.48] noting that the “real harshness of the extended doctrine comes, of course, from the fact that, on the basis of simple neglect, an individual director may be convicted of the offence itself”. See also the UK House of Lords decision in *R v G* [2004] UKHL 50, [2004] 1 AC 1034.

<sup>21</sup> See Issue 9, below, for discussion of strict liability and absolute liability offences.

### When to use a “Wilful Neglect” or “Neglect” provision

- 8.13 It is arguable that the decision whether to use “wilful neglect” or “neglect” should correspond to the level of intention or knowledge, or absence of intention or knowledge, in the substantive corporate offence. Nonetheless, it is clear from existing legislation that this is not applied in practice. For example, section 58(1) of the *Criminal Justice (Theft and Fraud) Offences Act 2001* provides for the derivative personal criminal liability of a director or officer of a corporate body in connection with an offence committed by the corporate body under the 2001 Act, if it can be proved to be attributable to “any neglect” on that officer’s part. The 2001 Act contains several fraud based offences<sup>22</sup> that require proof of knowledge or intention of an accused. Section 58(1) of the 2001 Act has the effect that a director or manager could be found criminally liable for a knowledge-based fraud offence committed by a corporate body under the 2001 Act, based on a failure by the director or manager to meet an objective neglect-of-duty standard without the prosecution being required to prove actual knowledge or intention by the director or manager.
- 8.14 Section 58 of the 2001 Act can be contrasted with section 22 of the *Criminal Justice Act 2011* which uses “wilful neglect” to attribute criminal liability to a director or officer in respect of the corporate offences to which the 2011 Act refers. Section 22 of the 2011 Act also fails to track the level of the culpability requirement of a number of the substantive offences in the 2011 Act. For example, section 15(15) of the 2011 Act provides that it is an offence “without reasonable excuse” (an objective culpability requirement) to fail or refuse to comply with an order made under that section to produce documents or provide information. Similarly, section 17 of the 2011 Act provides for an offence of concealing facts disclosed by documents, which requires that the defendant “knows or suspects” of a Garda investigation, or the likelihood of such an investigation, and conceals documentation which he or she “knows or suspects might be relevant”. Section 17(2) of the 2011 Act shifts the burden of proving the knowledge or suspicion to the defendant, if it is reasonable to conclude that the defendant so knew or suspected. This creates a strict liability offence. If a prosecution were to be brought against a director or manager under section 22 of the 2011 Act, its “wilful neglect” provision would require the prosecution to prove intention or recklessness on the part of the director or manager in connection with an either of the two outlined offences committed by the corporate body, even though proof of intention or recklessness is not required to convict the corporate body of the offence.
- 8.15 It is also worth noting that some derivative liability provisions omit both “any neglect” and “wilful neglect”. This is the case with section 8(6) of the *Competition Act 2002*, which provides for derivative liability for “consent and connivance” but not for “neglect” or “wilful neglect”. It may be argued that this legislative choice in the 2002 Act accurately reflects the substantive competition offences to which it refers, namely either impermissible anti-competitive agreements (which involve consent by

<sup>22</sup> For example section 6 of the 2001 Act (making a gain or causing a loss by deception) section 7 of the 2001 Act (obtaining services by deception) and section 9 of the 2001 Act (unlawful use of a computer).

the parties) or impermissible anti-competitive cartels (which involve connivance by the parties).

### Functions based test for attributing liability to individuals

8.16 The main model for determining which natural persons to whom a corporate body's criminal liability may be attached can be identified from the several derived liability provisions considered above. This model can be described as an "exhaustive list of office holders" model, as it expressly identifies the natural persons to whom liability can be attached. This model is often formulated to include: directors, managers, secretaries or other officers of the body corporate, (or other specified office holder), or persons purporting to act in such a capacity.<sup>23</sup>

8.17 This model was discussed in *The People (DPP) v Hegarty*<sup>24</sup> (a prosecution of a director under the *Competition Act*), where the Supreme Court held:

"As natural persons are directly instrumental in the actions of a body corporate, the ["consent and connivance" provision in the Competition Act] also created offences against certain influential position holders within a company, being essentially those without whose involvement the offending conduct could not be endorsed or approved. Culpability in this regard was confined to persons with a high level of responsibility for decision making i.e. directors, managers, other similar officers, and those who hold themselves out as such. The result was that, arising out of the same set of circumstances, any one of such persons, if not an undertaking in his/her own right, as well as an undertaking so defined, could each be guilty of a criminal offence. That was the scheme of the Act, with its justification being enforcement driven. If the Act criminalised one player but not the other, responsibility by way of effective sanction and deterrence could be skilfully and freely avoided, or at least substantially diminished, by any number of expedient devices, such as, in the case of a body corporate, liquidation, and in the case of an individual being, impecuniosity. That would not have addressed the weakness mentioned above; it would have made enforcement arduous and it would have made avoidance affordable and undemanding. Therefore, in principle, there is nothing surprising in the concept of both non-personal undertakings and their managers/officers and like persons, being exposed to criminal prosecution arising out of the same abusive conduct. Such persons are separate and distinct legal personalities and therefore no question of double punishment arises."

<sup>23</sup> See, for example, section 8(6) of the *Competition Act 2002*, section 77 of the *Consumer Protection Act 2007*, Regulation 61 of the *European Union (Capital Requirements) Regulations 2014*, section 22 of the *Criminal Justice Act 2011*, section 9 of the *Prevention of Corruption (Amendment) Act 2001*, and section 80(1) of the *Safety, Health and Welfare at Work Act 2005*.

<sup>24</sup> [2011] IESC 32; [2011] 4 IR 635, at 644.

- 8.18 As was noted by the Supreme Court in *Hegarty*, the objective of the this type of provision is to attach liability to those without whose involvement the offending conduct could not be endorsed or approved. This is usually done by referring to a general list of relevant persons, usually “director, manager or other similar officer.” A criticism that can be made of this approach is that, although the term “director” clearly refers to a senior person in the corporate body, a board member in a company, the term “manager or other similar officer” provides relatively little guidance on the scope of the provision. Case law indicates, however, that the term should be limited to persons with policy making or executive roles; and that formal titles should not determine the matter: substance rather than form should prevail.
- 8.19 A test of substance rather than form was applied by the English Court of Appeal in *R v Boal*.<sup>25</sup> The defendant had the title of “assistant manager” in a large London bookshop, Foyles Ltd. An inspection of the premises by the fire authority found that emergency exits were blocked, and the company was prosecuted for an offence under fire safety legislation. The defendant had been present in the shop on the day of the inspection and was also prosecuted as a “director, manager or other similar officer” of the company whose “consent, connivance or neglect” could be attributed to the offence by the company. The defendant argued that, although his title was “assistant manager” he in fact had no policy making or executive role in the company, and that he had merely a supervisory role. The English Court of Appeal agreed with this analysis and held that, although the defendant’s title contained the word “manager”, it was his actual function rather than his title that was relevant. On this basis, even though he was in charge of the day-to-day operation of the shop on the day in question, the Court held that he did not fall within the scope of the term “director, manager or other similar officer” in the fire safety legislation because he had no role in preparing the company’s fire safety policy.
- 8.20 Arising from case law such as *R v Boal*, it has become increasingly common for provisions that provide for the derivative criminal liability of a “director, manager or other similar officer” to include an additional element to the effect that those with policy-making functions in the corporate body can be “presumed” to have authorised, consented to or, as the case may be, neglected to do something that can be attributed to the offence by the corporate body. An example of this approach is section 8(7) of the *Competition Act 2002*.<sup>26</sup> This creates a presumption that a person whose duties include making decisions that can significantly affect an undertaking’s management consents to acts by the undertaking which constitute the commission of offence under the Act.

<sup>25</sup> [1992] QB 591.

<sup>26</sup> A further example is section 80(2) of the *Safety, Health and Welfare at Work Act 2005* which provides that it is to be presumed that a person whose duties include making decisions that, to a significant extent, could have affected the management of the undertaking, is a person who authorised, consented to or neglected to do something that led to the commission of the corporate offence.

- 8.21 This does not provide a definitive test as to the range of person to whom derivative liability applies, but it indicates that those with policy making or executive functions are clearly included.<sup>27</sup>

### **“Officer in Default” Model - Companies Act 2014.**

#### **Section 270 of the *Companies Act 2014***

Section 270 of the 2014 Act provides that an officer of a company who is in default shall be guilty of an offence. An officer who is in default is one who authorises or who, in breach of his or her duty as such officer, permits the default mentioned in the provision. In section 270 “default” includes a refusal to do a thing or a contravention of a provision. Section 271 of the 2014 Act goes on to provide that where it is proved that the defendant was aware of the basic facts concerning the default concerned, it shall be presumed that the defendant permitted the default unless the defendant shows that he or she took all reasonable steps to prevent it or that, by reason of circumstances beyond the defendant’s control, was unable to do so.

- 8.22 The “officer in default” provision is an important provision of the *Companies Act 2014* as it is the basis on which criminal liability for offences under the 2014 Act is imposed on company officers.
- 8.23 The “officer in default” provision in the *Companies Act 2014* provides for the liability of an officer who “authorises or who, in breach of his or her duty as such officer, permits” a default under the 2014 Act by that company.<sup>28</sup> The 2014 Act also provides that where it is proved that the defendant was aware of the basic facts concerning the default, it shall be presumed that the defendant permitted the default.<sup>29</sup> The defendant can rebut this presumption by showing that he or she took all reasonable steps to prevent the default, or that, by reason of circumstances beyond the defendant’s control, was unable to do so.<sup>30</sup> An example of offences to which the “officer in default” provision can apply is section 82 of the 2014 Act (replacing section 60 of the *Companies Act 1963*), which prohibits (subject to limited exceptions) a company from providing financial assistance to another for the purpose of acquiring any shares in the company. Section 82(11) of the 2014 Act provides that if “a company contravenes this section, the company and any officer of it who is in default shall be guilty of” an offence, which allows for the application of the “officer in default” provision in section 270 of the 2014 Act, where appropriate.

<sup>27</sup> See also Law Reform Commission, *Consultation Paper on Corporate Killing (LRC CP 26 - 2003)*, (LRC CP 26 - 2003), para. 2.57.

<sup>28</sup> Section 270(1) of the 2014 Act (which replaced section 383 of the *Companies Act 1963*, as amended by the *Company Law Enforcement Act 2001*).

<sup>29</sup> Section 271(1) of the 2014 Act provides that “permitted” in relation to the default means “permitted in breach of the defendant’s duty as an officer of the company concerned”. Section 271 also provides that “basic facts concerning the default” means such of the facts, relating to the one or more acts or omissions that constituted the default, as can reasonably be regarded as indicating, at the relevant time, the general character of those acts or omissions.

<sup>30</sup> Section 271(2) of the 2014 Act provides: “In relevant proceedings, where it is proved that the defendant was aware of the basic facts concerning the default concerned, it shall be presumed that the defendant permitted the default unless the defendant shows that he or she took all reasonable steps to prevent it or that, by reason of circumstances beyond the defendant’s control, was unable to do so”.

- 8.24 Section 383 of the *Companies Act 1963* contained a similar provision, which, as enacted in 1963, defined an “officer in default” as “any officer of the company who knowingly and wilfully authorises or permits the default, refusal or contravention...”.<sup>31</sup> Under the 1963 Act there were over 90 offences to which this provision applied but there were very few prosecutions of officers in default<sup>32</sup> due to the high evidential hurdle created by the requirement that the offence be committed “knowingly and wilfully”. The removal of the words “knowingly and wilfully” by the *Company Law Enforcement Act 2001* suggested that an officer could be made criminally liable even if he or she lacked full knowledge of a particular transaction or behaviour engaged in by the corporate body, so long as he or she is aware of the basic facts concerning the default.<sup>33</sup>
- 8.25 Section 60 of the 1963 Act, the predecessor to section 82 of the 2014 Act, was the offence charged in *The People (DPP) v Whelan and McAteer*<sup>34</sup> in which it was established that the company in question, a bank, had provided unlawful financial assistance in contravention of section 60 of the 1963 Act, and that the defendants (directors of the company) were aware of this. The trial judge in the Circuit Criminal Court applied the “officer in default” provision in section 383 of the *Companies Act 1963*. The defendants failed to rebut the presumption contained in section 383, that they permitted the default. Subsequently, the jury convicted them of the offence under section 60 of the 1963 Act.

### Shifting the evidential burden to the accused

- 8.26 The rebuttable presumption in section 271 of the 2014 Act places an onus on the defendant officer to show that he or she took all reasonable steps to prevent the default, and case law suggests that this involves shifting the evidential burden to the accused, leaving the legal burden of proof on the prosecution. Thus, in *The People (DPP) v PJ Carey & Co Ltd*,<sup>35</sup> the Court of Criminal Appeal considered the effect of section 50 of the *Safety, Health and Welfare at Work Act 1989* (since replaced by section 81 of the *Safety, Health and Welfare at Work Act 2005*). This provided that where a provision of the 1989 Act placed a duty on a person to do what was practicable or, as the case may be, reasonably practicable, “it shall be for the

<sup>31</sup> Section 383 of the *Companies Act 1963*, as amended.

<sup>32</sup> Courtney, *The Law of Private Companies*, 2nd ed (Butterworths, 2002) p. 660 [12.032]

<sup>33</sup> The words “knowingly and wilfully” were removed from section 383 of the 1963 Act by section 100 of the *Company Law Enforcement Act 2001*. This amendment followed from a recommendation in the 1998 *Report of the Working Group on Company Law Compliance and Enforcement*. The Explanatory and Financial Memorandum to the *Company Law Enforcement Bill 2000*, p.28. explained the change as follows:

“At present, ‘officer in default’ is defined as ‘any officer of the company who knowingly and wilfully authorises or permits the default, refusal or contravention’ in question. This section replaces that definition with one which is more specific and more easily proved in court; the existing definition is problematic as it is very difficult to prove that a person acted knowingly and wilfully in relation to a given offence. The new section makes no reference to acting ‘knowingly and wilfully’ and creates the presumption that an officer of the company has permitted the default, etc. in question unless he or she can prove otherwise.”

<sup>34</sup> Circuit Criminal Court (Judge Nolan) 17 April 2014, *The Irish Times*, 19 April 2014

<sup>35</sup> [2011] IECCA 63, [2012] 1 IR 234.

accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement". This is similar to the burden shifting involved in section 271(2) of the 2014 Act. In the *PJ Carey* case, Hardiman J, delivering the judgment of the Court of Criminal Appeal, held that the effect of section 50 of the 1989 Act was that the legal burden of proof remained on the prosecution. The Court also held that if the prosecution established by evidence a *prima facie* case, section 50 shifted an evidential burden only onto the accused to bring forward evidence that, for example, it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the relevant statutory duty or requirement. In that respect, the Court held that such an evidential burden shift was constitutionally permissible.<sup>36</sup>

### Authorise or, in Breach of the Duty as an Officer, Permit

- 8.27 The meaning of "permit" on its own appears to require a degree of intention or knowledge,<sup>37</sup> a subjective standard test. The fault element it imposes was considered in *Incorporated Law Society of Ireland v Carroll*,<sup>38</sup> in which the High Court (Murphy J) noted that "permit" involved a requirement of knowledge and that the type of knowledge required was either actual knowledge or a shutting of eyes to the obvious.<sup>39</sup> In relation to the word "authorise", a similar logic applies.<sup>40</sup>

<sup>36</sup> Similarly, in *The People (DPP) v Smyth* [2010] IECCA 34, [2010] 3 IR 688, the Court of Criminal Appeal considered section 29(2)(a) of the *Misuse of Drugs Act 1977* which provides a defence for the accused should he or she prove that he or she did not know and had no reasonable grounds for suspecting that what he or she had in his or her possession was a controlled drug or that he or she was in possession of a controlled drug. Delivering the Court's decision in *Smyth* Charleton J noted, [2010] 3 IR 688, at 696, that "[t]he fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence. The legal presumption that the accused is innocent, until his guilt is proven to that standard, operates to ensure objectivity within the system. It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person. Of itself, this does not infringe the constitutional principle that the accused should be presumed to be innocent until found guilty." To the same effect, see *O'Leary v Attorney General* [1995] 1 IR 254, in which the Supreme Court upheld the constitutionality of a reverse evidential burden in the *Offences against the State Act 1939*.

<sup>37</sup> Horan, *Corporate Crime* (Bloomsbury Professional, 2011), p.90.

<sup>38</sup> [1995] 3 IR 145. The case dealt with section 59(1)(b) of the *Solicitors Act 1954* which provides that "A solicitor shall not wilfully permit his name to be made use of, in business carried on by him as a solicitor, upon the account of, or for the profit of, an unqualified person". This was found not to create a criminal offence, by contrast with section 270 of the 2014 Act, but rather "constituted a prohibition the breach of which would justify the plaintiff's Disciplinary Committee recommending that a solicitor be struck from the roll".

<sup>39</sup> Murphy J referred to the English case *Grays Haulage Co Ltd v Arnold* [1966] 1 WLR 534 in interpreting the word "permit". This case related to an offence under the English *Road Traffic Act 1960* of an employer "permitting" an employee to driver a vehicle for longer than a certain aggregate period. In this case it was established that the driver did in fact drive for periods in excess of the maximum allowed by the 1960 Act. It was also established that the employer, a company of hauliers, did not maintain a system that would have enabled it to monitor the operations of the driver or prevent him exceeding the statutory limit. However, the prosecution did not prove that the defendants had actual knowledge that the vehicle was used as alleged in the information against them. In this case Lord Parker CJ noted that it was of the very essence of the offence of permitting someone to do something that there should be knowledge and that "knowledge is really of two kinds, actual knowledge, and knowledge which arises either from shutting one's eyes to the obvious, or, what is very much the same thing but put in another way, failing to do something or doing something not caring whether contravention takes place or not". It was found that, as neither of these types of knowledge was present in this case, it could not be said that the employers had permitted the wrongful act.

<sup>40</sup> Thus, it is not possible for an individual to authorise something passively without some level of knowledge similar to that required by Murphy J in relation to "permit".

- 8.28 However, for an officer to “permit” in the context of section 270 of the 2014 Act is to permit “in breach of his or her duty as an officer”. This requires a contravention of the 2014 Act that the officer permitted because he or she failed to meet a duty owed to the company, which appears to involve an objective test on the officer more akin to a negligence-type approach rather than one requiring subjective knowledge or intention. It appears therefore that an officer could “authorise or, in breach of his or her duty as an officer, permit” the relevant offending conduct by passively acquiescing in the performance of that conduct.<sup>41</sup>
- 8.29 If it is proved that the officer had knowledge of such facts as relate to one or more acts or omissions that constituted the default which can reasonably be regarded as indicating, at the relevant time, the general character of those acts or omissions, a presumption is created that the officer did permit the conduct.<sup>42</sup>
- 8.30 It appears that obtaining legal advice as to whether a course of conduct is lawful may be irrelevant to the question as to whether the defendant can show that he or she “took all reasonable steps” under section 271 of the *Companies Act 2014*.

*The People (DPP) v Whelan and McAteer*<sup>43</sup> concerned the interpretation of section 383 of the *Companies Act 1963* (since replaced by sections 270 and 271 of the *Companies Act 2014*) and the extent to which an officer of a corporate body could rely on the content of legal advice by way of a defence to a charge of being involved in the provision of a loan other than in the normal course of business contrary to section 60 of the 1963 Act.

In the Circuit Criminal Court, the trial judge (Judge Nolan) ruled that the issue of whether legal advice was obtained by the corporate body in relation to the transaction to which the charge under section 60 of the 1963 Act (since replaced by section 82 of the 2014 Act) related was irrelevant to the guilt or innocence of the accused.<sup>44</sup>

- 8.31 The effect of obtaining legal advice in such cases is discussed in further detail in Issue 9, below, in the context of a defence of due diligence.

<sup>41</sup> Horan, *Corporate Crime* (Bloomsbury Professional, 2011), p. 91.

<sup>42</sup> Section 271(1)(a)

<sup>43</sup> Circuit Criminal Court (Judge Nolan) 17 April 2014, *The Irish Times*, 19 April 2014.

<sup>44</sup> Charleton, Bolger and McDermott, *Criminal Law* (Bloomsbury 1999), para 18.23 state that a mistake as to law, even if that mistake is based on professional advice, should not be a defence in criminal proceedings: “the law should not encourage people to shop around for advice until they find that which suits them, regardless of the merits of the advisor.” The ruling in the *Whelan and McAteer* case and the analysis in Charleton et al may be compared with that applied in *Coyle v Callanan* [2006] 1 IR 447, which concerned an application to restrict two directors of a company under section 150 of the *Companies Act 1990* (since replaced by section 819 of the *Companies Act 2014*). The grounds for the application included a loan that was given to one director, by the company, for the purpose of selling his 50 per cent share in the company. Both the company and the director receiving the loan obtained independent legal advice to the effect that the share purchase was not contrary to section 60 of the 1963 Act. In refusing to restrict the directors the High Court (O’Leary J) held that, because the directors had received legal advice to the effect that the transaction was not contrary to section 60 of the 1963 Act, they were entitled to rely on that legal advice for the purposes of defeating the application to have them restricted, even though the Court also held that the advice was incorrect. It is notable that section 150 of the 1990 Act required the High Court to take into account whether a director acted honestly and responsibly and whether there is no other reason why it would be just and equitable to restrict the director: there is no similar provision in section 60 of the 1963 Act.

Table 1: Summary of Fault Elements

Person in corporate body	External element of the offence.	Fault element or mental attitude which must be proved
Director, manager, secretary or other officer of the body corporate or a person who was purporting to act in any such capacity.	Consented to, or connived in the commission of an offence by the corporate body.	Intention or recklessness
Director, manager, secretary or other officer of the body corporate or a person who was purporting to act in any such capacity.	Has by "wilful neglect" caused the corporate body to commit an offence	Intention or recklessness. Causation must be proved also.
Director, manager, secretary or other officer of the body corporate or a person who was purporting to act in any such capacity.	Has by "any neglect" caused the corporate body to commit an offence	Negligence. Causation must be proved also.
An officer of the company.	Authorised or permitted a default under the Companies Act 2014 by the corporate body.	Intention or recklessness (knowledge of the basic facts of the default).

There is significant overlap between the two models of attributing liability to an individual officer in a corporate body discussed above.

- 8.32 In relation to both, the first requirement is that some contravention of the relevant legislation has occurred. The two models operate somewhat differently in relation to this, however. It is a general requirement of the "consent, connive and neglect" provisions that a corporate body has committed an offence.<sup>45</sup> In all circumstances the relevant individual's criminal liability is contingent on the conduct of the corporate body. In relation to the "officer in default model", the officer's criminal liability is similarly derived from a failure to comply with a provision of the *Companies Act 2014*. However, depending on the provision contravened, this default might be committed by, for example, the company itself,<sup>46</sup> by someone acting on behalf of the company,<sup>47</sup> or by a director of the company.<sup>48</sup> If a default is not one required to be committed by the company itself, the "officer in default" may also be the entity committing the default, for example if that officer is the director or person acting on behalf of the company in the second and third example above. In such a case the application of the "officer in default" provision would not be contingent on the act of the company, but would permit the attribution of liability due to the default of the

<sup>45</sup> It is not necessarily required that the body has been either prosecuted or convicted of that offence, but it must be proved that the offence was committed: see *The People (DPP) v Hegarty* [2011] IESC 32; [2011] 4 IR 635, discussed above.

<sup>46</sup> See section 82(11) of the *Companies Act 2014*, which provides that an "officer in default" may be guilty of an offence contingent on the company's conduct of providing financial assistance in relation to the acquisition of its own shares.

<sup>47</sup> Section 531(9) of the *Companies Act 2014* provides that an "officer in default" may be guilty of an offence, contingent on the failure to include a statement of the company being in examinership on the website of the company or in e-mails to third parties, by someone acting on behalf of the company.

<sup>48</sup> See section 137(6) of the 2014 Act, which provides that an "officer in default" may be guilty of an offence, contingent on the failure of at least one of the company's directors being resident in an EEA state.

officer himself or herself. In this regard, the “officer in default” model appears to provide for “self executing” personal criminal liability. By contrast, the “consent, connivance and neglect” model always requires proof of an offence by the corporate body, that is, it involves derivative or “parasitic” liability.

- 8.33 As to the fault requirement of proving, on the one hand, that an individual “consented or connived” in the commission of a wrongful act (being an offence of a corporate body) and, on the other hand, that an individual “authorised or permitted” a wrongful act (being a default on a provision of the *Companies Act 2014*, by a company), there also appears to be significant similarities.
- 8.34 The differences in application and utility of each model are most apparent from a comparison of the provisions:
- that the wrongful act is attributable to wilful neglect on the part of the individual; or
  - that the wrongful act is attributable to any neglect on the part of the individual; and
  - the ability to raise a rebuttable presumption that the individual satisfies the fault requirement element.
- 8.35 Each of the 3 variations in approach has an effect on the application of the provision in which they are contained. As noted, the “wilful neglect” formulation does not broaden the applicability of the personal criminal liability because it appears to be comparable to the level of intention or knowledge involved in “consent or connivance”.
- 8.36 The corresponding effect of the “neglect” provision and the rebuttable presumption provision is to broaden the applicability of the tests of derivative personal criminal liability to which they apply, but by different means. “Neglect” results in the application of an objective standard that does not require proof of knowledge, and so provides an alternative mode of proof for the prosecution that involves a lower standard than “consent or connivance”.

The rebuttable presumption shifts the evidential burden to an accused, which as noted above has been upheld as constitutionally permissible.

### **Questions for consideration**

8.37 In light of this discussion, the Commission seeks views on the following:

- whether the existing two models for determining the personal criminal liability of directors, managers and other similar corporate officers (“consent, connivance or neglect” and “officer in default”) should be retained;
- if so, whether either or both of them should be adjusted (for example, whether the “consent, connivance or neglect” formula should correspond to the substantive offence to which it refers; and whether the presumptive rule that refers to persons with decision-making roles could be applied more generally); and
- whether there should be a single test.

## QUESTION 8

- 8(a) Do you think that the formulation of the standard clause concerning "consent, connivance or neglect" as a means of attributing personal criminal liability to directors, managers or similar officers in a corporate body is appropriate?
- 8(b) If not, what changes do you think should be made to the "consent, connivance or neglect" provision?
- 8(c) Should the use of either "wilful neglect" or "any neglect" be related to the substantive corporate offence in question (for example, should "wilful neglect" be used for an offence that requires proof of intention or knowledge and "any neglect" be used for an offence that does not require proof of intention or knowledge)?
- 8(d) Do you think that a provision to the effect that those who "make decisions that, to a significant extent, could have affected the management of the corporate body" are presumed to have authorised or consented to the offending acts of the corporate body, or that the acts are attributable to this person's connivance or neglect, should be applied generally?
- 8(e) Do you think that the "officer in default" provisions in the Companies Act 2014 should be retained or replaced by a "consent, connivance or neglect" provision?
- 8(f) If it should be retained, do you think the presumption that the officer has permitted a default, as set out in s. 271 of Companies Act 2014, is appropriate?
- 8(g) If you think that the "officer in default" provision should not be retained, do you think that it would be appropriate to include a rebuttable presumption akin to that set out in s.271 in a "consent, connivance or neglect" provision?
- 8(h) Do you think it would be appropriate or effective to allow such a presumption to only to apply to accused whose duties include "making decisions that, to a significant extent, could have affected the management of the undertaking"?
- 8(i) In either case, do you think that a requirement that the prosecution prove that the individual had some "basic knowledge" of the offence prior presumption taking effect should be retained?
- 8(j) What requirements, do you think, should be placed upon the individual to rebut the presumption?
- 8(k) Do you think that there should be a unified test for the attribution of criminal liability to an officer for an offence committed by a corporate body?
- 8(l) If the answer to question above is yes, what do you think the components of such a test should be, and why?



## ISSUE 9

# THE DEFENCE OF DUE DILIGENCE

### Introduction

- 9.01 Criminal offences can be grouped into three categories:<sup>1</sup>
- Intention-and-act-based offences: where the prosecution must prove (a) intent by the accused (that the offence was committed knowingly, intentionally or recklessly, called *mens rea*) and (b) that the accused committed the act constituting the offence (called the *actus reus*).
  - Act-only based offences, subject to a “reasonable precautions” or “due diligence” defence:<sup>2</sup> also called strict liability offences, where the prosecution is not required to prove intent by the accused but only that the accused committed the act constituting the offence, with the accused having a defence to the charge that he or she had acted “reasonably” or exercised “due diligence” to prevent the act occurring.
  - Act-only based offences, not subject to any defence: also called absolute liability offences, where the prosecution is not required to prove intent by the accused but only that the accused committed the act constituting the offence, with the accused having no defence such as “due diligence”.
- 9.02 This categorisation indicates that a defence of due diligence is relevant to offences that are primarily act-based strict liability offences. It would not be logical to provide a defence of “reasonable precautions” to an intention-and-act-based offence, such as fraud offences, which require proof of intention or knowledge; nor would such a defence be appropriate in an absolute liability offence, such as speeding.

<sup>1</sup> This three part-categorisation of criminal offences was developed Dickson J delivering the decision of the Supreme Court of Canada in *R v City of Sault Ste. Marie* (1978) 85 DLR (3d) 161, at 181-182. It was approved by Keane J in *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267, at 287-288.

<sup>2</sup> A variation of an act-only based offence with a “reasonable” or “due diligence” defence is an offence in which the prosecution is required to prove, in addition to the offending act, a negligence or unreasonableness based (objective) culpability element on the part of a defendant. This culpability element falls short of subjective knowledge or intention. An example of this type of offence is section 15(15) of the *Criminal Justice Act 2011* which provides that person who “without reasonable excuse” fails or refuses to comply with an order under section 15 (to make available particular documents or documents of a particular description, or to provide particular information to the Garda Síochána) shall be guilty of an offence. See below for discussion in Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (Oxford, 2013) p 170.

- 9.03 An example of the operation of a strict liability offence can be seen in the *Consumer Protection Act 2007* which prohibits corporate bodies from engaging in unfair, misleading or aggressive commercial practices,<sup>3</sup> and also provides that engaging in any such practice is a criminal offence. Thus, section 55(1)(y) of the 2007 Act prohibits a corporate body from creating an impression with a consumer, such as in an advertisement, that after-sales services are available when they are not. Section 56 provides that contravention of this prohibition is an offence. This is an act-only offence because it is not necessary for the prosecution to prove that the trader intended to mislead a consumer; it is sufficient that a misleading impression has resulted from the trader's advertisement. Section 78 of the 2007 Act, discussed below, provides that it is a defence to any prosecution under section 55(1)(y) of the 2007 Act if the accused proves that it "exercised due diligence and took all reasonable precautions to avoid commission of the offence." It is clear from the link between "due diligence" and "reasonable precautions" in section 78 of the 2007 Act that "due diligence" is closely connected with the concept of reasonable care,<sup>4</sup> which is a core element of negligence. In effect, therefore, a due diligence defence involves imposing criminal liability where a person has been negligent, has failed to take reasonable care.
- 9.04 Failure to exercise reasonable care can have significant adverse consequences, and it is therefore understandable that society would adopt measures to encourage greater care in a wide variety of settings, in particular those that involve the activities of corporate bodies. Ormerod and Laird have noted that many offences have been enacted that provide for a defence of "due diligence" and reasonable precautions, and that there is a case to be made for replacing the concept of "strict liability" with a concept of "criminal liability in negligence".<sup>5</sup> This would primarily involve a re-labelling of strict liability, rather than a substantive change in content, though it would also place a requirement on the prosecution to prove that an accused fell below an objective standard of care, rather than leaving the onus of proving the reasonableness of the accused's actions on the accused as is the case in strict liability offences.
- 9.05 By contrast, an offence of absolute liability, in which due diligence or reasonable care is not a defence, involves imposing criminal liability solely on the basis of the act involved. For example, section 171(1) of the *Fisheries (Consolidation) Act 1959* provides that it is an offence to cause polluting material to be released into a river, and there is no express defence of due diligence to such a charge. It has been held that the object of the 1959 Act, to prevent river pollution, could be defeated if proof of intention or knowledge (*mens rea*) by the accused was required in such a case, or if

3 The 2007 Act implemented Directive 2005/29/EC, the 2005 EU Directive on Unfair Commercial Practices (UCPD), and also consolidated most pre-2007 legislation on consumer protection. See generally the Commission's *Report on Consumer Insurance Contracts* (LRC 113-2015), paragraphs 9.28-9.44.

4 See also the English Court of Appeal decision *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1960] 1 All ER 193 at 219, in which Wilmer LJ stated: "An obligation to exercise due diligence is to my mind indistinguishable from an obligation to exercise reasonable care."

5 See Ormerod and Laird, *Smith and Hogan's Criminal Law* 14th ed (Oxford, 2013) p 170.

the taking of reasonable precautions was a defence.<sup>6</sup> Similarly, section 343 of the *Companies Act 2014* provides that it is an offence to fail to file a company's annual return by a specified date, and there is no express defence to plead that all reasonable precautions were in place to prevent this. To the same effect, the offences of exceeding a speed limit or illegal parking under the *Road Traffic Acts* (the most commonly prosecuted criminal offences, albeit summary offences and subject to fines and penalty points only) are not subject to a defence that, for example, the driver had taken reasonable precautions by driving within the speed limit or parking legally on the vast majority of occasions.

- 9.06 The Supreme Court has held that, at least in some instances, the failure to provide a defence of reasonable precautions to a criminal charge could render an offence unconstitutional. In *CC v Ireland (No.2)*<sup>7</sup> the Court held unconstitutional the offence of defilement of a girl under 15 years of age (so called "statutory rape") because it did not contain a defence of "honest mistake" as to the age of the child. As a result of this decision, new legislation was enacted providing for an offence of defilement of a child under 15 years of age, which carries a defence, which is expressly related to whether the defendant had a belief based on "reasonable grounds" that the child had attained the age of 15. The test of reasonableness is similar to a "due diligence" defence.<sup>8</sup>
- 9.07 The Court in *CC (No.2)* did not decide that all absolute liability offences are unconstitutional. In a Supreme Court decision ten years previously, *Shannon Regional Fisheries Board v Cavan County Council*,<sup>9</sup> Keane J suggested that it would be unconstitutional for the Oireachtas to enact a law that made all criminal offences ones of absolute liability, because such a law would deprive defendants of the right to a trial in due course of law under Article 38.1 of the Constitution. Keane J also stated, however, that the enactment of some offences as absolute liability offences would

<sup>6</sup> *In Maguire v Shannon Regional Fisheries Board* [1994] 3 IR 580, the defendant, who operated a piggery, had been convicted in the District Court of an offence under section 171(1) of the 1959 Act after material from a fractured pipe in the piggery leaked into a nearby river. It was agreed that the defendant had, at considerable expense, taken all reasonable precautions in the piggery's systems to prevent such leaks. On appeal, the High Court (Lynch J) held that this was not a defence to the charge. The Court held that this approach promoted the general object of the Act by encouraging greater vigilance to prevent river pollution. It also held that if proof of intention or knowledge (*mens rea*) was required in such a case, or if the taking of reasonable precautions was a defence, it would be difficult to establish that an offence had been committed. Similarly, in *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267, the High Court and, on appeal, the Supreme Court held that the offence in section 171(1) did not require proof of intention or knowledge. The defendant County Council in that case accepted that it had discharged untreated sewage into a river but pleaded that it had acted, in effect, under duress because it not been given sufficient funds by the Department of the Environment to build appropriate waste water treatment facilities. The majority in the Supreme Court (O'Flaherty and Blayney JJ) held that this plea did not amount to a defence under the 1959 Act as the Council had acted deliberately, even if it did argue that it had no other option. Dissenting on this point, Keane J held that section 171 should be interpreted as including, by implication, a defence of "reasonable precautions" and that, because the pollution was caused not by the absence of reasonable care by the Council but by the Department's failure to provide it with the necessary funds, the charge should be dismissed.

<sup>7</sup> [2006] IESC 33, [2006] 4 IR 1.

<sup>8</sup> In *CC (No.2)*, the Supreme Court declared unconstitutional the offence of defilement of a girl under the age of 15 years in section 1(1) of the *Criminal Law (Amendment) Act 1935*. Arising from this, the *Criminal Law (Sexual Offences) Act 2006* was enacted, section 2 of which provides for an offence of defilement of a child under the age of 15 years. Section 2 also provides that it is a defence to a charge that the defendant "honestly believed" that, at the time of the alleged offence, the child against whom the offence is alleged to have been committed was 15; and that where this defence is raised the court "shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances." Since the defence of "honest belief" is connected to a test of reasonableness, this is similar to a "due diligence" defence.

<sup>9</sup> [1996] 3 IR 267.

not conflict with fundamental constitutional principles, and he instanced offences such as illegal parking and speeding under the *Road Traffic Acts* as examples.<sup>10</sup>

- 9.08 The decision in *CC (No.2)* and Keane J's comments in the *Cavan County Council* case thus leave open to constitutional challenge whether certain absolute liability offences, such as those involving river pollution or failing to file a company's annual return because of the public policy that underpins such provisions. They also raise the question as to whether some absolute liability offences would only survive constitutional scrutiny if they were converted into strict liability offences, that is, in which a defence of "due diligence" or "reasonable precautions" applied.

### Mechanics of the "due diligence" defence

- 9.09 In order to avail of the "due diligence" defence an accused is required to produce evidence of positive steps or actions taken in order to prove the absence of negligence. This generally means that a person, corporate body or undertaking must prove that they had taken all reasonable steps by setting up a system to prevent the action which is the subject matter of the criminal act.

An example of a "due diligence" defence can be found in section 78(1) of the *Consumer Protection Act 2007* which provides<sup>11</sup> that the accused may avail of a defence by establishing that: (a) the commission of the offence was due to a mistake or the reliance on information supplied to the accused or to the act or default of another person, an accident or some other cause beyond the accused's control; and (b) the accused exercised due diligence and took all reasonable precautions to avoid commission of the offence. Aside from having to demonstrate something like mistake, a corporate defendant will need to produce evidence of the systems and procedures it had in place to avoid the commission of the offence, and that these included all steps that should reasonably have been taken to avoid its commission. The mere production of policies and procedures, without effective implementation, monitoring, communication and oversight, will not suffice.<sup>12</sup>

In order to avail of a "due diligence" defence, the act causing the offence must not have been intended by the accused. It would clearly not be appropriate to provide a defence for a corporate body that it "took all reasonable precautions to avoid commission of the offence", but then maintain that it intentionally committed the offending conduct in spite of those precautions. For this reason, a "due diligence" defence can apply only to an offence that does not require proof of intention or knowledge.

10 As noted in footnote 6, above, Keane J's judgment in *the Cavan County Council* case was a dissenting one, but the majority in the Supreme Court (O'Flaherty and Blayney JJ) did not express any views on the constitutionality or otherwise of absolute liability offences, nor on Keane J's analysis of this question. Keane J's analysis in his dissenting judgment has subsequently been cited with apparent approval by the High Court (Charleton J) in *Brady v Environmental Protection Agency* [2007] IEHC 58, [2007] 3 IR 232 at 251.

11 This applies to a prosecution for an offence under the 2007 Act, other than under section 65(2).

12 Cannon and Pegram, "A Costly Mistake" *New Law Journal*, 28 October 2011, p.1477, at p.1478, discussing what is required to make out a defence under section 7 of the UK *Bribery Act 2010*, of having in place "adequate procedures" to prevent bribery by persons associated with a corporate body.

- 9.10 A change to UK competition law on the prosecution of cartels illustrates how a “due diligence” defence can replace a requirement to prove intention or knowledge. As originally enacted, section 188 of the UK’s Enterprise Act 2002 provided that “[a]n individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented” a cartel. Over time, regulators and prosecutors suggested that the requirement to prove dishonesty made it too difficult to prosecute breaches, which reduced the deterrent effect of the offence.<sup>13</sup> In 2013 the offence was amended by section 47 of the UK Enterprise and Regulatory Reform Act 2013, which removed the word “dishonestly” from the definition of the offence in the 2002 Act. At the same time, the amendment introduced a number of statutory defences including a limited “due diligence” defence (discussed below). It also exempted from the cartel offence certain types of arrangement that would otherwise have been prohibited, particularly those where the terms of the arrangement were not kept secret from persons affected by it.
- 9.11 The fact that a “due diligence” defence can be concerned with the way that a corporate body manages its internal processes and risk exposure is demonstrated in the Australian Criminal Code, which provides:<sup>14</sup>
- “Failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.”
- 9.12 Case law indicates that the standard of proof placed on an accused is an evidential burden of proof, rather than the legal burden of proof which remains on the prosecution.<sup>15</sup>

### **Due diligence as a defence to specific offences?**

- 9.13 It is arguable that it would not be appropriate to apply a due diligence defence to all offences. For example, for the reasons noted above, the efficacy of parking and speeding offences under the *Road Traffic Acts* or the offence of failure to file a company’s annual return under the *Companies Act 2014* would be undermined by the availability of a “due diligence” defence. The policy underlying absolute liability offences was discussed by the High Court (Sullivan P) in *M’Adam v Dublin United*

<sup>13</sup> See the Impact Assessment published in advance of the 2013 Act by the British Department for Business Innovation and Skills, *A Competition Regime For Growth: A Consultation On Options For Reform* (2012) at 88–92, which explained the rationale for the changes made by the 2013 Act to the cartel offences in the 2002 Act under the heading “Removing the ‘dishonesty’ element from the offence and defining the offence so that it does not include agreements made openly.” Available at [http://www.legislation.gov.uk/ukia/2013/1066/pdfs/ukia\\_20131066\\_en.pdf](http://www.legislation.gov.uk/ukia/2013/1066/pdfs/ukia_20131066_en.pdf).

<sup>14</sup> Section 12.5(2) of the Commonwealth of Australia Criminal Code.

<sup>15</sup> See the discussion of *The People (DPP) v P.J. Carey & Co Ltd* [2011] IECCA 63, [2012] 1 IR 234 in Issue 8 above.

*Tramways Company Ltd*,<sup>16</sup> which was a prosecution for the offence of overloading a tram under the *Dublin Carriage Act 1953*:

“I am of opinion that the prohibitions contained in [the 1953 Act] are absolute. The object... is to protect the public against the danger that may result from the overloading of an omnibus, and that object could be achieved only by absolutely prohibiting the carriage in any omnibus of more than a limited number of passengers, and by penalising the owner for any breach of such prohibition, irrespective of his knowledge of such breach.”

- 9.14 It can be argued that due to the danger to the public which can result from certain types of conduct, it is appropriate to punish that conduct regardless of whether the conduct was intended.
- 9.15 Although such arguments exist in favour of absolute liability offences, and the Oireachtas continues to enact some such offences, it is at least arguable that a “due diligence” defence may be suitable for some offences that are currently absolute in nature. The application of a “due diligence” defence to such offences could also mitigate the constitutional difficulties discussed by Keane J in the *Cavan County Council* case. Keane J noted that the existence of a “due diligence” defence may also encourage the development of effective corporate compliance policies. In addition, Keane J noted that absolute criminal liability may discourage good corporate preventative and compliance policies, because those with management responsibility may well consider that the resources involved in such measures should not be put in place because, under an absolute liability offence, such measures will not avail the corporate body any defence. In that respect, absolute criminal liability may be inimical to good corporate standards or improvements in standards of care, which is typically the general object of much of the legislation with which this project is concerned, notably legislation on financial services and economic regulation.
- 9.16 In the *Cavan County Council* case the defendant had also argued that even though it had taken all precautions it could within its available resources, it was restricted in what it could do because the Department of the Environment, its parent Department, did not provide it with sufficient resources to do more. It was therefore argued that, as the Council had no alternative other than to perform the offending conduct (due to its statutory obligations), it was acting in effect under duress, and that this provided a defence to the charge under the 1959 Act.<sup>17</sup> The defence of duress is a recognised defence in criminal law, but is quite narrow in scope and can only apply where a “do it, or else” threat is made, where the threat is imminently related to the offence in question and where the threat is so great that it overbears the ordinary powers of a person.<sup>18</sup> The majority in the Supreme Court in the *Cavan County Council* case held that the provision in question did not provide for such a defence.

<sup>16</sup> [1929] IR 327, at 333.

<sup>17</sup> *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267, at 276.

<sup>18</sup> See Law Reform Commission, *Report on Defences in Criminal Law (LRC 95-2009)* (LRC 95-2009) at 157-190 and *Attorney General v Whelan* [1934] IR 518, at 526.

- 9.17 It does not seem that a variation of this argument, in which an individual argues that he or she was not a director, manager or similar officer but was required to carry out the offending conduct on the orders of a person in a superior management position, would be successful. Unless the nature of “superior orders” include a “do it, or else” threat of immediate harm, the law will not recognise that a subordinate employee has a defence; though such an argument may be made by way of a plea in mitigation at the sentencing stage.<sup>19</sup>

### The UK’s “Failure to Prevent” Model

- 9.18 The UK *Bribery Act 2010* criminalises a commercial corporate body’s failure to prevent bribery.<sup>20</sup> Section 7 of the 2010 Act provides a model for the use of a “due diligence” defence. The 2010 Act provides for a strict liability corporate offence of failing to prevent bribery. The corporate body is guilty of the offence if a person associated with it intentionally engages in bribery. If the corporate body shows it has adequate procedures designed to prevent such conduct, it will have a good “due diligence” defence. The purpose of the offence is to ensure that commercial organisations have appropriate procedures in place to prevent bribery.<sup>21</sup>
- 9.19 The model used in the UK 2010 Act appears to have influenced Head 13 of the *Draft Scheme of the Criminal Justice (Corruption) Bill*, published by the Department of Justice and Equality in 2012, which provides for a similar strict liability offence for a body corporate where “a director, manager, secretary, officer, employee, subsidiary or agent of a body corporate with the intention of obtaining or retaining business for the body corporate or to obtain or retain an advantage in the conduct of business for the body corporate”. Head 13(4) provides a defence “for the defendant body corporate to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence”.
- 9.20 As previously discussed in Issue 4 and Issue 6, above, the application of section 7 of the UK 2010 Act was considered by the English High Court in *Serious Fraud Office v Standard Bank Plc*,<sup>22</sup> in the context of the judicial approval of the UK’s first deferred prosecution agreement (DPA) under the *Crime and Courts Act 2013*. Leveson P noted

19 Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (Oxford University Press, 2015) p. 425 states: “It is not a defence for D to merely claim that the act was done by him in obedience of the orders of a superior, whether military or civilian.” Something akin to a “superior orders” defence appears to have been argued in *The People (DPP) v O’Mahoney, Daly and Maguire*, Circuit Criminal Court (Judge McCartan and a jury), 29 July 2015 (verdict), *The Irish Times*, 30 July 2015, in which three bank officials had been charged with conspiracy to mutilate or falsify documents relating to accounts. It was reported that counsel for the third defendant had, in his closing speech to the jury, argued that the third defendant was “a minion, a small person” and “basically a form of gofer” in relation to the commission of the conduct in question, which was not for her benefit, but “was definitely in the interest of somebody upstairs”. It is not possible to know whether the jury considered that something along the lines of a “superior orders” defence was open in this case; however, the third defendant was found guilty of the offence. See *The People (DPP) v O’Mahoney, Daly and Maguire*, Circuit Criminal Court (Judge McCartan and a jury), 26 July 2015 (defence speech to jury), *The Irish Times*, 27 July 2015.

20 Section 7 of the UK Bribery Act 2010.

21 UK Ministry for Justice, *The Bribery Act 2010: Guidance*, (March 2011), p. 8 para 11.

22 *Serious Fraud Office v Standard Bank Plc: Deferred Prosecution Agreement* (Case No: U20150854), English High Court, Queen’s Bench Division (Leveson P), 30 November 2015.

that the Serious Fraud Office (SFO) had been satisfied that the materials disclosed to the SFO were not sufficient to enable the defendant bank to establish the “due diligence” defence. He accepted that the materials failed to demonstrate that the defendant bank had adequate procedures in place designed to prevent persons associated with the commercial organisation from undertaking the bribery. Leveson P also noted that the bank’s applicable policy was unclear and was not reinforced effectively to relevant employees; and that the bank’s training did not provide sufficient guidance about relevant obligations and procedures.<sup>23</sup>

- 9.21 It has been suggested, prior to the conclusion of *Standard Bank*,<sup>24</sup> that a decision by the English Ministry of Justice to step back from a plan to create a new offence of “failing to prevent economic crime”, based on the model in section 7 of the *Bribery Act 2010*, was because “there have been no prosecutions under the model Bribery Act offence and there is little evidence of corporate economic wrongdoing going unpunished”.<sup>25</sup> It may be that the outcome of the *Standard Bank* case, albeit involving a DPA, indicates that the “due diligence” defence in the 2010 Act imposes a relatively high standard of corporate behaviour that cannot be complied with by merely having in place some corporate procedures that do not effectively result in compliance with the law.<sup>26</sup>
- 9.22 Whether a general offence of failing to prevent economic crime is enacted in the UK, it notable that, at the time of writing, HM Revenue & Customs is considering the creation of a new corporate offence of “failing to take reasonable steps to prevent tax evasion” based on the model in section 7 of the 2010 Act. It is suggested that this offence will include a “due diligence” defence based on the recognition that some well-run corporations, with strong compliance cultures, might nevertheless have an agent who disregards the firm’s policies and actively seeks to circumvent compliance procedures in order to facilitate the prohibited conduct. A “due diligence” defence is, therefore, intended to ensure that corporate bodies who have put in place adequate compliance procedures to prevent the criminal conduct do not face prosecution.<sup>27</sup>

<sup>23</sup> *Ibid.*, at para. 11 of the judgment.

<sup>24</sup> As noted, this was the first prosecution under section 7 of the 2010 Act: see Jeremy Wright (Attorney General for England and Wales), “Deferred Prosecution Agreement: Written statement – HCWS344” (1 December 2015); <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-12-01/HCWS344/>.

<sup>25</sup> By Andrew Selous, Parliamentary Under-Secretary of the Ministry of Justice, on 28 September 2015, in response to a written question from Byron Davis MP: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-09-09/9735>

<sup>26</sup> Lewis, “Corporate Crime & Corruption Informer: First SFO UK Bribery Act Convictions” (2014), discussing the first convictions under the *Bribery Act 2010*, which were in respect of two individuals in December 2014: <http://www.fieldfisher.com/publications/2014/12/corporate-crime-corruption-informer-first-sfo-uk-bribery-act-convictions#sthash.WjJcNn77.dpbs>.

<sup>27</sup> HM Revenue & Customs, *Tackling offshore tax evasion. a new corporate criminal offence of failure to prevent the facilitation of evasion*, (2015), Chapter 4.

### **A general defence of “due diligence”?**

- 9.23 The Law Commission of England and Wales suggested, in a 2010 Consultation Paper, that the courts should be given the power to apply a “due diligence in all the circumstances” defence (with the evidential burden on the defendant) to statutory offences that are, in whole or in part, silent on the question as to whether intention or knowledge (*mens rea*) is required for the defendant to be convicted. The Law Commission of England and Wales suggested that the courts would only apply such a defence in circumstances where it was appropriate to do so rather than in all cases. It sought views as to whether there were particular statutory offences which would not be able to avail of a general “due diligence” defence, for example road traffic offences.<sup>28</sup>
- 9.24 Gobert and Punch consider that there is no reason why the courts could not develop, using their common law powers, a general defence of “due diligence” which would exonerate a corporate defendant where the corporate body has acted in good faith and has made reasonable effort to identify and prevent the occurrence of the crime in question.<sup>29</sup>
- 9.25 In this jurisdiction, Keane J was prepared in the *Cavan County Council* case, discussed above, to read into the statutory offence in section 171 of the *Fisheries (Consolidation) Act 1959* a defence of “due diligence” even though this was not provided expressly by the offence.<sup>30</sup>

### **Due diligence, “reasonable steps”, delegation and relying upon professional advice**

- 9.26 In considering a “due diligence” defence, particularly in the context of corporate offences, an important consideration is how to apply such a defence in circumstances in which holders of particular offices, or named individuals, are given the task of ensuring compliance with designated matters as part of the normal course of delegation in an organisation.

<sup>28</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (2010) at para 1.71–1.80. The Law Commission of England and Wales did not publish a final Report on this area, but has noted that “regulatory aspects of the proposals in the consultation paper have been implemented in part by the Government in its guidance to departments. The remainder of the proposals, which dealt with a small number of aspects of corporate liability, are on hold but we aim to deal with them as part of a full scale project on corporate liability in the future”: see <http://www.lawcom.gov.uk/project/criminal-liability-in-regulatory-contexts/>.

<sup>29</sup> Gobert and Punch, *Rethinking Corporate Crime*, (Butterworths, 2003), at. 101

<sup>30</sup> In *The People (DPP) v Whelan & McAteer*, Circuit Criminal Court, 17 April 2014, *The Irish Times*, 19 April 2014, discussed further below, the defendants had been charged with the offence of providing a loan to buy shares in a company (in that case, a bank) other than in the ordinary course of business, contrary to section 60 of the *Companies Act 1963*. They submitted that the offence was subject to a defence of due diligence or reasonable care and that taking of legal advice which indicated that the activity in which they were involved did not breach section 60 of the 1963 Act constituted due diligence or reasonable care. The trial judge (Judge Nolan) rejected this defence on the ground that such legal advice, even if given, could not by itself constitute a full due diligence defence.

- 9.27 Legislation has provided for defences that a competent and reliable person was made responsible for ensuring that certain statutory requirements are satisfied.<sup>31</sup>

Section 54 of the *Investment Intermediaries Act 1995* provides that it shall be a defence to prove that the defendant had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of ensuring that those requirements were complied with and was in a position to discharge that duty.

- 9.28 The concept of delegating performance of a “due diligence” requirement has been frequently assessed in relation to the duty of directors to exercise due care skill and diligence in carrying out their functions as directors. This duty has been placed on a statutory footing by the *Companies Act 2014*,<sup>32</sup> but its origins flow, in part, from a director’s fiduciary duties in equity and, in part, from the duty of care in negligence.<sup>33</sup>
- 9.29 It has been acknowledged that, particularly in larger corporate bodies, a director must be allowed to delegate some function over which he or she has a duty to exercise due diligence, for obvious practical reasons.<sup>34</sup> However, though a director will often delegate the function of performing “due diligence” requirements, the statutory duty remains with the director. While the function may be delegated, the responsibility for exercising “due diligence” may not.<sup>35</sup>
- 9.30 Similarly, in certain circumstances a director will be required to engage professional advisers in order to deal appropriately with matters with which a director cannot have the expertise to deal.<sup>36</sup>
- 9.31 Although reliance on professional advice can form part of the reasonable steps a director must take to satisfy this duty, it is also the case that the director may not divest himself or herself of the obligations of a director.<sup>37</sup>

31 See for example, the *Investment Intermediaries Act 1995*, section 54 of the *Stock Exchange Act 1995*, and sections 65 and 79 of the *Investor Compensation Act 1998*.

32 Section 228 of the *Companies Act 2014*.

33 Ahern, *Director’s Duties* (Roundhall, 2009), at p.104 outlines the development of this duty, from both equitable and common law principles.

34 *In Kavanagh v Cook and Byrne* [2005] IEHC 225, which related to an application for restriction of a director, the High Court (MacMenamin J) noted that “issues such as delegation which may have a significant bearing in the defence of the activities of directors in larger enterprises can hardly be seen in the same light in this small company where the managing director either knew, must have known, or ought to have known, any relevant matter regarding the conduct of the company’s affairs.”

35 The Basel Committee on Banking Supervision, *Guidelines: Corporate Governance principles for banks*, (Bank for International Settlements, 2015), p.8, states that it is a recognised principle that “[t]he board has ultimate responsibility for the bank’s business strategy and financial soundness, key personnel decisions, internal organisation and governance structure and practices, and risk management and compliance obligations. The board may delegate some of its functions, though not its responsibilities, to board committees where appropriate” A statutory example of this ultimate responsibility is the obligation under the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*. Thus, the *Central Bank’s Report on Anti-Money Laundering/Countering the Financing of Terrorism and Financial Sections Compliance in the Irish Banking Sector* (Central Bank of Ireland, 2015), p. 30, states: “While the Board may delegate its AML/CFT responsibilities to Senior Management, the Board is ultimately responsible for ensuring compliance with the CJA 2010 and must put in place appropriate AML/CFT structures that reflect the nature and complexities of the bank’s activities.”

36 *Coyle v Callanan* [2006] 1 IR 447. This case concerned an application to restrict two directors of a company pursuant to *Section 150* of the *Companies Act 1990*. In refusing to restrict the directors the High Court (O’Leary J) found that as the respondents received legal advice and they were entitled to rely on that legal advice notwithstanding that the advice was incorrect.

37 In *Official Receiver v Ireland* [2002] BCC 428 it was noted that a director who had approved the removal of assets from the company for no consideration could not take refuge in the fact that he had obtained legal advice sanctioning the transaction. It was held that

- 9.32 This results in a prohibition on a director simply doing as advised. This is reflected in the fact that fulfilling the duty to exercise due care, skill, and diligence includes a continuing duty to acquire and maintain a sufficient knowledge and understanding of a company's business to enable directors properly to discharge their duties.<sup>38</sup>
- 9.33 Therefore delegation of "due diligence" function and reliance upon advice, when done reasonably, can be compatible with meeting the fiduciary duties and the duty of care of a director, and can therefore form part of the "reasonable steps" which an individual or corporation took in exercising due diligence for the purpose of a "due diligence" defence.

### **Professional Legal Advice, Official Advice & Mistakes as to Law.**

- 9.34 In the specific context of relying on erroneous advice as to the state of the law, resulting in the commission of an offence, the principle that ignorance of the law is no defence (*ignorantia juris non excusat*) must be considered.
- 9.35 In general a mistake as to law, even if that mistake is based on professional legal advice, or official advice provided by the State, is not a defence in criminal proceedings.<sup>39</sup> This is based on the long-established principle that "every person of discretion... is bound and presumed to know" the law.<sup>40</sup> There are strong policy arguments in favour of this position. To provide a defence of ignorance of the law may encourage such ignorance. It has been suggested an ignorance defence would encourage people to shop around for professional legal advice until they find that which suits them, regardless of the merits of the adviser.<sup>41</sup> It has also been argued that the effect of such a defence would be to "substitute the opinion of a person charged with a breach of the law for the law itself."<sup>42</sup>
- 9.36 The harshness that might result from the rule is often tempered by the fact that, in general, criminal wrongs will be seen as moral wrongs<sup>43</sup> which require proof of intention or knowledge on the part of an accused, who must therefore know or be reckless as to their commission of the moral wrong. This factor will not always be present, however, in strict liability and absolute liability offences.<sup>44</sup> The question, therefore, arises as to whether an individual or corporate body who has committed a strict or absolute liability offence, but who reasonably sought and relied on erroneous legal advice in an attempt to ensure that the relevant offence was not committed, should be prohibited from relying on obtaining the advice as part of the

the director was entitled to rely on legal advice, but not to the extent that he could abdicate all responsibility as a director by seeking to hide behind professional advisers.

38 *Re Barings Plc; Secretary of State for Trade and Industry v Baker & Ors* (No.5) [1999] 1 BCLC 433, *Re Vehicle Imports Ltd*, High Court (Murphy J), 23 November 2000.

39 Though it may function as a defence in relation to civil wrongs: see *Coyle v Callanan* [2006] 1 IR 447.

40 *Blackstone's Commentaries on the Laws of England* (first published 1765-1769), vol 4, p.24.

41 Charleton, Bolger & McDermott, *Criminal Law*, (Bloomsbury 1999), para 18.23.

42 Ormerod and Laird, *Smith and Hogan's Criminal Law*, 14th ed (Oxford University Press, 2015) p. 157, (n. 313), quoting *Cooper v Simmons* (1862) 7 H & N 707 at 717.

43 *Ibid.* p.381.

44 *Ibid.*

“reasonable steps” which must be established for the purpose of raising a “due diligence” defence.

In *The People (DPP) v Whelan and McAteer*, the defendants (charged with being involved in an unlawful loan to purchase shares in a company contrary to section 60 of the *Companies Act 1963*) argued that they had obtained professional legal advice to the effect that the particular transaction was not unlawful, and had been advised by the Financial Regulator that it was comfortable with the legality of the transaction.<sup>45</sup> The defendants argued that this amounted to taking “reasonable steps” sufficient to rebut the presumption in section 383(2) of the *Companies Act 1963*<sup>46</sup> that the defendants had permitted the default by the company, in this instance the default being the provision of an unlawful loan.

The prosecution argued that ignorance of the law is not a defence, and that what the accused believed regarding what was lawful was not relevant. It was further argued that the offence did not contain a requirement to prove the accused’s knowledge as to the lawfulness of their actions. The prosecution argued that, were the court to accept an argument that the erroneous advice gave rise to something akin to a “due diligence” defence, this would have far reaching implications which would apply to the whole of the Companies Acts.<sup>47</sup>

The defendants argued that it would not be appropriate for the court to find that the legal advice was irrelevant, as the possibility of being found guilty and sentenced to 5 years in prison, where there was no criminal intent, was contrary to the principles of justice. It was also argued that it was a fact that legal advice had been sought for the purpose of trying to minimise or prevent a breach of the 1963 Act.

The trial judge (Judge Nolan) held that it was a fundamental principle that ignorance of the law was not a defence. He also found that the mental element of the offence related to knowledge of facts, not of law. He held that “if I were to accept that there is such a thing as a good faith defence, I would be radically departing from the norms of Irish criminal law.”<sup>48</sup>

9.37 Thus in the *Whelan and McAteer case* it was found that the relevant “officer in default” provision did not provide a statutory defence of “due diligence”.<sup>49</sup>

45 *The People (DPP) v Whelan & McAteer*, Circuit Criminal Court, 10 April and 28 April 2014, *The Irish Times*, 11 April and 29 April 2014. In sentencing the defendants, the trial judge (Judge Nolan) held that it would be unjust to impose a custodial sentence as “a State agency had led them into error and illegality”.

46 Section 383 of the 1963 Act has since been replaced by section 271(2) of the *Companies Act 2014*.

47 Presumably this was due the suggestion that a “due diligence” defence be read into section 383 of the *Companies Act 1963*, as amended, which contains the provision attaching derivative liability to “officers in default”.

48 *The People (DPP) v Whelan & McAteer*, Circuit Criminal Court, 16 and 17 April 2014, *The Irish Times*, 17 and 18 April 2014.

49 This is arguably also the case in the replicate provision in the *Companies Act 2014*.

9.38 The general principle that ignorance of the law is no defence in criminal law has been “powerfully criticised”.<sup>50</sup> It has been argued that the prohibition of an ignorance of the law defence crystallised at a time when the contours of the criminal law were reasonably knowable.<sup>51</sup> However, it is arguable that this is no longer the case as the content of the criminal law is now subject to frequent change, and “whether particular conduct is subject to criminal sanctions at any particular time depends strongly on the social and political context.”<sup>52</sup> In addition, the remit of the criminal law has been expanded greatly in recent times, arguably beyond criminalising only conduct which is identifiable on its face as a “moral wrong”.<sup>53</sup> The presumption that everyone is deemed to have notice of the law, which forms the basis of the general rule, has been criticised as “outmoded and unrealistic given the volume and complexity of modern legislation”.<sup>54</sup> For example, the criminal law now contains significant numbers of offences aimed at supporting and enforcing the regulation of certain sectors.<sup>55</sup> Offences of this type can be technical in nature, potentially criminalising conduct which would only be identifiable as criminal with actual knowledge of the offence. It has been argued that an individual operating in a regulated sector, to which an offence of this nature applies, ought reasonably to have taken steps to familiarise themselves with the criminal law which applies to that sector,<sup>56</sup> but some of these offences can also be very general in their application.<sup>57</sup> The prohibition of an ignorance defence has led to harsh outcomes in relation to offences in which the offending conduct is not easily identifiable as criminal, and which can apply to the public generally.<sup>58</sup>

50 See Ormerod and Laird, *Smith and Hogan’s Criminal Law*, 14th ed (Oxford University Press, 2015) p. 156; Ashworth, “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 MLR 1.

51 Ashworth, “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 MLR 1, p. 3.

52 See McIntyre, McMullan and Ó Toghda, *Criminal Law*, (Roundhall, 2012), p.1, giving the example of the decriminalisation of consensual sexual acts between adults of the same sex. This is an example of the criminal law altering in light of changing social norms.

53 See McAuley and McCutcheon, *Criminal Liability* (Round Hall, 2000) p.570: “the *ignorantia* maxim may have taken root in the common law at a time when the criminal law was more or less corresponded with contemporary morality – in other words, when it was virtually confined to offences which were *mala in se*”.

54 McAuley and McCutcheon, *Criminal Liability* (Round Hall, 2000) p. 572.

55 Connery and Hodnett, *Regulatory Law in Ireland*, (Tottel, 2009), p.429, note that “It is a feature of regulatory law in Ireland that many breaches are criminal offences. One of the reasons for this is that Irish regulatory law is largely based on the implementation of EC Directives.”

56 See Ashworth, “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 MLR 1, p. 8. An example of this type of offence is section 34C(1) of the Central Bank Act 1997 (as inserted by section 19 of the *Markets in Financial Instruments and Miscellaneous Provisions Act 2007*), which provides that it is an offence to operate as a retail credit firm or home reversion firm without having applied to the Central Bank of Ireland for authorisation. This offence is not of general application, as it applies only to persons operating within the retail credit or home reversion sector.

57 Regulation 13(13) of the *European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (SI No.336 of 2011)* provides that it is an offence for a person to send an unsolicited marketing communication to an individual, who is not a customer, by SMS or e-mail or an unsolicited marketing communication to any individual by fax or automated calling machine unless prior consent of the individual has been obtained. This offence applies to any person, and so could be applied to a range of defendants such as companies with dedicated legal or compliance departments, who may be reasonably expected to have familiarised themselves with the rules regarding direct marketing, or could be applied to an individual sole trader without such resources.

58 *Surrey County Council v Battersby* [1965] 2 QB 194 in which the defendant was erroneously advised by a state authority that she was not required to register a child-care arrangement as a fostering arrangement under the UK *Children Act 1968*. The defendant was convicted of an offence for this failure to register. Her ignorance of the legal requirement was held not to be a defence.

- 9.39 The argument that an ignorance of the law defence would lead to the corruption of the legal profession, allowing individuals to “shop around” for a convenient legal opinion, has been criticised as “unduly cynical” and “questionable”.<sup>59</sup> It has been suggested that the policy arguments in favour of the prohibition of an ignorance of the law defence would not apply to a defence in which the ignorance or mistake is based upon “reasonable grounds”, as such a requirement would remove the risk of ignorance of the law being encouraged.<sup>60</sup>
- 9.40 The general rule that ignorance of the law is not a defence is not without exception in Ireland. The Oireachtas has provided a defence to a criminal offence which has not been brought to the notice of a defendant, in limited instances. Thus section 3(3)(b) of the *Statutory Instruments Act 1947* provides that a defendant shall have a defence to an offence provided by a statutory instrument where the prosecution does not prove that, at the date of the alleged contravention, notice of the making of the said statutory instrument had been published in *Iris Oifigiúil*, or that at the date of the alleged contravention reasonable steps had been taken for the purpose of bringing the effect of the statutory instrument to the notice of the public or of persons likely to be affected by it or of the defendant.
- 9.41 Reliance in good faith on erroneous legal advice has been found to be a good defence in other jurisdictions. In the US case *Long v State*,<sup>61</sup> the Supreme Court of Delaware held that, before engaging in the alleged offending conduct, the defendant had “made a bona fide, diligent effort, adopting a course and resorting to resources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and where he acted in good faith reliant upon the results of such effort” he had a defence. Similarly, there has been recognition in other jurisdictions that, ignorance of the law can be a defence where a defendant had no, or no reasonable opportunity to become aware of the law in question.<sup>62</sup> The defence in these cases are that the ignorance or mistake of the defendant is sufficient to remove the existence of any mental culpability (*mens rea*) on the part of the defendant.

59 O'Connor and Fairall *Criminal Defences* 3rd ed (Butterworths, 1996), p.64; Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999), p.910.

60 See Ashworth, “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 MLR 1, pp.6 and 24; O'Connor and Fairall *Criminal Defences* 3rd ed (Butterworths, 1996), p. 66.

61 (1949) 65 A 489.

62 The rule that ignorance or mistake of the law was no defence was overturned in South Africa in *S v De Blom* [1977] 3 SA 513 in which the defendant successfully defended a prosecution for contravening a regulation restricting the amount of jewellery which could be removed from the jurisdiction on the grounds that, due to her subjective ignorance of the regulation, the defendant was unaware that her actions were unlawful, and so she did not possess the requisite mental element for the crime. In *Lambert v California* 355 US 225 (1957) the US Supreme Court overturned a conviction of the defendant for failing to satisfy the obligation, as a felon, to register with the police, on the grounds that it was impossible for persons covered by the requirement to comply with it unless they knew about it, and there was no reason to assume this knowledge was widespread, or that the defendant was on notice of the requirement.

- 9.42 An alternative, but similar, defence of entrapment by estoppel has also been recognised in other jurisdictions.<sup>63</sup> This defence arises in circumstances in which a defendant has relied in good faith on erroneous advice as to law, provided by a state emanation, and such reliance resulted in the defendant being prosecuted. Unlike the ignorance of the law defences considered above, this defence is not based upon the defendant's subjective ignorance of the law, which results in a removal of a defendant's mental culpability (*mens rea*), but rather is based upon the defendant's reliance on his or her constitutional right to due process.<sup>64</sup> In *United States v Pennsylvania Industrial Chemical Corp*,<sup>65</sup> the defendant received and relied on the advice of a regulator regarding the legality of discharging industrial pollutants into rivers. The US Supreme Court held that, as a result of the erroneous advice provided by the state, the defendant did not have fair warning as to the conduct which the government intended to make criminal, and so constitutional due process requirements prevented the prosecution from proceeding.<sup>66</sup>
- 9.43 The American Law Institute's Model Penal Code allows both an ignorance of the law defence, in certain circumstances,<sup>67</sup> and specifically a reliance on erroneous official advice defence, in narrow circumstances.<sup>68</sup> It is intended that the erroneous advice defence would "induce fair results without undue risk of spurious litigation".<sup>69</sup>
- 9.44 As discussed above, the UK *Enterprise Act 2002* provides a different formulation on a "seeking legal advice" defence in relation to cartel offences. A defendant will have a defence where he or she can demonstrate that "before the making of the agreement,

63 See Connelly, "Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law", 48 U. Miami L. Rev. 627 (1994); and Stevenson, "Entrapment by Numbers", 16 U. Fla. J.L. & Pub. Pol'y 1 2005. The three leading Supreme Court cases in relation to this defence are *Raley v Ohio* 360 US 423 (1959); *Cox v Louisiana* 379 US 559 (1965); and *United States v Pennsylvania Industrial Chemical Corp* 411 US 655 (1973). Officially induced error of law was recognised in the Supreme Court of Canada in 1995 in *Jorgensen v R* [1995] 4 SCR 55. An exception to section 19 the *Canadian Criminal Code*, which provides that "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence", was recognised where a defendant shows that, after establishing he or she made an error of law, that he or she consulted an appropriate official, obtained reasonable advice and relied on that advice in committing the offending action. This can be held to be a proper basis for a stay of proceedings.

64 Article 38.1 of the Constitution of Ireland contains similar fair procedures protection: "No person shall be tried on any criminal charge save in due course of law." O'Malley, *The Criminal Process*, (Roundhall, 2009), p.31; regarding entrapment generally states that "In the United States, it is treated as a substantive defence, but in most other common law jurisdictions it provides a grounds only for granting a stay. The justification for granting a stay on grounds of entrapment, as in courts in England, Canada and elsewhere have stressed, is not that the accused is innocent or that he might not get a fair trial, but rather that the courts cannot allow the integrity of the criminal process to be compromised."

65 411 US 655 (1973).

66 *United States v Pennsylvania Industrial Chemical Corp* 411 US 655 at 647 (1973): "Thus, to the extent that the regulations deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."

67 Article 2, Section 2.04(1) of the American Law Institute's *Model Penal Code* (1985): where the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or the law provides that the state of mind established by such ignorance or mistake constitutes a defence.

68 Article 2, Section 2.04(3): where the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offence.

69 Article 2, Section 2.04 of the American Law Institute's, *Model Penal Code* (1985).

he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.”<sup>70</sup> The UK Competition and Marketing Authority, in its guidance note on cartel offence prosecutions, has noted that “[f]or the defence under section 188B(3) to succeed, an individual must show that the purpose for which he or she took steps to disclose the arrangements to a professional legal adviser was to obtain advice about them. The steps must also have been “reasonable”. The CMA takes the view that this must genuinely be an attempt to seek legal advice about the arrangement.”<sup>71</sup> There have been no reports regarding the application of this defence,<sup>72</sup> and so its operation in practice remains uncertain. However, unlike the “reliance in good faith” or “estoppels” defences considered above, this defence does not appear to require that a defendant has relied upon incorrect advice as to the state of the law, but rather only requires that the defendant has taken “reasonable steps” and made a genuine attempt to seek professional legal advice. In this way, this defence appears to be a form of “due diligence” defence, specifically aimed at ensuring that attempts are made to seek legal advice, rather than imposing a more general requirement that “all reasonable steps” are taken.

## Conclusion

- 9.45 The question of how a company officer can be found criminally liable and whether and when he or she can be protected by seeking legal or other expert advice, or advice from an official body such as a regulator, is a matter of considerable practical importance to the daily running of companies and how a director should discharge his or her duties under companies legislation. There is an argument to be made that legislation should be drafted in such a way as to make it clear whether the advice can provide a defence to an officer and if so, in what precise circumstances it may do so.
- 9.46 A person who faces potential criminal liability due to his or her actions or inactions causing the company to commit an offence - either under the “consent, connivance or neglect” provision or the “officer in default” provision - perhaps ought to be able to raise a defence to such liability on the grounds that they acted with all reasonable care and diligence which could be expected of a reasonable person in their shoes, in order to not attract the criminal liability in question. A “due diligence” defence allows a person to demonstrate that they have acted with due care and taken positive measures to prevent the offence occurring.

<sup>70</sup> Section 188B of the UK *Enterprise Act 2002*, as inserted by section 47 of the *Enterprise and Regulatory Reform Act 2013*.

<sup>71</sup> UK Competition and Marketing Authority *Cartel Offence Prosecution Guidance* (2014), issued pursuant to section 190A of the *Enterprise Act 2002 (UK)*.

<sup>72</sup> This defence is only available in the prosecution of offences which occurred after 1 April 2014,

- 9.47 However it is also arguable, for the reasons discussed above, that there should not necessarily be a “due diligence” defence available to all criminal offences and that there are grounds for suggesting that some offences should, on public policy grounds, remain absolute in nature. The Commission seeks views on these questions.

#### QUESTION 9

- 9(a) Do you think that corporate criminal offences should contain a general statutory defence of “due diligence” (strict liability offences)?
- 9(b) Do you think that it is appropriate that certain offences which do not require proof of intention or knowledge should not contain such a defence (absolute liability offences)?
- 9(c) Do you think that a defence of “due diligence” should only be available to an “officer in default” or to a person who is prosecuted for an offence on a “consent, connivance, neglect or wilful neglect” where the corporate offence is one of strict liability, or should that defence be available in all cases?
- 9(d) How, do you think, should “due diligence” and “reasonable precautions” be defined?
- 9(e) Do you think that corporate criminal offences should contain a statutory duress defence, which applies where a corporate body has no opportunity to avoid the offending conduct despite having taken all available steps to so avoid? If so, how do you think this defence should be formulated?
- 9(f) Do you think that a subordinate corporate officer, or employee, should have access to a statutory duress or “superior orders” defence? If yes, in what circumstances, do you think, should such a defence be available? How do you think this defence should be formulated?
- 9(g) Do you think that obtaining professional advice by a director, officer or corporate body should be considered in determining whether “reasonable steps” have been put in place to prevent an offence for the purpose of raising a “due diligence” defence?
- 9(h) Do you think that corporate criminal offences should provide for a statutory defence of reliance, in good faith, upon a reasonable held mistake or ignorance as to the law? If yes, in what circumstances, do you think, should such a defence be available? How do you think this offence should be formulated?
- 9(i) Do you think that corporate criminal offences should provide for a statutory defence of “due diligence” in seeking legal advice? If yes, in what circumstances, do you think, should such a defence be available? How do you think this offence should be formulated?



## ISSUE 10

# ARE IRISH FRAUD OFFENCES ADEQUATE?

## Introduction

- 10.01 In law, the term “defraud” or “fraudulently” means dishonestly to prejudice or risk prejudicing another’s right, in the knowledge that you have no right to do so.<sup>1</sup> A number of common law and statutory offences deal with fraud-related activities whether committed by an individual or a corporate body. These include the common law offence of conspiracy to defraud, and the fraud-based offences in the *Criminal Justice (Theft and Fraud Offences) Act 2001*, including obtaining services by deception,<sup>2</sup> unlawful use of a computer,<sup>3</sup> false accounting,<sup>4</sup> forgery<sup>5</sup> and using a false instrument.<sup>6</sup> As discussed in Issue 7, above, the 2001 Act provides for the derivative criminal liability of directors, managers and similar officers of a corporate body for offences committed by the corporate body under the 2001 Act.<sup>7</sup> In addition, in the specific context of companies, the *Companies Act 2014* retained the offence of fraudulent trading.<sup>8</sup>
- 10.02 Despite the broad range of fraudulent conduct covered by these offences, there is no substantive offence of simple fraud in Irish law.<sup>9</sup> The Office of the Director of Corporate Enforcement, in its *Submission on White Collar Crime*, questioned whether the existing range of fraud-based offences is sufficient and suggested extending the scope of the existing fraudulent trading offence and enacting new offences, comparable to those in US law, of mail fraud and wire fraud.<sup>10</sup>

1 See Horan *Corporate Crime* (Bloomsbury Professional 2011) at 982, citing *Welham v DPP*[1961] AC 103, *R v Sinclair*[1968] 1 WLR 1246 and *Wai Yu-Tsang v R*(1976) 64 Cr App R 29.

2 Section 7(1) of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

3 Section 9 (1) of the 2001 Act.

4 Section 10(1) of the 2001 Act.

5 Section 25 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

6 Section 26 of the 2001 Act.

7 Section 58 of the 2001 Act, discussed in Issue 7, above.

8 Section 722 of the *Companies Act 2014* which replaced the comparable offence of fraudulent trading under section 297 of the *Companies Act 1963* as amended.

9 Law Reform Commission, *Report on Inchoate Offences (LRC 99-2010)*, p. 102, n. 95; McIntyre, McMullan and Ó Toghda, *Criminal Law* (Roundhall, 2012), p. 197.

10 Available at: <http://www.odce.ie/Publications/CorporateStatutory/Others/TabId/219/ArtMid/519/ArticleID/525/Submission-on-White-Collar-Crime.aspx>.

- 10.03 Some of the activities that took place in Irish financial institutions in the lead up to the financial crisis may comprise offences under current law.<sup>11</sup>
- 10.04 The Commission asks whether the existing fraud offences are sufficient to deal with fraudulent behaviour, or whether further fraud based offences, such as mail or wire fraud, should be introduced into Irish law. In addition, the Commission asks whether the existing range of fraud offences should be augmented by placing the common law offence of conspiracy to defraud on a statutory footing, and whether a definition of intention to defraud should be put on a statutory footing.

### **The Main Fraud and Dishonesty Offences applicable to Corporate Offences**

- 10.05 Of the many fraud and dishonesty based offences existing in Irish Law, the Commission has identified five offences that appear to cover the widest range of fraudulent or wrongful conduct in Irish law. These are: the common law offence of conspiracy to defraud; making a gain or causing a loss by deception (section 6 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*); obtaining services by deception (section 7 of the 2001 Act); unlawful use of a computer (section 9 of the 2001 Act); and fraudulent trading (section 722 of the *Companies Act 2014*). It should be noted that the range of conduct covered by these offences is expanded further when account is taken of the inchoate versions of these offences, that is, incitement to commit any of them, conspiracy to commit them or attempt to commit them.<sup>12</sup>

### **Conspiracy to Defraud**

- 10.06 Conspiracy to defraud is a common law offence.

The offence of conspiracy to defraud is committed when two or more persons agree

- (a) to deprive, by dishonesty, a person of something that belongs to him or her or to which he or she is, would be, or might be, entitled, or
- (b) by dishonesty to injure some proprietary or other right of that person.<sup>13</sup>

11 Horan, "Irish white-collar criminals? An examination of potential offences at law by bankers in default", (2009) 4 Commercial Law Practitioner 71, argues that the manipulation of balance sheets to induce investors to purchase shares in the false belief that the company is financially stable could come within the scope of section 6 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*. See also Horan, "Bank Job" (2009) 103 Gazette Law Society of Ireland 20, at 22; Horan, *Corporate Crime* (Bloomsbury Professional, 2011); and Hancock, *The Irish Times*, 18 December 2013.

12 See generally Law Reform Commission, *Report on Inchoate Offences (LRC 99-2010)*.

13 This is the definition set out by the UK House of Lords in *Scott v Metropolitan Police Commissioner* [1975] AC 819, and endorsed by the Supreme Court in *Attorney General v Oldridge* [2000] 4 IR 593.

- 10.07 This is a very broadly applicable offence.<sup>14</sup> The intention or knowledge (*mens rea*) required for this offence appears to be less than proof of intent to defraud, but rather, proof of some kind of dishonesty.<sup>15</sup> It must also be established that the conspirators dishonestly agreed to bring about a situation where the victim's economic interests will be put at risk.<sup>16</sup> The Commission has previously noted that the following examples could constitute a conspiracy to defraud:

For example, if a person agrees with another to make a false insurance claim he or she is likely to be committing conspiracy to defraud under the definition given above; and may also be engaged in a conspiracy to commit one or more of the crimes in the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

There is, however, a range of conduct that satisfies the definition of conspiracy to defraud but which involves non-criminal "frauds." Plausible examples include: trading while insolvent before this was criminalised under company law legislation; performing a "nixer" at work; or adversely possessing another's land with a view to obtaining a freehold. In each case, for conspiracy to defraud, as with all conspiracies, the behaviour needs to be agreed to be pursued by two or more and need not actually be performed.<sup>17</sup>

- 10.08 The offence is sufficiently broad in scope that it can result in the criminalisation of a dishonest act which, except for the agreement between two or more people to do it, would not otherwise attract criminal liability.<sup>18</sup> The offence punishes the agreement to act dishonestly rather than the dishonest act itself.<sup>19</sup> It is, in part, for this reason that it has attracted the criticism of being vague and uncertain, and offending the legality principle,<sup>20</sup> and having the potential to punish behaviour which might not warrant criminalisation. The generality of the offence has proved to be useful in prosecuting complex cases.<sup>21</sup> In the UK there has been criticism of the corresponding

14 McAuley and McCutcheon, *Criminal Liability* (Roundhall Sweet & Maxwell, 2000), p. 429, note that while the offence is "undoubtedly hydra-headed, its incriminating features have been clearly and consistently delineated by the courts for at least two centuries." See also *Attorney General v Oldridge* [2000] 1 IR 593, at 600, discussed below.

15 In *Scott v Metropolitan Police Commissioner* [1975] AC 819, at 840, the UK House of Lords stated: "Where the intended victim of a 'conspiracy to defraud' is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough".

16 See *Wai Yu-tsang v The Queen* [1992] 1 AC 269 at 280: "For this purpose it is enough for example that... the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk." See also *R v H* [2015] EWCA Crim 46.

17 Law Reform Commission, *Report on Inchoate Offences (LRC 99-2010)*, pp.101-102.

18 *Ibid* p.106, citing the example that the offence is capable of encompassing sharp practice in business. If traders agree with each other not to reveal shortcomings of the products they sell, such sharp practice might traditionally have been met with the response "buyer beware" although this is now more comprehensively addressed by legislation such as the *Consumer Protection Act 2007*. In principle, such activity could also constitute conspiracy to defraud.

19 McAuley and McCutcheon, *Criminal Liability* (Roundhall Sweet & Maxwell, 2000), p. 430.

20 *Report on Inchoate Offences (LRC 99-2010)* p.106 where the Commission concluded that "the vice of conspiracy to defraud is also its virtue" as its vagueness is what allows it the flexibility to catch novel harmful conduct.

21 *Ibid*, at paras 3.106-3.107. The Commission also acknowledged that the constitutionality of the common law offence of conspiracy to defraud was endorsed by the Supreme Court in *Attorney General v Oldridge* [2000] 4 IR 593.

common law UK offence, and pressure for its abolition,<sup>22</sup> based on the argument that it is “so wide that it offers little guidance on the difference between fraudulent and lawful conduct”.<sup>23</sup> Despite this, the Commission recommended in a Report in 2010 that it should be retained because of a net loss in terms of criminal conduct covered as criminal.<sup>24</sup> The risk that its abolition would result in a *lacuna* in the law has also been a factor in arguing against its abolition under English law.<sup>25</sup>

### **Section 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001 – Making Gain or Causing Loss by Deception.**

Section 6(1) of the *Criminal Justice (Theft and Fraud Offences) Act 2001* provides that a person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence.<sup>26</sup>

- 10.09 The offending conduct (*actus rea*) of this offence is that a person was induced, by means of a deception, to do, or refrain from doing an act. The intention or knowledge requirement (*mens rea*) of the offence is that the perpetrator acted dishonestly, and intended to make a gain for himself or herself, or another, or caused a loss to another.<sup>27</sup>
- 10.10 “Deception” is defined in the 2001 Act as where a person: (a) creates or reinforces a false impression, including a false impression as to law, value or intention or other state of mind; (b) prevents another person from acquiring information which would affect that person’s judgement of a transaction; or (c) fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship.<sup>28</sup> This definition covers a wide area of circumstances where a perpetrator is aware of and acts on the mistake or misunderstanding of another.
- 10.11 “Dishonestly” is defined by the 2001 Act to mean acting without a claim of right made in good faith.<sup>29</sup>

22 Ormerod and Laird, *Smith and Hogan’s Criminal Law*, 14th ed (Oxford University Press, 2015), p.512.

23 Law Commission of England and Wales, *Report on Fraud* (2002), para. 1.6.

24 *Report on Inchoate Offences (LRC 99-2010)*, p. 106

25 Ormerod and Laird, *Smith and Hogan’s Criminal Law*, 14th ed (Oxford University Press, 2015), p.512.

26 Section 6(2) of the 2001 Act provides that a person found guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

27 Section 2(3) of the 2001 Act provides that: (a) “gain” and “loss” are to be construed as extending only to gain or loss in money or other property, whether any such gain or loss is temporary or permanent; (b) “gain” includes a gain by keeping what one has, as well as a gain by getting what one has not, and (c) “loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.

28 Section 2(2) of the 2001 Act.

29 Section 2(1) of the 2001 Act.

- 10.12 The types of activities which arguably come within the scope to this offence are vast<sup>30</sup> and it has been described as a “catch all” offence.<sup>31</sup>

### **Section 7 of the Criminal Justice (Theft and Fraud Offences) Act 2001 – Obtaining Services by Deception.**

Section 7 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* provides that a person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception obtains services from another is guilty of an offence.<sup>32</sup>

- 10.13 The intention or knowledge requirement (*mens rea*) of the offence under section 7 of the 2001 Act is the same as that in the offence of making gain or causing loss by deception under section 6 of the 2001 Act. The offending conduct (*actus rea*) under the section 7 offence differs in its objective to that of section 6.<sup>33</sup> The section 7 offence criminalises a person, by deception, obtaining a service from another. The perpetrator will be deemed to have obtained the service where he or she obtains services from another where the other is induced to confer a benefit on some person by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.<sup>34</sup>
- 10.14 Given that the mental element is the same for both the section 7 offence and the section 6 offence, when viewed together they can be seen to cover an extremely wide array of fraudulent conduct.<sup>35</sup>

30 Travers, “Mail and Wire Fraud: The United States Prosecutors’ ‘True Love’ - Should Equivalent Offences be Enacted in Ireland Part 2” (2014) *Irish Criminal Law Journal* 73, at p.75, identifies the many forms of conduct that have been prosecuted under section 6 of the 2001 Act: aggressive and misleading commercial practices, falsifying prices displayed on goods in order to obtain them for less than their retail value, fraudulently obtaining a bank loan, purporting to operate a fictitious business in order to obtain money, fraudulently obtaining credit, a solicitor transferring the homes of his clients into his own name and using them to obtain property loans. Horan *Corporate Crime* (Bloomsbury Professional 2011), p.507, argues that obtaining investment funds on foot of a personal guarantee without disclosing that numerous other personal guarantees have been issued by the same guarantor, or by falsely representing that no other personal guarantees had been issued by the same guarantor, could constitute obtaining a gain or causing a loss by deception, because if the guarantee is unenforceable for insufficient funds, the consent obtained for the investment of funds was secured by deception. Similarly, drawing down multiple mortgages on one property without disclosing to the bank the existence of other loans could arguably constitute obtaining a gain or causing a loss by deception, as the bank’s consent to the release of the funds was vitiated by the failure of the mortgagee to disclose the existence of the other mortgages.

31 Wade, “Stolen Moments”, *Gazette*, Law Society of Ireland, October 2002, p 12.

32 Section 7(4) of the 2001 Act provides that a person guilty of the offence is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

33 McIntyre, McMullan and Ó Toghda, *Criminal Law*, (Roundhall, 2012), p. 199.

34 Section 7(2) of the 2001 Act. Section 7(3) extends this definition by providing: “a person obtains services where the other is induced to make a loan, or to cause or permit a loan to be made, on the understanding that any payment (whether by way of interest or otherwise) will be or has been made in respect of the loan.”

35 Criminal Law Codification Advisory Committee, *Draft Criminal Code and Commentary* (2010), available at [www.criminalcode.ie](http://www.criminalcode.ie), suggested that the offences in sections 6 and 7 of the 2001 Act should be consolidated into a single offence of “deceiving with intent”.

### **Section 9 of the Criminal Justice (Theft and Fraud Offences) Act 2001 – Unlawful use of a computer.**

*Section 9 of the Criminal Justice (Theft and Fraud Offences) Act 2001* provides that a person who dishonestly, whether within or outside the State, operates or causes to be operated a computer within the State with the intention of making a gain for himself or herself or another, or of causing loss to another, is guilty of an offence.<sup>36</sup>

- 10.15 The section 9 offence provides for a specific offence of fraud by using a computer. One of the policy grounds for the enactment of this offence was to criminalise dishonest conduct involving computers as a serious offence.<sup>37</sup>
- 10.16 The offending conduct (*actus rea*) of this offence is that the perpetrator dishonestly operates or causes to be operated a computer within the State, whether he or she is within or outside the State.<sup>38</sup> Again the mental element of this offence is identical to that in making gain or causing loss by deception under section 6, and obtaining services by deception under section 7.<sup>39</sup>
- 10.17 As the mental requirement of this offence matches those under sections 6 and 7 of the 2001 Act, the section 9 offence can be seen as widening the scope of the criminalisation of dishonest and intentional conduct even further, arguably to any such conduct which results in a computer in Ireland being caused or permitted to be used.

### **Fraudulent Trading under Section 722 of the Companies Act 2014**

- 10.18 The fraudulent trading offence in section 722 of the *Companies Act 2014* broadly reproduces the fraudulent trading offence in the *Companies Acts 1963 to 2013*, which the 2014 Act replaced.<sup>40</sup>

Section 722 of the 2014 Act provides that if any person is knowingly a party to the carrying on of the business of a company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the person shall be guilty of a category 1 offence.

<sup>36</sup> Section 9(2) of the 2001 Act provides that a person guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both

<sup>37</sup> McIntyre, McMullan and Ó Toghda, *Criminal Law*, (Roundhall, 2012), p. 200, noted that section 5 of *the Criminal Damage Act 1991*, which provided for a summary offence of computer hacking, was found to be inadequate in fully addressing other forms of dishonesty involving computers.

<sup>38</sup> On the breadth of the conduct covered, see McIntyre, "Computer Crime in Ireland: A critical assessment of the substantive law", 15 *Irish Criminal Law Journal* 11.

<sup>39</sup> *Ibid.*

<sup>40</sup> Section 722 of the 2014 Act replaced section 297 of *the Companies Act 1963*, as amended. The only differences are that the 2014 Act decouples the criminal offence of reckless trading from civil liability, both of which were previously provided for under in section 297 of the 1963 Act, and section 722 of the 2014 Act identifies the offence as a Category 1 offence.

- 10.19 It is arguable that conduct as diverse as falsifying accounts, manipulating balance sheets and granting undisclosed loans on non-commercial terms to bank customers for the purchase of shares could fall under this provision.<sup>41</sup>
- 10.20 The application of this offence is qualified by the following requirements:
- The accused must have some knowledge of the fraudulent acts;<sup>42</sup>
  - The fraudulent acts must be in the context of the “carrying on of the business of a company”, though not specifically in the context of a trade;<sup>43</sup>
  - The accused must have had intent to defraud.<sup>44</sup>
- 10.21 Though the intention requirement will be clear in some straightforward cases,<sup>45</sup> it has been argued that, because the 2014 Act (like the 1963 Act) does not contain a definition of “intent to defraud”, inconsistencies have emerged in the jurisprudence and it is therefore difficult to establish the necessary intention or knowledge requirement for the offence.<sup>46</sup>
- 10.22 Causing a company to trade while insolvent does not necessarily amount to fraudulent trading.<sup>47</sup> However, where a company carries on business that incurred debts and there was, to the knowledge of the directors, no reasonable prospect of the creditors being paid, an intention to defraud can generally be inferred.<sup>48</sup>

<sup>41</sup> Horan, “Irish white-collar criminals? An examination of potential offences at law by bankers in default” (2009) 4 Commercial Law Practitioner 71, 75.

<sup>42</sup> See Horan *Corporate Crime* (Bloomsbury Professional 2011) at 981. In *Bank of India v Morris* [2004] BCC 404 it was held that in the comparable British offence a defendant is not required to have known every detail of the fraud, but must have some knowledge of the fraudulent intent. In *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 it was held that “blind eye knowledge” where an obvious fraud is being ignored can suffice.

<sup>43</sup> See *Re Hunting Lodges Ltd (In Liquidation)* [1985] ILRM 75 and *R v Philippou* (1989) 89 Cr App R 290 to the effect that the relevant “business of the company” is not required to be the sole or even the dominant purpose of the company.

<sup>44</sup> The knowledge and intention requirements appear to prevent the application of the offence to defendants who are ignorant or objectively reckless as to the acts involved, though it is arguable that blameworthy conduct committed ignorantly or recklessly would be more appropriately prosecuted under an offence of reckless trading. This is considered under Issue 10, below.

<sup>45</sup> Ahern, *Directors’ Duties* (Round Hall 2009) at 467 comments that this is demonstrated by: *Re Aluminium Fabricators Ltd* High Court 13 May 1983, *Re Kelly’s Carpetdrome* High Court 1 July 1983 and *Re Hunting Lodges* [1985] ILRM 75.

<sup>46</sup> Ahern, *Directors’ Duties* (Round Hall 2009) at 459 comments that intent to defraud will in some instances be fairly clear but that this is not generally the case and, more often, the requirement to prove intent to defraud will not easily be established.

<sup>47</sup> This is reflected in the English decision in *Re White & Osmond (Parkstone) Ltd* High Court 30 June 1960 in which Buckley J stated: “[i]n my judgment, there is nothing wrong with the fact that the directors incur credit at a time when, to their knowledge, the company is not able to meet all its liabilities as they fall due. What is manifestly wrong is if the directors allow a company to incur credit at a time when the business is being carried on in such circumstances that it is clear that the company will never be able to satisfy its creditors. However, there is nothing to say that directors who genuinely believe that the clouds will roll away and that the sunshine of prosperity will shine upon them again and disperse the fog of their depression are not entitled to incur credit to help them get over the bad time.”

<sup>48</sup> *Re Wm C Leitch Bros Ltd* [1932] Ch 71, 77, which concerned section 275(1) of the English *Companies Act 1929*, and which permitted a court to impose personal liability on directors of a company where it appeared that the business of the company was being carried on “with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose.”

- 10.23 For a person to be liable for fraud he or she must be proved to have been engaging in dishonesty, a concept that is associated with fraud.<sup>49</sup> In proposing reform of the law of theft and fraud, the Commission recommended that dishonesty be defined by reference to the absence of a claim of legal right,<sup>50</sup> and this was implemented in the *Criminal Justice (Theft and Fraud Offences) Act 2001* which defines “dishonestly” as meaning “without a claim of right made in good faith”.<sup>51</sup> This definition appears to be subjective,<sup>52</sup> though whether or not it applies in the context of criminal fraudulent trading under the *Companies Act 2014* is not clear.
- 10.24 The Commission seeks views on whether it necessary to define “intent to defraud” for the purposes of section 722 of the *Companies Act 2014*.

### Inchoate Offences

- 10.25 The common law provides that for every criminal offence an ancillary, inchoate, crime of attempting that offence, conspiring to commit it, and inciting it, also exist.<sup>53</sup> The ability to attach an inchoate offence to a substantive offence expands the realm conduct which is criminally prohibited, allowing for a failed or uncompleted substantive offence to be made subject to criminal sanction. The inchoate offences of attempt, conspiracy and incitement apply generally to all criminal offences including the fraud based offences considered above. Therefore, in order to understand the full range of fraudulent conduct that is subject to criminal sanction, an analysis of the inchoate offences is required.

### Attempt

- 10.26 It is desirable on policy grounds to criminalise not only criminal acts, but also the attempt of such acts. The rationale behind the inchoate offence of attempt is that the moral culpability of someone attempting to commit a crime, and failing, can be on par with that of a successful perpetrator. It is also in the interest of society to deter the attempted commission of crimes whether the attempt proves successful or not.<sup>54</sup> The application of the offence of attempt can allow for the intervention of the criminal law in the relevant conduct, prior to the harmful outcomes of substantive offence occurring.
- 10.27 The offending conduct requirement of attempt occurs when an accused does an act that is more than merely preparatory, and is proximate to the relevant substantive

<sup>49</sup> Keay, “Fraudulent Trading The Intent to Defraud Element”, 35 *Comm L World Rev* 121, at p.124. In England the test for dishonesty requires consideration of two factors; whether the act was dishonest by the standards of reasonable and honest people, and whether the defendant appreciated that his or her actions were dishonest by those standards: see *R v Ghosh* [1982] QB 1053. This test has been criticised by the Commission because it *inter alia* “assume[s] that ordinary decent people will readily agree on standards”: see Law Reform Commission, *Report on the Law Relating to Dishonesty (LRC 43-1992)* at 141. The Ghosh test has come in for considerable criticism, and has also been criticised by the Law Commission of England and Wales: see *Legislating the Criminal Code: Fraud and Deception* (Consultation Paper No 155, 1999) at 53-55.

<sup>50</sup> Law Reform Commission, *Report on the Law Relating to Dishonesty (LRC 43-1992)* at 353.

<sup>51</sup> Section 2(1) of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

<sup>52</sup> Horan, *Corporate Crime*, (Bloomsbury Professional 2011), at 983.

<sup>53</sup> Law Reform Commission, *Report on Inchoate Offences (LRC 99-2010)*.

<sup>54</sup> *Ibid* p.11.

offence.<sup>55</sup> For the proximity requirement to be satisfied there must be an act that “must go beyond mere preparation, and must be a direct movement towards the commission after the preparations have been made; that some such act is required, and if it only remotely leads to the commission of the offence and is not immediately connected therewith, it cannot be considered as an attempt to commit an offence”.<sup>56</sup>

- 10.28 The mental culpability requirement of attempt is a specific intent to commit a particular crime. A desire to commit the crime without intent will not suffice.<sup>57</sup> The criminal attempt may involve an objectively harmless act that is rendered criminal by a guilty mind.<sup>58</sup>
- 10.29 The expansion of the types conduct covered by the criminal law, due to the criminalisation of an attempted fraud offence, can be seen in *The People (Attorney General) v Sullivan*.<sup>59</sup>

The defendant was prosecuted for the common law offence of attempting to obtain money by false pretences with intent to defraud. The defendant was a midwife who was contracted to receive a specified salary in return for attending 25 births in a year. In order to receive her salary the defendant was required to complete the 25 attendances. On top of this salary, she was entitled to receive additional pay for every additional birth, in excess of 25 births, attended in each year. It was found that the defendant had submitted forms related to fictitious births. No evidence was submitted, however, as to whether the defendant had reached the required 25 birth attendances which would result in her making a gain from the fictitious claims. The question which came before the court was whether a criminal attempt or merely preparatory steps for the offence had been committed. The Supreme Court held that the defendant had indeed committed a criminal attempt, as each fictitious claim was “sufficiently proximate” to the substantive offence.

- 10.30 It is clear from *Sullivan* that the offence of attempt extends the conduct covered by fraud based offences beyond merely the commission of the offences, and also covers acts done with the intent to commit the relevant fraud offence, when this act is sufficiently proximate to the offensive conduct, whether or not the substantive offence occurs.

<sup>55</sup> *The People (Attorney General) v Sullivan* [1964] IR 169.

<sup>56</sup> *The People (Attorney General) v Thornton* [1952] IR 91, at 93.

<sup>57</sup> *Ibid.*

<sup>58</sup> Law Reform Commission, *Report on Inchoate Offences, (LRC 99-2010)*, pp. 52-3. The Commission has criticised this approach because the requirement that intention to commit the substantive offence be proved, even if the *mens rea* of the substantive offence is something short of intention (such as recklessness), can result in an under-criminalisation of conduct that may justify criminalisation. The Commission recommended that the requisite *mens rea* for an attempt should track that of the substantive offence.

<sup>59</sup> [1964] IR 169.

## Conspiracy

- 10.31 Aside from the substantive common law offence of conspiracy to defraud, discussed above, there are two forms of the inchoate offence of conspiracy under Irish law that can apply to the other fraud offences considered above. *Section 71* of the *Criminal Justice Act 2006* provides that it is an offence to conspire with one or more persons to do an act that constitutes a serious offence (defined as an offence for which a person may be punished by imprisonment for a term of 4 years or more)<sup>60</sup> irrespective of whether such act actually takes place or not. In addition, common law provides a more broadly applicable inchoate offence of conspiracy, which is the making an agreement to do an unlawful act, or to do a lawful act by unlawful means.<sup>61</sup> The statutory conspiracy offence in the 2006 Act does not replace the common law offence, but rather places a specific application of it (that is, an agreement to commit a serious offence) on a statutory footing.<sup>62</sup> The common law offence is much broader in its application because it applies not just to agreements to commit a serious crime, but also an agreement to commit other crimes, and civil wrongs,<sup>63</sup> such as a tortious wrong.<sup>64</sup> “Conspiracy” is not defined in the 2006 Act. It appears that the common law principles regarding conspiracy should apply to the statutory offence also.<sup>65</sup>
- 10.32 Other than fraudulent trading under the *Companies Act 2014*, each of the other fraud offences considered above can fall within the definition of “serious offence” when tried on indictment. Therefore, one or other of the two inchoate conspiracy offences can be applied to each of the considered offences.<sup>66</sup>
- 10.33 The offending conduct requirement of conspiracy is that at least two, or more, people make an agreement to do an act that constitutes a serious offence, or to do an unlawful act, or to do a lawful act by unlawful means. A mental requirement of conspiracy was not outlined in the 2006 Act, and the issue has not been reported in case law in this jurisdiction. The Commission has formed a number of conclusions regarding this requirement, drawn from cases concerning the common law offence:<sup>67</sup>
- (a) Intention regarding the act of agreement is required;<sup>68</sup>
  - (b) Intention regarding the goal or object of the conspiratorial agreement is required;<sup>69</sup>

<sup>60</sup> Section 70(1) of the 2006 Act.

<sup>61</sup> *R v Jones* (1832) 110 ER 485, 487.

<sup>62</sup> Law Reform Commission, *Report on Inchoate Offences, (LRC 99-2010)* p. 72.

<sup>63</sup> *Ibid* p. 71.

<sup>64</sup> *R v Parnell* (1881) 14 Cox CC 508.

<sup>65</sup> McIntyre, McMullan and Ó Toghda, *Criminal Law*, (Roundhall, 2012), p. 339.

<sup>66</sup> As noted above, conspiracy to defraud is a common law offence. As such, if tried on indictment, it is not confined by the same express limits in length of sentence as are prescribed in relation to statutory offences. Common law offences are, however, subject to the jurisdictional limits of the relevant sentencing court, certain constitutional limits, and general sentencing principles which in turn are developed within constitutional restraints: see Law Reform Commission, *Report on Inchoate Offences, (LRC 99-2010)*, p. 14.

<sup>67</sup> *Ibid*, pp. 85-6.

<sup>68</sup> *R v O'Brien* [1954] SCR 666.

<sup>69</sup> *R v Thomson* (1966) 50 Cr App R 1.

- (c) Knowledge of the circumstances that render the goal of an agreement unlawful is needed;<sup>70</sup>
  - (d) Knowledge may not, however, be needed in respect of all the details, or the precise details, of the conspiratorial plan;<sup>71</sup>
  - (e) Knowledge that what is agreed to be done is unlawful or that merely agreeing to do something unlawful is criminal in itself is not required.
- 10.34 The effect that the existence of the two inchoate offences of conspiracy have in relation to the fraud offences outlined above is to extend the conduct covered by these crimes to include the preparatory conduct of agreeing to commit the relevant offence with another.

### Incitement

- 10.35 Of the three inchoate offences considered, incitement is the most remote from the actual commission of the substantive offence. The offence of incitement relates to a person (the incitor) getting another (the incitee), by way of command, encouragement or request,<sup>72</sup> to commit a criminal offence.
- 10.36 The offending conduct of incitement is the act of inciting another to commit the crime. This incitement can be by way of "suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity", or otherwise.<sup>73</sup> The inciting act can be either express or implicit,<sup>74</sup> and delivered directly or indirectly.<sup>75</sup> The inciting communication must reach the intended incitee,<sup>76</sup> though this intended incitee can be the world at large.<sup>77</sup> The act of incitement does not have to result in the commission of the intended conduct,<sup>78</sup> or affecting actual influence on the incitee.<sup>79</sup>
- 10.37 The mental requirement of the offence of incitement is multi-tiered. Firstly, the perpetrator must have intended the act of incitement, recklessness as to the act will not suffice.<sup>80</sup> The second limb of the mental requirement is that the incitor intends the commission of the substantive offence. In meeting this requirement it must be shown that the incitor intends each constituent element of the substantive offence.<sup>81</sup>

<sup>70</sup> *Churchill v Walton* [1967] 2 AC 224.

<sup>71</sup> *R v Porter* [1980] NI 18.

<sup>72</sup> Law Reform Commission, *Report on Inchoate Offences* (LRC 99-2010), p. 114, citing the American Law Institute's Model Penal Code.

<sup>73</sup> Holmes JA in *S v Mkosiyana* (1966) 4 SA 655, 658.

<sup>74</sup> *Race Relations Board v Applin* [1973] QB 815.

<sup>75</sup> *R v Jones* [2007] EWCA Crim 1118; [2008] 1 QB 460.

<sup>76</sup> *R v Banks* (1873) 12 Cox CC 393.

<sup>77</sup> *R v Most* (1881) 7 Q.B.D. 244.

<sup>78</sup> *The People (DPP) v Murtagh* [1990] 1 IR 339, 342.

<sup>79</sup> *DPP v Armstrong* [2000] Crim LR 379.

<sup>80</sup> Law Reform Commission, *Report on Inchoate Offences* (LRC 99-2010), pp. 118-9.

<sup>81</sup> *R v Most* (1881) 7 Q.B.D. 244.

<sup>82</sup> Thirdly, the incitor must intend that the substantive offence will be committed by the intended incitee.

- 10.38 As with the other two inchoate offences considered, the offence of incitement can be applied in connection with the fraud offences analysed in this Issue. The effect of this is, again, to expand the conduct which is covered by the criminal law in relation to fraudulent conduct.

### US Mail Fraud and Wire Fraud<sup>83</sup>

- 10.39 The US offences of mail fraud and wire fraud have been much lauded by prosecutors for their broad applicability to a wide variety of fraudulent conduct.<sup>84</sup>

- 10.40 The US Federal criminal offence of mail fraud was first enacted in 1872 and wire fraud, which is similarly defined,<sup>85</sup> was introduced in 1952. One of the differences between the statutory definitions of mail and wire fraud is that, in place of the requirement for a mailing in the executing of the fraud in the case of mail fraud, wire fraud requires that something be transmitted or caused to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce.<sup>86</sup> Several cases have confirmed that wire fraud can apply to transmissions by computers. These can meet the requirements of the offence even though the relevant statutes were enacted prior to the proliferation of computers and computing technology as a facilitator of global communication.<sup>87</sup>

- 10.41 The courts have generally considered the two statutes together, with court decisions relating to one of the statutes being generally applicable to the other.<sup>88</sup>

<sup>82</sup> As with the use of intention as the mental culpability element in the offence of attempt, the Commission has criticised this approach in the *Report on Inchoate Offences (LRC 99-2010)*, because it can result in an under-criminalisation of conduct that may justify criminalisation. Again, the Commission recommended that the requisite *mens rea* for an attempt should track that of the substantive offence.

<sup>83</sup> Rakoff, "The Federal Mail Fraud Statute (Part 1)", 18 Duq. L. Rev. 771, 771-72 (1980): "To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger our Cuisinart-our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling' but we always come home to the virtues of 18 U.S.C. 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it..."

<sup>84</sup> *Ibid.* See also Rosenblatt and Michaels, "Mail and Wire Fraud", 34 Am Crim L. Rev 771; Behrens, "18 U.S.C. § 1341 and § 1346: Deciphering the Confusing Letters of the Mail Fraud Statute", 13 St. Louis U. Pub. L. Rev. 489 (1993); Travers, "Mail and Wire Fraud: The United States Prosecutors' 'True Love'- Should Equivalent Offences be Enacted in Ireland", Irish Criminal Law Journal 2014, 2, 46.

<sup>85</sup> 18 USC § 1343 (fraud by wire, radio, or television): "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretences, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 USC § 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both."

<sup>86</sup> Travers, "Mail and Wire Fraud: The United States Prosecutors' 'True Love'- Should Equivalent Offences be Enacted in Ireland", Irish Criminal Law Journal 2014, 2, 46, 47.

<sup>87</sup> See for example *United States v Pirello* 255 F3d 728, 732 (9th Cir 2001).

<sup>88</sup> Geraldine Szott Moohr, "Mail Fraud Meets Criminal Theory" 67 University of Cincinnati Law Review 1, fn. 3.

10.42 On their face, the two offences of US mail fraud<sup>89</sup> and wire fraud<sup>90</sup> contain two consistent elements:

- (a) The existence of a scheme to defraud;
- (b) Mailings, or interstate wires, were used in furtherance of a scheme to defraud.

The US courts have also read in a third element taken from the common law definition of fraud:

- (c) the defendant must have an intention to defraud.<sup>91</sup>

10.43 The prosecution must prove that a scheme to defraud existed, in which the use of mailing, or interstate wire, was reasonably foreseeable, and the mailing occurred in furtherance of the scheme.<sup>92</sup> The US Supreme Court has noted that to be part of the execution of the fraud, the use of the mails need not be an essential element of the scheme, and it is sufficient for the mailing to be “incident to an essential part of the scheme” or “a step in the plot”.<sup>93</sup>

10.44 In order to understand the conduct covered by these offences, it is necessary to consider each of the outlined constituent elements of the offences in turn.

### **Scheme to Defraud**

10.45 The term “scheme to defraud” has not been defined in statute. The US courts have exercised wide latitude in identifying numerous types of schemes that come within the mail fraud statute. These appear to fall into two general categories:<sup>94</sup>

- deceptive schemes which are intended to defraud individuals of money or other tangible property interests; and
- deceptive schemes which operate to deprive individuals of intangible rights or interests.<sup>95</sup>

10.46 The first category of schemes involves “calculated efforts to use misrepresentations or other deceptive practices to induce the innocent or unwary to give up some tangible interest”.<sup>96</sup> Examples of such schemes include false insurance claims, fraudulent investment schemes, misrepresentations in the sale of used automobiles, false application forms for loans, fraudulent loan marketing schemes, check kiting

<sup>89</sup> 18 USC § 1341.

<sup>90</sup> 18 USC § 1343.

<sup>91</sup> *United States v Dinome*, 86 F 3d 277 (2d Cir. 1996).

<sup>92</sup> *United States v Sawyer*, 85 F 3d 713, 723 (1st Cir. 1996).

<sup>93</sup> *Schmuck v United States*, 489 US 705, at 710-11 (1989).

<sup>94</sup> *United States v McNieve*, 536 F 2d 1245, 1248 (8th Cir. 1976).

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

schemes, false advertising, and various bribery and kickback schemes.<sup>97</sup> This category of scheme can arise regardless of the nature of the relationship between the perpetrator and the victim of the scheme.

- 10.47 The second category includes schemes to defraud someone of more intangible rights. This category represents a broadening of the application of the offences, and has been described as “seemingly limitless” in its application.<sup>98</sup> This broader application was developed by judicial interpretation to convict individuals in relation to schemes to deprive a citizen’s rights to the honest services of their government officials,<sup>99</sup> and private employees defrauding their employer of honest and faithful service.<sup>100</sup> Judicial inconsistency in the interpretation of this category led to the US Congress placing it on a statutory footing in 1988,<sup>101</sup> and extending the definition of “scheme to defraud” to include “a scheme or artifice to deprive another of the intangible right of honest services”. Though this second category of “scheme” significantly broadens the application of the mail and wire fraud offences, the US courts have qualified its application somewhat by requiring the existence of a fiduciary relationship between the perpetrator and victim of the scheme.<sup>102</sup>

### In Furtherance of a Scheme

- 10.48 The next element of these offences is that the perpetrator must have used or caused the use of mailing or interstate wires to be used in furtherance of the “scheme to defraud”. As to the mental culpability involved, the perpetrator need not know or contemplate the use of mail, provided it can be proved that he or she caused the mail to be used.<sup>103</sup> In *United States v Sawyer*,<sup>104</sup> it was noted that the “defendant need not personally use the wires as long as such use was a reasonably foreseeable part of the scheme.”
- 10.49 In order for the use, or the cause of use of mail or interstate wire, to satisfy this element of the offences, the use must be in furtherance of the “scheme to defraud”. It is not required that the use of mail or interstate wires form an essential element of the “scheme to defraud”, provided the mailing or wire is “incident to an essential part of the scheme”.<sup>105</sup> It has been noted that this places a limitation on the application of these offences as it prevents them from covering all fraudulent conduct “but only those limited instances in which the use of the mails is a part of the execution of the

97 Rosenblatt and Michaels, “Mail and Wire Fraud”, 34 Am Crim L Rev 771, at 776-7.

98 *Ibid.*

99 *United States v Margiotta*, 688 F 2d 108 (2d Cir. 1982).

100 *United States v Von Barta*, 635 F 2d 999 (2d Cir. 1980).

101 The US Supreme Court in *United States v McNally*, 483 US 350, 356 (1987) narrowed the interpretation of “scheme to defraud” by holding that “the original impetus behind the mail fraud statute was to protect people from schemes to deprive them of their money or property”. In response to this the US Congress passed 18 USC § 1346.

102 Rosenblatt and Michaels, “Mail and Wire Fraud”, 34 Am Crim L Rev 771, p. 780; Coffee “The Metastasis of Mail Fraud: The Continuing Story of the Evolution of White Collar Crime”, 21 Am. Crim. L. Rev. 1.

103 *United States v Pereira*, 347 US 1, 8 (1954).

104 85 F3 d 713, 723 (1st Cir. 1996).

105 *Schmuck v United States*, 489 US 705, 705 (1989).

fraud”.<sup>106</sup> However, the link between the mailing or wiring can be relatively remote and still allow for the commission of these offences. In *Schmuck v United States*,<sup>107</sup> the US Supreme Court rejected the argument that mail fraud can be predicated only on a mailing that affirmatively assists the perpetrator in carrying out his fraudulent scheme, and that routine and innocent mailings (“ones that contain no false information”) cannot satisfy the mailing requirement.

- 10.50 The mailings or wiring must be sufficiently related to the scheme to meet the “in furtherance” requirement. This is not a high threshold in practice. Provided the mailing in some way assists the execution of the scheme, it will be “in furtherance” even if the individual mailing does not, by itself, disclose a scheme to defraud.<sup>108</sup>

### Intent to Defraud

- 10.51 The mental requirement of the US mail fraud and wire fraud offences is that the perpetrator had a specific intention to defraud.<sup>109</sup> Reckless disregard for the truth of a representation involved in the scheme can satisfy the mental requirement also.<sup>110</sup>
- 10.52 The mail and wire fraud offences appear to target the conduct of scheming to defraud, rather than the completed fraud. They target “the attempt to defraud”.<sup>111</sup> These offences have been identified as essentially inchoate in nature.<sup>112</sup> In theory, therefore, the offences can occur entirely in the mind of a single defendant and never manifest itself beyond, in the case of mail fraud, the causing of the single use of the mail.<sup>113</sup> It is arguably for this reason that these offences encompass virtually all types of fraud.<sup>114</sup>

### US Mail and Wire Fraud v Irish Fraud Offences – Criminalised Conduct Gap

- 10.53 One of the purposes of the introduction of mail fraud and wire fraud in the United States was to facilitate federal jurisdiction for certain fraud crimes.<sup>115</sup> However, as Ireland is not a federal state, this justification is not applicable in the Irish context. The question as to whether it would benefit Ireland to introduce these offences must be based on whether they would criminalise wrongful behaviour that our current range of fraud offences do not.

<sup>106</sup> *Kann v United States*, 323 US 88, 95 (1944).

<sup>107</sup> *Ibid.*

<sup>108</sup> *United States v Serino*, US 835 F 2d 924 (1987) at p. 928.

<sup>109</sup> *United States v Costanzo*, 4 F 3d 658, 664 (8th Cir. 1993).

<sup>110</sup> *United States v Hannigan*, 27 F 3d 890, 892 n.1 (3d Cir. 1994).

<sup>111</sup> *United States v Coffman*, 94 F 3d 330, 333 (7th Cir. 1996).

<sup>112</sup> Travers, “Mail and Wire Fraud: The United States Prosecutors’ ‘True Love’- Should Equivalent Offences be Enacted in Ireland” (2014) *Irish Criminal Law Journal*, 2, 46, at 50; Szott Moohr, “Mail Fraud Meets Criminal Theory” 67 *University of Cincinnati Law Review* 1, 19.

<sup>113</sup> Rakoff, “The Federal Mail Fraud Statute (Part 1)”, 18 *Duq. L. Rev.* 771, at 777 (1980).

<sup>114</sup> Travers, “Mail and Wire Fraud: The United States Prosecutors’ ‘True Love’- Should Equivalent Offences be Enacted in Ireland”, (2014) *Irish Criminal Law Journal* 2, 46,

<sup>115</sup> *Attorney General v Oldridge* [2000] 4 IR 593, 600.

- 10.54 It has been argued that the offences of mail fraud and wire fraud should be introduced into Irish law.<sup>116</sup> At issue is whether a gap in the criminalisation of fraudulent conduct exists in this jurisdiction. When the conduct covered by the US mail and wire fraud is contrasted against each of the Irish fraud offences considered above, and their ancillary inchoate offences, the gap in conduct covered may not be significant.
- 10.55 The common law offence of conspiracy to defraud, in a similar manner to the US offences, is inchoate in nature and criminalises the entering of an agreement between two or more people, for the purpose of acting dishonestly to deprive another of something.
- 10.56 In *Attorney General v Oldridge*<sup>117</sup> the Supreme Court considered a request to extradite the respondent to the United States. This related to the US case of *United States v Moses*,<sup>118</sup> and involved a fraudulent scheme in which the defendants defrauded three banks of \$28 million. The respondent was indicted in the US for wire fraud and for aiding and abetting wire fraud. The respondent resisted the US extradition request by claiming that there was no statutory equivalent in Ireland to the US offences.
- 10.57 The Supreme Court found, regarding the acts with which the respondent was charged, that it was alleged that the respondent played an essential part in the allegedly fraudulent scheme, that is, the banks were induced, by the respondent's actions, not to call in the loans which they advanced. If this was proved, the respondent played an essential part in continuing the conspiracy to defraud the banks.<sup>119</sup>
- 10.58 In the Supreme Court the applicant confirmed that the relevant corresponding offence in Irish law being relied upon was the common law offence of conspiracy to defraud. The Court held that the acts as charged against the respondent in the United States would, if proved, correspond to conspiracy to defraud.
- 10.59 Though this case is confined to its facts, it does not point towards a particular gap in the criminalisation of fraudulent behaviour in Ireland, when compared with US law. As conspiracy to defraud is inchoate in nature it can apply to fraudulent behaviour that has not yet been perpetrated on an intended victim. However, as the aim of the Irish offence is to deter and punish conspiratorial agreements, it is arguably less applicable than US mail or wire fraud which appear to allow for one person alone to commit the US offences.<sup>120</sup> However, the inchoate offence of attempting to commit conspiracy to defraud, does appear to cover this gap in criminalised conduct.

116 *Office of the Director of Corporate Enforcement, Submission on White Collar Crime* (2010) (n 27).

117 *Attorney General v Oldridge* [2000] 4 IR 593

118 337 Fed. Appx. 443 (6th Cir. 2009).

119 *Attorney General v Oldridge* [2000] 4 IR 593, at 601.

120 Rakoff, "The Federal Mail Fraud Statute (Part 1)", 18 Duq. L. Rev. 771, 777 (1980).

- 10.60 The Irish offences in the *Criminal Justice (Theft and Fraud) Offences Act 2001* of making gain and causing loss by deception and obtaining services by deception<sup>121</sup> when taken together, due to their common mental requirement, criminalise an extremely large range of fraudulent conduct under Irish law. When compared to the US offences of mail and wire fraud it has been argued that the US offences have “the ability to cover fraud schemes which are in their infancy, even those which amount to nothing more than a fraudulent intent on the part of the accused and which involve no inducement of another person, as long as there is an associated mailing or wire communication” which these Irish offences do not.<sup>122</sup> Again, the inchoate attempt version of these offences goes some way towards narrowing this gap in criminalised conduct.
- 10.61 Focusing solely on wire fraud in the case of computer communications, it is arguable that the offence of unlawful use of a computer in the 2001 Act incorporates an even greater range of fraudulent conduct than is criminalised than under the American offence. While wire fraud is contingent on the use of interstate wires, the Irish offence is not confined by this qualification, and thus appears to criminalise any use of a computer provided the prescribed mental element is present. Unlawful use of a computer appears to cover virtually all of the conduct to which wire fraud is generally applied in the modern context.<sup>123</sup>
- 10.62 The offence of fraudulent trading in section 772 of the *Companies Act 2014* is of great use in deterring and punishing specific conduct of corporate bodies, and their officers. However, the knowledge and intention requirements, along with the requirement that the fraudulent acts must be done in the context of the “carrying on of the business of a company”, appear easily to fall within the scope of US mail or wire fraud, once the causing the using of mailing or interstate wires in furtherance of the intended fraud are satisfied. Thus, section 722 appears to cover some fraudulent conduct in which the mail or a wire does not play any part, but other than this, the scope of application of the US offences appears greater.
- 10.63 On the face of these Irish fraud offences, an assessment that they fail to cover a range of fraudulent conduct which is covered by US mail and wire fraud appears to be correct. However, this apparent gap does not take account of the reality that inchoate offences broaden the scope of the substantive fraud-based offences to include attempts, conspiracies or incitements to commit these substantive offences. When these inchoate offences are considered, any apparent gap is reduced significantly and perhaps may not exist.
- 10.64 An individual who acts with a fraudulent intent when using or causing to be used a mailing or wire communication in furtherance of a specific scheme to defraud, might very well fall within the inchoate versions of the Irish fraud based offences. Should

<sup>121</sup> Sections 6 and 7 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

<sup>122</sup> Travers, “Mail and Wire Fraud: The United States Prosecutors’ ‘True Love’ - Should Equivalent Offences be Enacted in Ireland Part 2” (2014) *Irish Criminal Law Journal*, 3, 73, at 80.

<sup>123</sup> Non-computer based “wire” communication is becoming less common as information technology develops.

the use of the mail or wire incite another to commit a fraud, or complete an agreement to commit a fraud, an offence may have occurred.

- 10.65 When considering the inchoate offence of attempt, there may appear to be a gap when the “proximity” requirement of attempt and the “in furtherance” requirement of the US offences. In *The People (Attorney General) v Sullivan*,<sup>124</sup> the Supreme Court noted that “acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are”.<sup>125</sup> This may arguably be a more confining standard than exists in the US offences which require only that the act of mailing be “incident[a] to an essential part of the scheme”.<sup>126</sup>
- 10.66 Though these different standards may result in a gap in the conduct covered by Irish law when compared to the US offences, it should be noted that the “proximate” requirement has attracted some criticism for being vague, though the Commission has noted that this criticism should not be overstated.<sup>127</sup> Given this, the Commission questions whether the adoption of the less prescriptive standard used in applying the American offence would be justified.

#### QUESTION 10

- 10(a) Do you think that Irish law contains a gap that US mail fraud and wire fraud type offences would fill?
- 10(b) If yes, in what respect do you think the offence filling the gap would be formulated?
- 10(c) Do you think that conspiracy to defraud be put on a statutory footing? If so, how should it be defined? Do you think that a statutory offence of conspiracy to defraud should be confined in its application to criminalising conspiracies to commit substantive fraud based offences or should it also criminalise conspiracies to commit non-criminal wrongs?
- 10(d) Do you think that “intent to defraud” in section 722 of the Companies Act 2014 should be defined? If so, how should it be defined?

<sup>124</sup> [1964] IR 169.

<sup>125</sup> *Ibid*, at 195-196, Walsh J quoting with approval *R v Eagleton* (1855) Dears 515, at 537.

<sup>126</sup> *Schmuck v United States*, 489 US 705, at 705 (1989).

<sup>127</sup> Law Reform Commission, *Report on Inchoate Offences* (LRC 99-2010), p. 31.

## ISSUE 11

# RECKLESS TRADING

- 11.01 In Issue 10, the Commission noted that current law provides for many fraud-based criminal offences, and that some of the activities that took place in Irish financial institutions in the lead-up to the financial crisis may comprise offences under them.
- 11.02 In this section of the Issues Paper, the Commission explores whether, if decisions are made that fall short of fraud-based activity, such activity should come within the criminal law. Put simply, should reckless behaviour be criminalised? Excessive risk taking and other errant behaviour in business can have wide reaching and detrimental effects on commercial activity, the national economy and society in general. However, not all risk taking is, or indeed ought to be, a criminal offence and a delicate balance between the types of behaviour that are permitted and those that are criminally prohibited needs to be struck if new offences are to be created.
- 11.03 While the behaviour of officials in banks leading up to the financial crisis has been described as being “reckless”, reckless trading is not a criminal offence in Ireland, although civil liability may be imposed on company directors for reckless trading.<sup>1</sup> Against this background, calls have been made for the criminalisation of “reckless trading”.<sup>2</sup>
- 11.04 The question of criminalising reckless trading was raised during the Oireachtas debates on the *Companies (No.2) Bill 1987*, which was enacted as the *Companies Act 1990* and which provided for civil liability of company directors for reckless trading in section 297A of the *Companies Act 1963*, since replaced by section 610 of the *Companies Act 2014*. An amendment was proposed to the 1987 Bill that would have provided for the criminalisation of reckless trading. This amendment was “prompted by a feeling that the consequences for creditors or indeed anybody else are just as serious if in the course of winding up it is found to be to some extent due to reckless trading, as indeed if it were due to fraudulent intent.” The proposed amendment was withdrawn when a consensus emerged that the prospect of criminalising such conduct constituted “very difficult territory” and would cause uncertainty for companies, their directors, and public prosecutors. In particular, it was suggested that it might be more appropriate to confine criminalisation to clear-cut cases of fraudulent conduct, and that the introduction of a criminal offence of reckless trading

<sup>1</sup> Under section 610 of the *Companies Act 2014*. The relevant provisions of the 2014 Act replicate those in the *Companies Act 1963*, which in turn derived from recommendations made by the Company Law Reform Committee (the Cox Committee) and which were modelled on equivalent provisions in the English *Companies Act 1948*. see *Report of the Company Law Reform Committee* (Pr 4523, 1958).

<sup>2</sup> See, for example, Office of the Director of Corporate Enforcement *Submission on White Collar Crime* (2010); Open Government Partnership Ireland (Department of Public Expenditure and Reform) *Report of a Consultation with Civil Society Representatives and Citizens on Ireland's Participation in OGP* (2013). See also Houses of the Oireachtas Committee of Public Accounts *Interim Report on the Committee's Examination of Bank Stabilisation Measures* (31/CPAS/008, 2013), which commented that “[t]here is no provision for instance for reckless trading for financial services and there is a need to examine whether a provision which would provide for presumptive liability or presumptive sanctions for directors of failed financial institutions is necessary.”

“would cause enormous uncertainty for companies, their directors and, indeed, even public prosecutors.”<sup>3</sup> It remains the case that section 610 of the 2014 Act, which replaced section 297A, provides for the civil liability of company directors for reckless trading under Irish law, as well as criminal (and civil) liability for fraudulent trading, but not criminal liability for reckless trading.

### **Civil Liability for Reckless Trading in the *Companies Act 2014***

11.05 Section 610 of the *Companies Act 2014* provides that if a company officer engages in reckless trading, he or she may be restricted or disqualified as a director. He or she may also be held personally liable for all or part of a company’s debts if, in the course of the winding up of the company or in the course of examinership proceedings,<sup>4</sup> it appears that he or she was “knowingly a party to the carrying on of any business of the company in a reckless manner.”<sup>5</sup>

11.06 While recklessness is not defined in the 2014 Act, section 610 provides that a company officer shall be deemed to have been knowingly a party to reckless trading if:

(a) the person was a party to the carrying on of the company’s business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company would cause loss to the creditors of the company, or any of them, or

(b) the person was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities).<sup>6</sup>

11.07 Section 610 of the 2014 Act largely replicates the civil liability provisions for reckless trading in section 297A of the *Companies Act 1963*,<sup>7</sup> and case law on section 297A is therefore will be relevant to interpreting section 610.<sup>8</sup> Thus, it has been held that recklessness under section 297A of the 1963 Act is to be determined using an objective standard,<sup>9</sup> as opposed to the primarily subjective standard associated with recklessness in the criminal law context.<sup>10</sup> In addition, it has been held that as to being “a party to the carrying on of any business”, a person must have been actively participating in the management of the company.<sup>11</sup>

<sup>3</sup> Vol. 396 Dáil Éireann Debates *Companies (No.2) Bill* 1987 Report Stage (6 March 1990).

<sup>4</sup> Under Part 10 of the *Companies Act 2014*.

<sup>5</sup> Section 610(1)(a) of the *Companies Act 2014*.

<sup>6</sup> Section 610(3)(a)-(b) of the *Companies Act 2014*.

<sup>7</sup> As inserted by section 138 of the *Companies Act 1990*.

<sup>8</sup> See for example *Re Hefferon Kearns Ltd* (No.2) [1993] 3 IR 191; *Re PSK Construction Ltd* [2009] IEHC 538.

<sup>9</sup> *Re Hefferon Kearns Ltd* (No 2) [1993] 3 IR 191.

<sup>10</sup> See the discussion below of *The People (DPP) v Murray* [1977] IR 360 and *The People (DPP) v Cagney and McGrath* [2007] IESC 46, [2008] 2 IR 111.

<sup>11</sup> *O’Keefe v Ferris* [1997] 3 IR 463, 469.

- 11.08 It therefore appears that the tests applied to determine civil liability for reckless trading differ from the tests that apply in connection with crimes that may be committed with reckless intent. Moreover, civil liability for reckless trading may be distinguished from criminal liability for fraudulent trading which carries the stigma of a criminal conviction.

### Consideration of Criminal Liability for Reckless Trading

- 11.09 An offence of reckless trading would differ from the existing criminal offence of fraudulent trading under section 722 of the *Companies Act 2014* primarily because of the different level of intent required, that is, reckless intent as distinct from fraudulent intent. The requirement of recklessness is a lower threshold than fraudulent intent. Fraudulent intent requires that a person is knowingly a party to the fraud,<sup>12</sup> whereas reckless intent is usually defined as engaging in conduct which involves taking an unjustifiable risk, of which the accused was aware,<sup>13</sup> of causing harm to others.<sup>14</sup>
- 11.10 Whereas intention or knowledge associated with fraud requires the accused to have consciously brought about a result, recklessness merely requires that the accused consciously ran the risk that a particular result would come about.<sup>15</sup> Recklessness is the mental element required for involuntary manslaughter (manslaughter by an unlawful and dangerous act) and is therefore well understood in that context;<sup>16</sup> and recklessness is also to be found in specific statutory offences, such as handling stolen goods under section 17 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*<sup>17</sup> and the offence of reckless endangerment under section 13 of the *Non-Fatal Offences Against the Person Act 1997*.
- 11.11 Recklessness can be assessed either subjectively or objectively.<sup>18</sup> In the Supreme Court decision *The People (DPP) v Murray*,<sup>19</sup> Henchy J endorsed the subjective definition of recklessness in the American Law Institute's Model Penal Code.<sup>20</sup> Henchy J made clear that the required intent (*mens rea*) for the purposes of

12 In the case of fraudulent trading, "knowingly a party to the carrying on of the business of the company with intent to defraud creditors".

13 See *The People (DPP) v Murray* [1977] IR 360, discussed below.

14 Hanly, *An Introduction to Irish Criminal Law*, 2nd ed (Gill & Macmillan 2006) at 82.

15 Law Reform Commission *Report on Corporate Killing* (LRC 77-2005) at 16-17.

16 *Ibid* at 17.

17 Section 17 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, which concerns handling stolen property, provides: "A person is guilty of handling stolen property if (otherwise than in the course of the stealing) he or she, knowing that the property was stolen or being reckless as to whether it was stolen, dishonestly (a) receives or arranges to receive it, or (b) undertakes, or assists in, its retention, removal, disposal or realisation by or for the benefit of another person, or arranges to do so."

18 Walsh J in *The People (DPP) v Murray* [1977] IR 360 stated: "Recklessness may either be purely subjective in the sense that it is conscious taking of an unjustified risk of which the accused actually knows and thus imports foresight, or the purely objective test of the conscious taking of an unjustified risk of which the accused does not actually know but of which he ought to have been aware."

19 [1977] IR 360.

20 Section 2.02(2)(c) of the Model Penal Code provides: "a person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of a high degree."

recklessness in the particular context of that case, which concerned capital murder, is subjective and not objective. Griffin, Parke and Kenny JJ also endorsed a subjective test for recklessness. This subjective test of recklessness was approved and applied by the Supreme Court in *The People (DPP) v Cagney and McGrath*,<sup>21</sup> which concerned the offence of reckless endangerment under section 13 of the *Non-Fatal Offences Against the Person Act 1997*. The creation of a new offence of reckless trading would therefore be assumed to conform to this subjective test of recklessness.

- 11.12 The effect of applying, by contrast, an objective recklessness test as the fault element was discussed by the UK House of Lords in *R v G*,<sup>22</sup> which noted that a conviction should depend on proof not simply that a defendant caused an injurious result to another but that his or her state of mind when so acting was culpable. The Court also held that an objective recklessness definition was capable of leading to obvious unfairness in that it was neither moral nor just to convict a defendant on the strength of what someone else (the objective reasonable person) would have apprehended if that defendant himself had no such apprehension; and that such an objective interpretation of “reckless” was offensive in principle and apt to cause injustice.
- 11.13 The main difference between the objective and subjective interpretations of recklessness is that the objective interpretation not only allows for liability to be attached to an individual who was aware of a risk, but also to an individual who was not so aware, but reasonably ought to have been. An argument in favour of this interpretation is that the results of an inadvertent risk can be just as detrimental as if the individual was aware of the risk. The individual who causes, or fails to avert the results of a risk due to thoughtlessness or inconsideration may be no less blameworthy than an aware individual.<sup>23</sup>
- 11.14 Gross negligence is similar to objective recklessness in that it too involves the assumption of risk.<sup>24</sup> Criminal gross negligence is different from ordinary negligence in civil liability, and gross negligence requires that a person has not merely been in breach of the standard of care required (the test in civil liability) but has fallen “far below” the standard of care.<sup>25</sup> It has been suggested that because neither the test for gross negligence nor objective recklessness require consideration of the subjective mind of the offender, these may be better suited to an assessment of corporate decision-making than other, subjective, mental elements.<sup>26</sup> Nonetheless, it is clear that current Irish law, as set out in the *Murray* and *Cagney and McGrath* cases, above, favours a subjective test of recklessness based on the US Model Penal Code.

21 [2007] IESC 46, [2008] 2 IR 111, at 127, where Hardiman J noted that reckless criminal intent requires “an accused in Ireland must have foreseen the risk that his conduct would bring about the relevant result, but have elected to proceed with his conduct nonetheless”.

22 [2004] 1 AC 1034.

23 Blomsma, *Mens Rea and Defences in European Criminal Law*, (Intersentia, 2012), p. 140.

24 Law Reform Commission *Report on Corporate Killing* (RC 77-2005) at 17, discussing the test of gross negligence in manslaughter.

25 *Ibid.*

26 *Ibid* at 18.

## United Kingdom

### Criminal Liability for Reckless Trading

11.15 In the aftermath of the global financial crisis, the UK Government and Parliament commissioned a number of significant reports analysing UK banking failures, and these made a number of recommendations for reform.<sup>27</sup> In its 2012 *Consultation Paper on Sanctions for the Directors of Failed Banks*,<sup>28</sup> the British Treasury proposed the introduction of criminal sanctions for serious misconduct in the management of a bank and, crucially, suggested that the offence should carry a test of objective, not subjective, recklessness. The following rationale was offered for this:

“Creating a new criminal offence involving recklessness would send a very clear signal that society (which might have to pay a heavy price for dealing with the consequences of recklessness) is determined to prevent and deter that conduct. At the very least, it would surely make bank directors think twice before taking certain decisions. It would probably slow down the taking of such decisions; a responsible bank board might, for example, obtain legal advice about whether a decision could be considered to be reckless.”

11.16 The Treasury’s Consultation Paper acknowledged that, as many business decisions necessarily involve judgements regarding uncertain future risk, “it would be inherently more difficult, therefore, to decide whether someone ought to have been aware of a risk that occurred, [...] or to judge whether it was reasonable or unreasonable to take a particular risk”.<sup>29</sup> However, despite this it was still noted that this objective recklessness was an appropriate basis on which to proceed.

11.17 During the ensuing consultation process, concern was expressed that criminal sanctions for such reckless behavior would deter people from becoming bank directors. In addition, some respondents maintained that such reform would add little to existing regulatory powers over approved persons in existing criminal offences and company law requirements, especially in light of the costs and duration of investigations and prosecutions.<sup>30</sup> Ultimately, the British Treasury accepted a recommendation from the Parliamentary Commission on Banking Standards for the introduction of a criminal offence of reckless misconduct limited to the banking sector, which was enacted in the UK *Financial Services (Banking Reform) Act 2013*, discussed below.<sup>31</sup> It has been observed that although these recommendations attracted public and political support, many commentators have cited practical difficulties with the proposals and that strong opposition was likely to follow if

<sup>27</sup> See in particular: HM Treasury, *Consultation Paper: Sanctions for the Directors of Failed Banks* (2012); HM Treasury *Summary of Consultation Responses to Sanctions for the Directors of Failed Banks* (2013); *Changing Banking for Good: Report of the Parliamentary Commission on Banking Standards* (2013); and HM Treasury *The Government’s Response to the Parliamentary Commission on Banking Standards* (2013).

<sup>28</sup> HM Treasury *Sanctions for the Directors of Failed Banks* (Consultation Paper, 2012) at 14.

<sup>29</sup> *Ibid.*, 15.

<sup>30</sup> HM Treasury *Summary of Consultation Responses to Sanctions for the Directors of Failed Banks* (2013) at 78.

<sup>31</sup> See *Changing Banking for Good: Report of the Parliamentary Commission on Banking Standards* (2013) Vol II) at 512ff, and HM Treasury *The Government’s Response to the Parliamentary Commission on Banking Standards* (2013).

enacted.<sup>32</sup> In particular, concerns were voiced that any such offence would require jurors to determine whether business decisions - taken years previously in an unpredictable commercial environment - were reckless when they were made. The prospect of custodial sentences flowing from decisions which may be deemed reckless years later, with the aid of hindsight, could result in a chilling effect on business leaders making bold but legitimate decisions.<sup>33</sup>

### **Criminal Offence of Causing a Financial Institution to Fail**

- 11.18 Notwithstanding these criticisms, a criminal offence of recklessness relating to a decision causing a financial institution to fail was enacted in the UK *Financial Services (Banking Reform) Act 2013*.<sup>34</sup> This offence is committed if a senior manager in a financial institution takes, agrees to take or fails to take steps to prevent, a decision being taken, aware that the risk of implementing the decision could cause the institution to fail, and acting in a way that falls far below what could reasonably be expected of a person in the accused's position, and the implementation of the decision causes the financial institution to fail. The standard of intent (*mens rea*) for this offence is subjective, recklessness, not objective recklessness, because the offence requires actual knowledge of the risk. It will not be sufficient to prove that the accused manager ought to have known of such a risk.
- 11.19 The former Governor of the Central Bank of Ireland suggested in 2015 that the *Financial Services (Banking Reform) Act 2013* "could be usefully mirrored in Ireland" as a means of tackling "egregious recklessness in risk-taking" in financial undertakings.<sup>35</sup>
- 11.20 A person found guilty of the offence in the UK 2013 Act is liable, on summary conviction, to a maximum term of imprisonment of 12 months and, on conviction on indictment, to a maximum term of imprisonment of 7 years, or a fine, or both. The severity of punishment appears to satisfy criticisms raised that negligible sanctions in other areas of regulation had led to a weakening of the deterrent effect of such regulation, and a diminishing of the stigma attached to criminal liability.<sup>36</sup>
- 11.21 Nonetheless, as noted above, the offence in the UK 2013 Act has been criticised for a number of reasons. Concern has been expressed that its practical impact could be that senior managers would take "overly defensive decisions".<sup>37</sup> It is also suggested that regulators would have difficulty conducting an investigation in relation to an

<sup>32</sup> Clifford Chance, *Changing banking for good? Parliamentary Commission on Banking Standards proposes sweeping changes to bank regulation in the UK* (Briefing Note, 21 June 2013) at 3.

<sup>33</sup> See, for example, Anderson "Government plans to sanction directors of failed banks are flawed", *Law Society Gazette*, (22 July 2013).

<sup>34</sup> Section 36 of the *UK Financial Services (Banking Reform) Act 2013*.

<sup>35</sup> Remarks by Governor Patrick Honohan prepared for the session "Politics by Other Means? Eurozone Institutions and National Sovereignty in the Bank Bailout Negotiations" at the Annual Conference of the Institute for New Economic Thinking (INET), Libert ,  galit , fragilit , Paris, 9 April 2015.

<sup>36</sup> See Clifford Chance *Changing banking for good? Parliamentary Commission on Banking Standards proposes sweeping changes to bank regulation in the UK* (Briefing Note, 21 June 2013) para. 1.4.3.; and, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (Hampton Review) (2005).

<sup>37</sup> O'May, Corsi, Knott and Iyengar, "Reading between the lines: a look at the new criminal liability for senior bank management" *Butterworths Journal of International Banking and Financial Law* June 2014, 390 at 391. See also Kirk, "Bringing down the bank" *Compliance Monitor*, April 2014.

alleged offence since it could potentially have a very wide breadth and could interfere with the daily functioning of the institution under investigation. It has also been suggested that the burden of proof may be difficult to discharge owing to multiple external and internal factors that could lead to the collapse of the institution.<sup>38</sup> At the time of writing (January 2016), there does not appear have been any prosecution initiated in relation to the offence.

## Australia

### **Criminal offences regarding recklessness in the discharge of director's good faith, use of position and use of information**

- 11.22 In Australia, there is no general criminal offence of reckless trading, but recklessness is criminalised in three key circumstances under the Australian *Corporations Act 2001*.<sup>39</sup>
- 11.23 Firstly, under the 2001 Act a director or other officer of a corporation commits an offence if he or she is reckless, or intentionally dishonest (a concept very close to fraudulent intent), and fails to exercise his or her powers and discharge his or her duties in good faith, in the best interests of the corporation, or for a proper purpose.<sup>40</sup>
- 11.24 Secondly, a director, or other officer of a corporation, commits an offence under the 2001 Act if he or she uses his or her position dishonestly:
- with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the corporation; or
  - recklessly as to whether the use may result in himself or herself or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.<sup>41</sup>
- 11.25 This second offence also provides for criminal liability of a director or officer where there is a dishonest intention (similar to a fraudulent intention), but it also provides for a lesser culpability element of recklessness to be applied. Regardless of which culpability element is applied, however, the requirement to prove dishonesty must be present. This offence does not appear to criminalise conduct that involves taking an unjustifiable risk of causing harm to others that is not dishonest.
- 11.26 Thirdly, the 2001 Act provides that a person who obtains information because he or she is, or has been, a director or other officer or employee of a corporation commits an offence if he or she uses the information dishonestly:
- with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the corporation; or

<sup>38</sup> Ibid.

<sup>39</sup> Under section 184 of the *Corporations Act 2001*.

<sup>40</sup> Section 184(1) of the 2001 Act.

<sup>41</sup> Section 184(2) of the 2001 Act.

- recklessly as to whether the use may result in himself or herself or someone else directly or indirectly gaining an advantage, or causing detriment to the corporation.<sup>42</sup>
- 11.27 Once again, however, although this third offence allows for its application if either knowledge or recklessness is present, dishonesty on the part of an accused person must be present.
- 11.28 When considering the criminalisation of recklessness in the corporate context, a real difficulty arises in determining what kinds of actions and behaviours constitute legitimate risk taking, and what kinds constitute conduct that should be discouraged by the criminal law. These Australian provisions have been described as relating to behaviour that falls outside the realm of justifiable risk-taking,<sup>43</sup> and they appear to involve dishonesty as a key element in all except the first offence, rather than just a reckless disregard for the consequences of risk-taking. As already discussed in detail in Issue 10, dishonesty is a concept associated with fraud<sup>44</sup> and thus, in relation to the second and third Australian offences, the realm of conduct covered does not extend very far beyond fraudulent acts or to criminalising simply reckless conduct.
- 11.29 The first Australian offence outlined above appears to go further in criminalising recklessness, by allowing for criminal liability to be incurred due to a reckless but not necessarily dishonest (intentional and knowing) breach of duty by a director. However, the view that this offence in section 184 of the Australian 2001 Act does not target “merely” reckless corporate conduct is supported by the comments of the Australian Commonwealth Director of Public Prosecutions (CDPP) on the section 184 offences. The Director noted that the conduct criminalised by section 184 “is usually associated with self-enrichment or the desire to obtain an advantage for another”.<sup>45</sup> The Director indicated that “very few, if any, of the matters the CDPP prosecutes involve arguments that the defendant’s conduct was justifiable risk taking or that the provision under which the defendant was charged was an impediment to proper risk taking or wealth creation.”<sup>46</sup>
- 11.30 It has been noted that section 184 is intended as a deterrent for “deliberate fraudulent conduct” by officers, and designed to provide the Australian courts with the discretion to impose penalties “on directors who do the wrong thing”.<sup>47</sup> Though the Australian offences are framed in a manner that may incorporate non-fraudulent but subjectively reckless conduct, they do not appear to be designed to cover conduct that is solely reckless, and it appears that in practice their application have been reserved for activity that comes close to fraudulent conduct.

<sup>42</sup> Section 184(3) of the 2001 Act.

<sup>43</sup> Letter from Graeme Davidson, Deputy Director, Commonwealth Director of Public Prosecutions to Corporations and Financial Services Division of the Australian Treasury, *Review of Sanctions in Corporate Law*, 1 June 2007, available at <http://archive.treasury.gov.au/documents/1285/PDF/DPP.pdf> at p. 3

<sup>44</sup> A. Keay, “Fraudulent Trading The Intent to Defraud Element”, 35 *Comm L World Rev* 121. At p. 124.

<sup>45</sup> Graeme Davidson, Deputy Director, Commonwealth Director of Public Prosecutions to Corporations and Financial Services Division of the Australian Treasury, *Review of Sanctions in Corporate Law*, 1 June 2007.

<sup>46</sup> *Ibid.*

<sup>47</sup> Australian Minister for Employment, *Submission to the Senate Education and Employment References Committee: Inquiry into the Provision of the Fair Work (Registered Organisations) Amendment Bill 2013*, (Department of Employment), p. 5.

- 11.31 Criminal prosecutions under section 184 appear to be used in conjunction with civil non-criminal penalties<sup>48</sup> and with civil penalty provisions that can also be subject to criminal sanctions.<sup>49</sup> This statutory regime allows for a range of enforcement options that escalate in severity on an enforcement pyramid and the offences in section 184 occupy the apex of the pyramid.<sup>50</sup>

## Conclusion

- 11.32 The question posed in this issue is whether it is desirable to extend the criminalisation of certain corporate conduct beyond intentionally dishonest conduct to include reckless conduct. In considering this, it is essential to bear in mind that not all risk taking is, or indeed ought to be, a criminal offence, because the ability to take risks is a necessary aspect of carrying on business. To hinder necessary risk taking by extending the remit of the criminal law too far is undesirable. A balance between the types of corporate risk taking that must be permitted and those that should be criminally prohibited needs to be struck if new offences are to be created. Against this background, the Commission seeks views on the following questions.

<sup>48</sup> Provided for under section 180 of the 2001 Act.

<sup>49</sup> Provided for under sections 181, 182 and 183 of the 2001 Act.

<sup>50</sup> See Welsh, "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice", 33 Melb U L Rev 908, at 923 where it was noted that "many more criminal prosecutions than civil penalty proceedings have been issued in cases where ASIC [the Australian Financial Services Regulator] had a choice between both of these enforcement regimes. This is not what would be expected had the civil penalty regime been utilised in a manner envisaged by responsive regulation. This outcome is a result of the policy adopted by ASIC and the DPP to initiate a criminal prosecution in all situations where the evidence would support one."

## QUESTION 11

- 11(a) Do you think that Irish law requires an offence of reckless trading?
- 11(b) If so, do you think that this offence should take the form of a general offence or be restricted to certain types of corporate activity?
- 11(c) If reckless trading should be criminalised, do you think any of the provisions discussed from the United Kingdom or Australia would be useful models to follow in the Irish context?
- 11(d) If reckless trading should be criminalised, do you think that the fault element involved should be subjective or objective in nature? Do you think that there are risks or potential failings in pursuing either approach, and how, in your view, might these risks or potential failings be mitigated?
- 11(e) What formulation do you think a criminal offence of reckless trading should take, and your reasons for this formulation.
- 11(f) Do you think that an offence of causing a financial institution to fail should be introduced into Irish law?
- 11(g) If so, do you think that section 36 of the UK's Financial Services (Banking Reform) Act 2013 is a good model to follow in the Irish context?
- 11(h) If not, what would be the appropriate ingredients of such an offence?

## ISSUE 12

# APPROPRIATE TRIAL VENUE

- 12.01 The Circuit Criminal Court is the court of trial for virtually all criminal offences tried on indictment (that is, which involve jury trial), except for a list of specified offences, notably murder (and attempted murder) rape and certain competition offences,<sup>1</sup> which are reserved for trial with a jury in the Central Criminal Court (the High Court).<sup>2</sup> The fact that virtually all trials on indictment take place in the Circuit Criminal Court, with certain cases only being reserved to the Central Criminal Court, has been described as arbitrary,<sup>3</sup> illogical,<sup>4</sup> and as failing to take account of the complexity of the legal matters arising in a given case.<sup>5</sup>
- 12.02 In relation to crimes that are likely to involve a corporate body, the 2000 *Report of the Competition and Mergers Review Group*<sup>6</sup> recommended that any criminal prosecution on indictment for a breach of the Competition Acts should be should be tried in the Central Criminal Court, on the basis that such jury trials should be presided over by judges of the High Court with specific knowledge of this area of law. This recommendation was implemented in the *Competition Act 2002* which provides that the Central Criminal Court has exclusive jurisdiction to hear competition law prosecutions tried on indictment concerning abuse of a dominant position and in connection with anti-competitive agreements.<sup>7</sup>
- 12.03 Other than the specified competition law offences, all other indictable offences, including corporate offences that may have involved enormous financial and societal impact, are tried in the Circuit Criminal Court.
- 12.04 The conferral of exclusive jurisdiction on the Circuit Criminal Court, rather than the Central Criminal Court, and the absence of any procedure to transfer a trial on indictment from one court to the other in a suitable case, has attracted a great deal of criticism, including in the area of corporate crime. In 1999, Carney J observed that the trial of all fraud cases in the Circuit Criminal Court was indicative of the relative unimportance of corporate crimes.<sup>8</sup> This criticism was endorsed by other commentators at the time.<sup>9</sup>

1 Other offences reserved to the Central Criminal Court are treason, a number of offences under *the Offences Against the State Act 1939*, offences under the Geneva Conventions Act 1962 and genocide and crimes against humanity under the *International Criminal Court Act 2006*.

2 Section 11 of the *Courts (Supplemental Provisions) Act 1961* provides that the Central Criminal Court is the name given to the High Court when exercising its criminal jurisdiction in connection with trials on indictment.

3 O'Malley, *The Criminal Process*, (Roundhall, 2009), p. 273.

4 Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) para .537.

5 Law Reform Commission, *Consultation Paper on Consolidation and Reform of the Courts Acts (LRC CP 46-2007)*, p.222.

6 *Final Report of the Competition and Mergers Review Group* (2000), pp.96 and 164.

7 See section 11 of *the Competition Act 2002*.

8 Coulter, "Judge Wants Jurisdiction to Try Major Fraud Cases" *The Irish Times* 22 October 1999.

9 Courtney, "Editorial" (1999) 11 *Commercial Law Practitioner* 262.

- 12.05 In 2003, the *Report of the Working Group on the Jurisdiction of the Courts* recommended that there should be greater flexibility to allow for transfer of cases between the Circuit Criminal Court and the Central Criminal Court.<sup>10</sup>
- 12.06 Many of the reasons in favour of conducting trials on indictment in competition cases in the Central Criminal Court are applicable to other offences involving corporate bodies. In such cases the issues involved, whether of fact or law, tend to be quite complex and their resolution can require sometimes very complex and lengthy evidence and cross-examination, notably of expert witnesses. The result of this complexity may include:
- costs will not necessarily be reduced by holding the trial in the Circuit Court because the cost of retaining relevant experts and lawyers will be the same no matter in which the trial is conducted;
  - an appeal from either the Circuit Criminal Court or the Central Criminal Court lies to the Court of Appeal, and thus there is no difference in any appeal costs;
  - it is unlikely that a group of specialist judges with relevant areas of legal specialism can be developed in the Circuit Court, because Circuit Court judges are assigned to particular circuits and, unlike High Court judges, do not form a collective pool available to be assigned to one court or another or one case or another.<sup>11</sup>
- 12.07 In addition, due to the largely regional nature of Circuit Court circuits, discussed below, the trial of corporate offences in the Circuit Court could result in a trial involving a corporate body being heard in one circuit, where its head office is located, and a related trial involving its directors, managers or other senior officers being heard in a different circuit, where those individuals live. This could result in a duplication of costs and inconsistency in outcomes.
- 12.08 It is arguable, therefore, that the Central Criminal Court may represent a suitable venue for the trial of complex corporate crime prosecutions. The use of this Court for such prosecutions could eliminate the difficulties identified above because it has access to specialist judges of the High Court with expertise to deal with potentially complex cases, and both the company and the individual officer may be prosecuted in the same court.<sup>12</sup> The Commission therefore seeks views as to whether there is a case for: (a) greater flexibility in the process of transferring cases between the Circuit Criminal Court and the Central Criminal Court; and/or (b) conferring exclusive jurisdiction on the Central Criminal Court in respect of certain corporate offences.

<sup>10</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) para 431.

<sup>11</sup> *Final Report of the Competition and Mergers Review Group* (2000), para 4.9.

<sup>12</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) para 11.221.

## Location where criminal trial commences

- 12.09 In criminal trials in the District Court, as a general rule proceedings involving an individual must be commenced in the District Court district (which, typically, approximates to a county) where an offence was committed, or where the accused was arrested, or where the accused resides.<sup>13</sup> A corporate body cannot be arrested, and the question of its “residence” for the purpose of criminal proceedings can also give rise to uncertainty. Similarly, it can be very difficult to point to a particular location as being where a defendant committed an act such as failing to file a company’s annual return under the *Companies Act 2014*. These issues have, to a large extent, been addressed in legislation which provides for where a prosecution should be initiated if this confusion arises.<sup>14</sup>
- 12.10 In relation to a trial on indictment in the Circuit Criminal Court, the criminal jurisdiction of the court is exercised by the judge or judges of the circuit in which the offence in question was committed or in which the accused resides or has been arrested.<sup>15</sup> As with the rule concerning trials in the District Court, the rationale for this is that an accused should be prosecuted in the locality where the crime is alleged to have been committed. Again, the confusion in relation to the application of this provision to offences committed by a corporate body has been addressed in legislation, which provides for a specific circuit to be identified as the venue for trial.<sup>16</sup>
- 12.11 Despite these legislative advances the prosecution of a complex indictable corporate offence may still be tied to a circuit which is not the most appropriate venue available. Aside from the undue expense, and lack of availability of expert judges, other difficulties can arise due to this mandatory fixing of court and circuit.

<sup>13</sup> Section 79 of the *Courts Act 1924*; and Order 13 of the *District Court Rules 1997*, as amended. The exception to this are prosecutions initiated in the Special Criminal Court under section 47 of the *Offences Against the State Act 1939*.

<sup>14</sup> See section 79A into the *Courts of Justice Act 1924*, inserted by section 178 of the *Criminal Justice Act 2006*. Section 79A provides for the exercise of jurisdiction by a judge of the District Court in criminal cases where a crime is committed in the State, the accused does not reside in the State, he or she was not arrested for and charged with the crime in the State, and either the crime was committed in more than one District Court district or it is known that it was committed in one of not more than five District Court districts, but the particular district concerned is not known. Where the conditions in section 79A apply, the offence is deemed to have been committed in each of the districts concerned and a judge assigned to any of the districts concerned may deal with the case. If the specific District in which the crime was committed is not known, or could be one of more than 5 Districts, the crime is deemed to have been committed in Dublin Metropolitan District. In order for proceedings to fall within section 79A, it must be shown that reasonable efforts have been made to ascertain the whereabouts of the accused for the purposes of arresting him or her for and charging him or her with the crime concerned.

<sup>15</sup> Section 25(3) of the *Courts (Supplemental Provisions) Act 1961*.

<sup>16</sup> See section 25A of the *Courts of Justice Act 1924*, as inserted by section 179 of the *Criminal Justice Act 2006*. Section 25A provides for the exercise of jurisdiction by a judge of the Circuit Court in indictable offences where a crime is committed in the State, the accused does not reside in the State, he or she was not arrested for and charged with the crime in the State, and either the crime was committed in more than one circuit or it is known that it was committed in one of not more than three Circuits, but the particular Circuit concerned is not known. Where the conditions in section 25A apply, the offence is deemed to have been committed in each of the Circuits concerned and a judge of any of the Circuits concerned may deal with the case. If the specific Circuit in which the crime was committed is not known, or could be one of more than 3 Circuits, the crime is deemed to have been committed in the Dublin Circuit. In order for proceedings to fall within section 25A, it must be shown that reasonable efforts have been made to ascertain the whereabouts of the accused for the purposes of arresting him or her for and charging him or her with the crime concerned.

### Limited transfer possible between Circuits in Circuit Criminal Court; and no transfer possible from Circuit Criminal Court to Central Criminal Court (High Court)

Since 1995,<sup>17</sup> a trial in the Circuit Criminal Court outside Dublin may be transferred to the Dublin Circuit where, for example, it can be established that a local jury may be prejudiced to the extent that the accused cannot be afforded a fair trial.<sup>18</sup> The test is that “it would be manifestly unjust” not to transfer the case. This creates a substantial burden and transfers are not likely to be available except in the most exceptional of cases.<sup>19</sup> The effect of this provision is that in practice almost all serious crime committed within a circuit remains for trial in that circuit.<sup>20</sup>

- 12.12 This sets an extremely high standard to be met in order to transfer a criminal proceeding to the Dublin Circuit Criminal Court. In addition, it rules out the possibility of a prosecution being transferred to the Central Criminal Court in any circumstance. The effect has been described as giving rise to an excessively rigid system in which no account can be taken of the facts, the law, or other circumstances relevant to any particular case that might justify even the transfer of a case to the Dublin Circuit Criminal Court.<sup>21</sup> The position in place since 1995 represents the culmination of a series of legislative restrictions on transfer made since 1924.
- 12.13 Indeed, between 1924 and 1964, the relevant legislation provided that, in any case where the possible sentence on conviction was more than one year, the prosecution and the accused had a statutory right to have a case transferred from the Circuit Criminal Court to the Central Criminal Court.<sup>22</sup>
- 12.14 Between 1964 and 1981, legislation provided for transfer of any indictable offence from the Circuit Court to the Central Criminal Court.<sup>23</sup> As was the case between 1924 and 1964, the Circuit Court judge was required to make such a transfer on application by either the prosecution or accused, provided that 7 days notice was given.<sup>24</sup> Because this right of transfer was not restricted to serious offences, such as offences carrying at least 5 years imprisonment on conviction (arrestable offences), many

<sup>17</sup> Pursuant to section 32 of *the Courts and Court Officers Act 1995*.

<sup>18</sup> Walsh, *Criminal Procedure* (Roundhall 2002) p.703, gives an example of where either the accused or the alleged offence has developed such a notorious reputation in the locality that a local jury would find it difficult to approach the question of guilt or innocence with an open mind.

<sup>19</sup> The likelihood of a court recognising the requisite “manifest injustice” appears low. This is arguably a higher standard than having to prove “a real risk of an unfair trial”, which is required to have a prosecution stayed or prohibited due to adverse publicity. Thus in *Rattigan v Director of Public Prosecutions* [2008] 4 IR 639, regarding the risk of an unfair trial due to adverse publicity, the Supreme Court noted, at para. 50, that “a court will only stop a trial if it is satisfied that the normal safeguard procedures in a trial, including the making of appropriate directions, will not, in fact, achieve a fair trial. In practice, this will rarely be the case [...] Furthermore, it must always be borne in mind, as it has been in so many decisions, that there is no evidence to suggest that, in general at least, jurors do not exercise their function properly and with the required independence of mind”. Thus section 32 is only applicable in the rarest of cases.

<sup>20</sup> Circuit Court Judiciary Submission to the Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) para 418.

<sup>21</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) para 538.

<sup>22</sup> Section 54 of *the Courts of Justice Act 1924*.

<sup>23</sup> Section 6 of *the Courts Act 1964*.

<sup>24</sup> The Circuit Court judge had discretion to transfer if less than 7 days notice was provided.

relatively minor prosecutions<sup>25</sup> were tried in the Central Criminal Court up to 1981. The provision was therefore open to abuse, and it was abused.<sup>26</sup>

- 12.15 For this reason, in 1981 significant restrictions were placed on the right to transfer by providing that transfers from the Circuit Court sitting outside Dublin were only to be allowed to the Circuit Court sitting in Dublin, based upon the discretion of the Circuit Court judge to which the application was made.<sup>27</sup> This change removed any possibility of transferring a Circuit Criminal Court trial to the Central Criminal Court. This was followed by a further restriction enacted in 2005, described above, which remains the position at the time of writing.
- 12.16 Against this background, it is clear that the current position, namely, that the Circuit Criminal Court has exclusive jurisdiction to try most indictable offences, and more particularly that it is no longer possible to transfer a trial to the Central Criminal Court, has not always been the case. Indeed, between 1924 and 1981 the prosecution and the accused had a statutory right to transfer cases carrying a sentence on conviction of more than one year from the Circuit Criminal Court to the Central Criminal Court. The history of the statutory transfer provisions since 1981 indicates that the Oireachtas moved from one end of the spectrum, a highly open approach that was subject to abuse, to virtually the other end, a restrictive approach that allows transfer only between one Circuit and another and subject to a high threshold test, and with no possibility of transfer from the Circuit Criminal Court to the Central Criminal Court. The Commission therefore considers that it is appropriate to seek views as to whether there is a case for moving back from this end of the spectrum.

### **Previous recommendations to allow greater flexibility in transfers, including from Circuit Criminal Court to Central Criminal Court**

- 12.17 As noted above, in 2003, the *Report of the Working Group on the Jurisdiction of the Courts* recommended that there should be greater flexibility to allow for the transfer of cases between the Circuit Criminal Court and the Central Criminal Court, and it considered a range of options in this context.<sup>28</sup>
- 12.18 One option would be to provide for a judicial or administrative procedure for transfer, under which either the court to which an indictable prosecution had been returned for trial or a designated court or judge could hear applications for transfer to another court, whether another Circuit Criminal Court or the Central Criminal Court.<sup>29</sup> The Report referred in this respect to the position in New Zealand, where the relevant legislation refers to a number of specific factors, including: (a) the gravity of the

<sup>25</sup> Such as burglaries and larcenies.

<sup>26</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) para 414.

<sup>27</sup> Section 31 of the *Courts Act 1981*.

<sup>28</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) (n 136) para 563.

<sup>29</sup> *Ibid* at para 566.

offence; (b) the complexity of the issues; (c) the desirability of the prompt disposal of cases; and (d) the interest of justice generally.<sup>30</sup> The Report noted that it would be possible to provide that such a decision on venue would be final and unappealable.<sup>31</sup> The 2003 Report considered that, if adopted, it would also be important to include a strict time limit of 14 days during which an application could be made, in order to avoid the build up of wasted costs. While this option appears at first sight to be broadly similar to the position prior to 1981 described above, it differs in an important respect by including some criteria to guide the application for a transfer.

- 12.19 A second option put forward in the 2003 Report was to allow the Director of Public Prosecutions (DPP) to designate a court at the time the prosecution is returned for trial.<sup>32</sup> The DPP already retains a broad discretion to transfer cases to the Special Criminal Court,<sup>33</sup> the standard being that the DPP must be satisfied prior to deciding to transfer a case that the ordinary courts are, in his or her opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge.<sup>34</sup> Although this standard may not be entirely appropriate in the case of corporate offences, the question as to the adequacy of the Circuit Court to try such a prosecution could be a relevant consideration.
- 12.20 The 2003 Report noted that among the benefits of granting the DPP a general discretion of transfer, either to or from the Dublin Circuit, or to the Central Criminal Court, include that the DPP may be very well apprised of the specific features of an indictable case at an early stage of a prosecution. The DPP would be in a strong position to determine whether the transfer of venue or jurisdiction might be appropriate on the grounds of obvious exceptional seriousness, complexity or length, from an early stage. Nonetheless, the 2003 Report that the then DPP indicated no wish to act as sole arbiter in such cases, and suggested that a court should make any such decision, having heard the submissions of the DPP and the accused.<sup>35</sup>
- 12.21 A third option considered in the 2003 Report was the possibility of conferring a power on the judge in charge of the Central Criminal Court, or another designated judge such as the President of the High Court, to initiate a procedure for considering the transfer of a case from that court to the Circuit Criminal Court. The 2003 Report considered that this might be pertinent where a backlog of cases might have built up in the Central Criminal Court and that such a procedure would facilitate an earlier trial in the Circuit Criminal Court.

<sup>30</sup> *Ibid* at para 526.

<sup>31</sup> In general, the decision made by a Circuit judge in relation to whether or not to allow a transfer has been final and unappealable, though it has been subject to judicial review. See *Todd v Murphy* [1999] 2 IR 1 in relation to the Constitutionality of such provision.

<sup>32</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) para 566.

<sup>33</sup> Sections 46 and 47 of the *Offences Against the State Act 1939*.

<sup>34</sup> Under section 47(2) of the 1939 Act, in order to exercise this discretion, the DPP must issue a certificate to the Court that he or she is so satisfied.

<sup>35</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) para 566.

- 12.22 As noted above, the standard to be applied, either by a judge or the DPP, in determining whether to allow a transfer is of great importance. Since 1981 the Oireachtas has moved away from a highly flexible approach that, in effect, allowed any indictable offence to be transferred, at the discretion of the court, at the request of either the prosecution or the accused. This move towards a highly restrictive system was arguably justified in order to prevent costly and unnecessary transfers. However, the current test, that a transfer is to be refused unless the refusal will result in “manifest injustice”, is set at such a high standard that it makes any transfer highly unlikely.
- 12.23 The 2003 *Report of the Working Group on the Jurisdiction of the Courts* outlined a number of factors which might be taken into account by a judge considering an application to transfer, including the overriding interests of justice and without prejudice to the generality of that test, the following:
- (a) the nature of the case and of facts alleged;
  - (b) the degree of gravity or complexity of the case, having regard to those facts;
  - (c) the convenience of the parties and of witnesses;
  - (d) any risk of prejudicial publicity;
  - (e) any risk of intimidation of witnesses or jurors; and
  - (f) the objective of an expeditious trial.<sup>36</sup>
- 12.24 The Commission seeks views as to whether such factors may be relevant in relation to the transfer of prosecutions of the corporate offences with which this project is concerned, between Circuit Court circuits, or between the Circuit Criminal Court and the Central Criminal Court.

### **Whether certain corporate offences should be “reserved” to Central Criminal Court**

- 12.25 The list of offences reserved for trial by the Central Criminal Court has been added to at various times and it is therefore not a fixed list.<sup>37</sup> It would be entirely consistent with this approach to consider, as an alternative to the transfer procedure discussed above, whether legislation should be enacted to confer exclusive jurisdiction on the Central Criminal Court in respect of certain specified corporate offences.

<sup>36</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) para 573. The 2003 Report made specific reference to the application of these criteria to an application for transfer involving a prosecution for rape, and it therefore included the need to take account of the views of the complainant. This factor has not been included in the list of factors set out in the text above.

<sup>37</sup> Section 25(2) of the *Courts (Supplemental Provision) Act 1961* set out an initial list of “reserved offences”, notably murder, for which the Central Criminal Court has exclusive jurisdiction. Since then a number of specific offences have been added to this list, namely, offences under the *Geneva Convention Act 1962*, the *Criminal Law (Rape)(Amendment) Act 1990*, the *Criminal Justice (United Nations Convention Against Torture) Act 2000*, the *Criminal Justice (Safety of United Nations Workers) Act 2000*, the *Competition Act 2002* and the *International Criminal Court Act 2006*.

- 12.26 Such an approach would have the advantage that certain complex corporate criminal prosecutions would benefit from being tried by a jury exclusively in the Central Criminal Court. This was the approach taken in the 2000 *Final Report of the Competition and Mergers Review Group*, and implemented in the *Competition Act 2002* in relation to prosecutions of certain competition law offences.
- 12.27 If this approach were adopted, the question arises as to which specific offences should be reserved to the jurisdiction of the Central Criminal Court. One way of analysing this was suggested in 2001 by the Law Commission of New Zealand which commented that: “[t]he touchstone for determining how a case proceeds through the courts will in the main be the maximum penalty that can be imposed for the offence with which the defendant is charged. Maximum penalties reflect how comparatively seriously society views different crimes, and provide a suitable basis for determining how the cases should be handled.”<sup>38</sup>

Section 6(1) of the *Criminal Justice (Theft and Fraud Offences) Act 2001* provides for the offence of “making gain or causing loss by deception”. Should a corporate body be convicted of this offence, on indictment, the Circuit Criminal Court has jurisdiction to impose a fine with no maximum limit. By contrast, the *Competition Act 2002* provides for a specific limit to the fine that may be imposed on conviction for the competition law offences reserved for trial in the Central Criminal Court.<sup>39</sup>

Section 716(2)(a) of the *Companies Act 2014* provides that it is a criminal offence where a relevant person who does not deliver up to the liquidator, or as the liquidator directs, all such part of the real and personal property of the company as is in the person’s custody or under the person’s control, and which the person is required by law to deliver up. On conviction on indictment the Circuit Criminal Court may impose a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

- 12.28 As can be seen from the above, the level of fines that can result from offences committed by a corporate body vary greatly. If a list of corporate offences to be reserved to the Central Criminal Court is to be based on the level of fine imposed on a corporate body, consideration may need to be given to whether a specific threshold should be set, whether in absolute terms (for example an unlimited fine, or a fine not exceeding a specified amount or one related to turnover) or by reference to proportionality (for example a percentage of turnover or payroll costs of a corporate body).

<sup>38</sup> Law Commission of New Zealand, *Simplification of Criminal Procedure Legislation: an Advisory Report to the Ministry for Justice* (Study Paper 7 January 2001) at 7, cited in *Law Reform Commission, Consultation Paper on Consolidation and Reform of the Courts Acts (LRC CP 46-2007)*, pp.230-231.

<sup>39</sup> Section 8 of the *Competition Act 2002* provides that the penalty under section 6(1) of the Act (that is an offence involving an agreement, decision or concerted practice) for an undertaking on indictment is a fine of up to €4,000,000 or 10 per cent, whichever is the greater, of the turnover of the undertaking; and in the case of an individual a fine of up to €4,000,000 or 10 per cent of the turnover of the individual, whichever is the greater, and/or to imprisonment for a maximum term not in excess of 10 years (raised from 5 years in 2012). For offences pursuant to section 6 (excluding section 6(1)) and section 7 of the Act, the penalty on indictment is a fine not exceeding whichever of the following amounts is the greater €4,000,000 or 10% of the turnover of the undertaking.

- 12.29 It may also be relevant to consider the severity of any sentence of imprisonment that may be imposed on, for example, a director, manager or officer of the corporate body, as this also indicates the level of seriousness or severity of the labelling attached to the offence.
- 12.30 Of course, it may be that the suitability of the Central Criminal Court to try certain complex corporate offences should not be based solely on the severity of potential penalties but, as discussed above, should be based primarily on its capacity to take account of the complexity of the legal matters arising in a given case, and other pragmatic reasons. Such complexity may arise in cases which do not include the potential for extremely onerous penalties.

### **Conclusion and questions**

- 12.31 The Commission seeks views on the appropriate venue and jurisdiction for the prosecution of corporate criminal offences. This includes the question as to whether a more flexible approach should be provided for the transfer of certain corporate offences either from one circuit to the Dublin Circuit, or from the Circuit Court to the Central Criminal Court. It also seeks views as to whether the jurisdiction to try certain corporate offences should be given exclusively to the Central Criminal Court, and if so which offences should this include.

## QUESTION 12

- 12(a) Do you think that there should be a process for transferring cases involving the criminal cases involving corporate bodies to or from a Circuit Court circuit, to the Central Criminal Court, or the Dublin Circuit Court?
- 12(b) If yes, do you think such a transfer should be granted as of right on the request of either the accused or the prosecution, or should a standard be required to be met to allow such a transfer?
- 12(c) If a standard should be set, what do think this standard should be, that is, what criteria or factors should come into consideration?
- 12(d) Do you think that the same standard should be applied in relation to transfers between Court circuits, and a transfer from the Circuit Court to the Central Criminal Court?
- 12(e) If not, how and why, do you think the standard should differ?
- 12(f) Regarding the standard to be applied, do you think the discretion regarding this standard should lie with the Director of Public Prosecutions, a Circuit Court Judge, or a Central Criminal Court or High Court Judge, or some or all of these?
- 12(g) Do you think that, in addition to offences under sections 6 and 7 of the Competition Act 2002, other corporate offences should be within the exclusive jurisdiction of the Central Criminal Court?
- 12(h) If yes, what criteria do you think should be applied to determine this?

Please fill in your name and contact details below. Click submit button to email your submission. If submitting by webmail please check your drafts folder and sent items to ensure that your email has been submitted.

First name *	<input type="text"/>
Surname *	<input type="text"/>
Telephone/mobile number	<input type="text"/>
Email address*	<input type="text"/>
Confirm email address *	<input type="text"/>
Organisation	<input type="text"/>

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