Report

Regulatory Powers and Corporate Offences

Volume 1: Regulatory Powers, Chapters 1 to 7

Volume 2: Corporate Offences, Chapters 8 to 13

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OVERVIEW AND EXECUTIVE SUMMARY

Background to the Report

1. This Report forms part of the Commission's Fourth Programme of Law Reform[1] and it contains our final recommendations in this wide-ranging project on regulatory powers and corporate offences. In January 2016, we published our Issues Paper on the project[2] and this was followed by an extensive public consultation process. This included a discussion of the project at our 2016 Annual Conference, which heard from national and international experts on financial and economic regulation and on corporate offences.[3] During the consultation process, we also received many submissions from individuals and bodies with an interest in this area, and we greatly appreciate those contributions, which assisted our analysis and the conclusions arrived at in this Report. We also benefitted from further discussions during the consultative process, and we have attempted to list all those who provided us with valuable insights on the acknowledgements page of the Report.

2. In the context of the issues that arise in this project, the financial crisis that emerged in 2008 has focused attention on two related legal matters. First, that financial and economic regulators should have a complete range of powers in their regulatory toolkit to carry out their functions effectively. Second, that the general principles on corporate criminal liability should reflect the reality of modern corporate decision-making, and that current law should be adequate to address what a former Governor of the Central Bank described as egregiously reckless risk-taking.[4] This Report seeks to make a contribution to these two matters, while acknowledging that it forms part of a wide range of policy and legislative initiatives at national and EU level, and that our current law has been used in significant criminal trials that related to the financial crisis.

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[1] *Report on Fourth Programme of Law Reform* (LRC 110-2013), Project 1.

[2] *Issues Paper on Regulatory Enforcement and Corporate Offences* (LRC IP 8-2016).

[3] The speakers' presentations at the Commission's 2016 Annual Conference, held on 3 November 2016, are available at *http://www.lawreform.ie/news/annual-conference-speakers%e2%80%99-presentations.692.html*.

[4] 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 INET Annual Conference, 9 April 2015, available at *https://www.centralbank.ie/news/article/governor-patrick-honohan-at-inet-annual-conference*.

3. The wider policy and legislative initiatives include the Government's 2013 policy statement Regulating for a Better Future,[5] which referred to the desirability of a review of elements of sectoral economic regulation. The Report also takes account of the significant legislative initiatives to date in this area, and those planned, notably in the Government's 2017 document Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework,[6] which also referred to the Commission's project that has culminated in this Report.

4. In view of the Report's length, it has been divided into 2 volumes. Volume 1, comprising Chapters 1 to 7, concerns regulatory powers, and Volume 2, comprising Chapters 8 to 13, concerns corporate offences. Volume 2 also includes the Appendix, which contains 4 Draft Schemes of Bills intended to implement the Commission's recommendations for reform in the Report.

Chapter 1: Overview and the Need for a Corporate Crime Agency

5. Chapter 1 provides the general background and context for the Report. It underlines the importance of examining both regulatory enforcement and corporate criminal liability, as these areas were, and continue to be, central to the legal responses to the financial and economic crisis that emerged in 2008.

6. The chapter points out that, before 2008, previous crises resulted in important reforms of the financial regulatory system in the first decade of the 21st century; however, it is also clear from the reviews carried out since 2008, including the 2016 Oireachtas Banking Inquiry, that a combination of "light touch" regulation leading up to 2008 and poor resourcing of the financial regulator meant that the available powers were not used to their full effect. In terms of previous corporate failures, the chapter notes that these also led to important statutory reforms, notably in the Theft and Fraud Offences Act 2001, and that the reforms enacted in the 2001 Act have been the basis for many of the charges and convictions in the criminal trials held between 2014 and 2018 that related to pre-2009 banking activity.

7. The chapter also refers to the significant statutory reforms enacted since 2008 to address perceived weaknesses in the regulation of financial services generally, and in the procedures for combating serious corporate wrongdoing. A number of these reforms emerged from initiatives agreed between EU member states to strengthen the regulatory system in financial services and related sectors. In Ireland, a number of significant reviews

[5] Department of the Taoiseach, *Regulating for a Better Future: A Government Policy Statement on Sectoral Economic Regulation* (2013), Section 3.3.

[6] Government of Ireland, *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework*, p.4, available at *www.dbei.gov.ie*.

of the weaknesses in the pre-2008 regulatory system have been undertaken. These have led to important reforms to, and enhanced powers for, the Central Bank of Ireland and other financial and economic regulators. They have also prompted reforms to corporate criminal liability, or so-called “white collar” crime.

8. While significant reforms have been enacted to date, the chapter concludes that further changes are required to improve the regulatory powers of financial and economic regulators and to address more effectively corporate criminal liability. In November 2017, the Government published a report entitled Measures to Enhance Ireland’s Corporate, Economic and Regulatory Framework. This document includes a wide-ranging review of the reforms already enacted concerning the regulatory powers of financial and economic regulators and corporate criminal offences. It also sets out a range of further measures under active consideration, while noting that consideration will also be given to recommendations emerging from this Report.

9. Echoing the Government’s 2017 paper, this chapter recommends that a new independent Corporate Crime Agency should be established on a statutory basis to investigate corporate offences. This should be a multidisciplinary agency similar to the Criminal Assets Bureau established under the Criminal Assets Bureau Act 1996. The chapter also recommends that a dedicated Prosecution Unit for corporate offences be established, ideally situated in the Office of the Director of Public Prosecutions. This Unit would work in close liaison with the proposed multidisciplinary Agency. The Commission also recommends that, bearing in mind previous experience, both the Corporate Crime Agency and the Prosecution Unit require adequate resources in order to discharge their functions effectively.

Chapter 2: A Standard Template for Regulatory Powers

10. Chapter 2 contains an overview of developments in regulation since the 1990s, and notes that financial and economic regulators, to be effective, require a variety of powers in their “regulatory toolkit”. These powers (often described as forming an “enforcement pyramid”) range from relatively modest, but often-used powers such as inspections and warning notices, through an intermediate level of regulatory powers, including financial sanctions, to the highest level of legal power, criminal prosecution and, in a licensing regime, licence revocation. The available research on regulatory powers strongly suggests that regulators need this variety of powers in order to work effectively.

11. Against this background, the chapter recommends that there should be a standard framework of regulatory powers for financial and economic regulators in Ireland. Existing legislation contains significant variation with respect to the powers possessed by such regulators. Legislation has been enacted on a case-by-case basis over many years, leading to some inconsistencies and anomalies in the individual statutory regimes. The chapter identifies two significant matters in this respect, namely, what the core elements of a complete “regulatory toolkit” should entail, and whether gaps have arisen in the specific

content of such core elements that require attention. It also recommends the establishment of a Regulatory Guidance Office to provide general guidance on regulatory policy.

12. The chapter recommends that financial and economic regulators should each have a regulatory toolkit that includes the following 6 "core" powers:

    (1) the power to issue a range of warning directions or notices, including to obtain information by written request and "cease and desist" notices;

    (2) the power to enter and search premises and take documents and other material, for example where relevant for product testing purposes;

    (3) the power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or to produce documents (including provision for determining issues of privilege);

    (4) the power to impose administrative financial sanctions, subject to court oversight, to ensure compliance with constitutional requirements, discussed in detail in chapter 4;

    (5) the power to enter into wide-ranging regulatory compliance agreements or settlements, including consumer redress schemes, discussed in detail in chapter 4; and

    (6) the power to bring summary criminal prosecutions (prosecutions on indictment are the responsibility of the Director of Public Prosecutions).

13. The chapter concludes that certain other powers, such as licensing powers and "fitness and probity" requirements, while of great importance for some financial and economic regulators, could not be classified as "core" regulatory powers. Affording such powers to regulators would require consideration on a case-by-case basis.

14. Significantly, certain financial and economic regulators have not been conferred with the power to impose administrative financial sanctions or to enter into regulatory compliance agreements. These matters are discussed separately in Chapters 3 and 4, where the Commission recommends that regulators should be conferred with such powers in order to ensure that they have a complete regulatory toolkit at their disposal. The Commission therefore recommends in Chapter 2 that such powers should form part of the standard framework for financial and economic regulators.

15. The second issue identified in the chapter is that case-by-case development has led to significant gaps in the statutory powers conferred on certain financial and economic regulators. An example of this was identified in the Supreme Court decision in CRH plc, Irish Cement v Competition and Consumer Protection Commission (2017). There, the Competition and Consumer Protection Commission had been conferred with significant powers of entry and search (so-called "dawn raid" powers), a standard component of the regulatory toolkit. However, the relevant legislation did not adequately cater for a process

to handle privileged material obtained illegally during the entry and search. In a corporate context, it is likely that an enormous quantity of documents will be involved in such a search. It is therefore necessary to cater for finding documents that may be privileged and that the process for separating them from admissible evidence is done lawfully. The Commission previously identified this in the context of its 2014 Report on Disclosure and Discovery in Criminal Cases. The Commission therefore recommends that the general framework for regulatory powers should take account of the gaps identified in cases such as the Irish Cement case.

16. The Commission's recommendation for a common legislative template of powers – a common "regulatory toolkit" – to include the 6 "core" powers identified above, should also encourage and facilitate the use of a common formula of words when conferring particular powers on regulators, and assist in avoiding specific gaps such as those identified in the Irish Cement case. Such a common template could also lay the groundwork for a single Regulatory Powers Act (as has been enacted in some jurisdictions) at some point in the future, but the Commission does not consider that such an Act is required at this time.

17. The Commission also recommends that a Regulatory Guidance Office, with membership drawn from Government Departments and Regulators, should be established with a remit to provide guidance and information on regulatory matters, including national and international best practice in economic regulation, the content of Regulatory Impact Assessments (or comparable documents) and lessons learned from the relevant case law. Such an Office would facilitate the State's ability to meet in full relevant international standards, such as the OECD's 2012 *Recommendation on Regulatory Policy and Governance*.

Chapter 3: Administrative Financial Sanctions

18. Chapter 3 examines whether similarly situated financial and economic regulators should be empowered to impose administrative financial sanctions (sometimes inaccurately referred to as civil fines), which are regarded by many commentators as an important component of an effective "regulatory toolkit", and which are listed in Chapter 2 as one of the 6 "core" regulatory powers.

19. The Central Bank's statutory Administrative Sanctions Procedure (ASP) is used as a reference model in this regard. In Purcell v Central Bank of Ireland (2016), the High Court (Hedigan J) held that the Central Bank's ASP does not constitute the administration of justice, in particular because it does not involve a final determination and is subject to court oversight. As such, it was found to be constitutionally permissible.

20. The Commission recommends that the Central Bank's ASP should, subject to some reforms, be extended to similarly situated financial and economic regulators. The resulting sanctions should be referred to as Administrative Financial Sanctions (AFS). The main reform recommended is that the procedure leading to such sanctions should be aligned with the process followed by the Solicitors' Disciplinary Tribunal and the Medical Council's

Fitness to Practise Committee. These bodies use a single in-house investigation, the results of which are presented to a panel of external persons selected for the purpose of considering the evidence gathered. Under the proposed regime, the panel would make a determination as to the level of AFS to be imposed, having regard to stated statutory criteria. The Commission recommends that these criteria should include:

(1) the gravity and the duration of the breach;

(2) the degree of responsibility of the natural or legal person responsible for the breach;

(3) the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;

(4) the importance of profits gained or losses avoided by the natural or legal person responsible for the breach, insofar as these can be determined;

(5) the losses for third parties caused by the breach, insofar as these can be determined;

(6) the level of cooperation of the natural or legal person responsible for the breach with the competent authority;

(7) previous breaches by the natural or legal person responsible for the breach; and

(8) any action taken to mitigate the damage caused by the breach.

21. The Commission also recommends that, having regard to constitutional requirements, the sanction determined would ultimately be subject to oversight by the High Court.

Chapter 4: Regulatory Enforcement Agreements

22. Chapter 4 deals with Regulatory Enforcement Agreements (REAs), which are also regarded as an important component of the regulatory toolkit, and which are listed in Chapter 2 as one of the 6 “core” regulatory powers. REAs are an agreed settlement between a regulator and a regulated entity that can be entered into in place of the more formal AFS process discussed in Chapter 3. Here again, the Commission has used as a reference point the settlement procedure employed by the Central Bank in its regulation of financial services.

23. Following the Commission’s endorsement of AFSs in Chapter 3, the Commission further concludes that REAs represent a valuable addition to the regulatory toolkit, and should be conferred on those financial and economic regulators who do not currently possess such powers. The Commission makes a number of recommendations regarding the process and content of such agreements, including that:

(1) negotiations leading to REAs should be on a “without prejudice” basis;

(2) they must be evidenced in writing;

(3) they must be publicised;

(4) they may include not only a specific sum by way of agreed settlement with the regulator but may also include consumer redress schemes; and

(5) they may be subject to being made an order of court, but that there should be no general requirement to do so.

Chapter 5: Deferred Prosecution Agreements

24. Chapter 5 considers whether a regime of Deferred Prosecution Agreements (DPAs) should be enacted in Ireland. DPAs are agreements entered into between a prosecuting authority and a defendant to a possible criminal prosecution. Under such agreements, the prosecution is suspended for an agreed period, in exchange for the defendant complying with certain conditions during that time. If these conditions are complied with, the prosecution will be brought to an end without the defendant receiving a conviction. DPAs would fulfil a role for certain instances of corporate offending, operating in a manner similar to diversion programmes for individuals, community courts, or the application of the Probation of Offenders Act 1907 in the District Court.

25. DPAs provide a third option to the prosecution where a decision whether to prosecute may be in the balance and where a decision not to prosecute may be under serious consideration. Relying on such an "all-or-nothing" choice can lead to problems in dealing with corporate offences, as it can result in an alleged offence not being prosecuted. This generates the problem of a lack of accountability for certain types of commercial economic crime. DPAs are seen as filling this gap. A regime without DPAs may also discourage cooperation and self-reporting by corporate offenders, thereby inhibiting the detection and investigation of offending.

26. A DPA regime helps to ensure a proportionate response to offending, especially where it is accompanied by elements such as the corporate body's admission of having offended, the publication of the relevant facts of the offence(s), proportionate financial sanctions comparable to what might be impose on conviction, the implementation of corporate compliance programmes and restorative payment schemes (where relevant).

27. The Commission recommends the enactment of a statutory DPA model comparable to that enacted in the UK in 2013, under which a DPA will only come into effect if it has been approved by a court. The Commission rejects the introduction of the US style of DPAs, as they do not operate under legislation, they are dependent on a wide discretion of US prosecutors and they are not subject to effective judicial oversight.

28. The Commission also recommends that, as in the UK, the Court must satisfy itself that the terms of the DPA are both (a) fair and proportionate and (b) in the interests of justice.

29. The Commission also recommends that the detailed procedures concerning DPAs are best left to be determined in a Code of Practice to be developed by the DPP, comparable to the DPP's Guidelines for Prosecutors and the DPP's Guidelines for the Cartel Immunity Programme (which operates under the *Competition Act 2002*).

Chapter 6: Coordination between Regulators

30. Chapter 6 considers how financial and economic regulators can ensure suitable coordination of their actions, in particular where their statutory functions overlap. It also considers how regulators' actions might be coordinated with the proposed Regulatory Guidance Office described in Chapter 2.

31. The Commission recommends that the best approach to coordination is the use of cooperation agreements concluded by mutual agreement between regulators, recorded in a Memorandum of Understanding (MoU). With regard to common inspectorates, it recommends that these would be of particular use where the division or overlap between regulators is particularly complex. While MoUs may be sufficient in some contexts, the overlap of serious and complex matters requires a more defined institutional response. Common inspectorates require significant resources and expertise, so they should only be used where there is a strongly identifiable need. The chapter also recommends greater information sharing provisions between regulators, which will take account of the Data Protection Act 2018 and the Data Sharing and Governance Bill 2018.

32. The Commission recommends that the form of coordination instruments should be determined largely on a case-by-case basis. The usual default should be a coordination agreement agreed between the regulators and recorded in an MoU. In circumstances where the need for coordination is more systematic, structural changes such as joint inspectorates or a lead agency may be appropriate.

Chapter 7: Appeals from Regulatory Decisions

33. Chapter 7 considers the most appropriate appeal regime in respect of regulatory decisions with significant market impact, such as the Administrative Financial Sanctions discussed in Chapter 3. For such decisions, 3 possible avenues of appeal are currently provided for in the statutory schemes for financial and economic regulators:

    (1) appeals to an appeal panel, constituted on a when-needed, *ad hoc*, basis;

    (2) appeals to an appeals tribunal, a permanent standing body such as the Irish Financial Services Appeals Tribunal; or

    (3) appeals to the High Court.

34. The Commission recommends that, in general, appeals from market affecting regulatory decisions should be to the High Court. The Commission also recommends, however, that the Irish Financial Services Appeals Tribunal (IFSAT), which is a standing body, should be retained on the basis that it has worked effectively to date.

35. The Commission also recommends that where appeals are to the High Court, the Court may be assisted by assessors in respect of complex financial or economic issues, as is currently the case in competition cases. The Commission also recommends that, to ensure that such appeals are dealt with efficiently, a High Court Regulatory Appeals List should be established, comparable to the existing High Court Commercial Court List and the Competition Court List. The Commission recognises that for this system to be fully effective will require additional resources to be allocated to the High Court.

36. Chapter 7 completes Volume 1 of the Report.

Chapter 8: Corporate Criminal Liability

37. Chapter 8 considers the current law concerning the attribution of criminal liability for corporate crime, and makes a number of recommendations for its reform. Corporate bodies generally have the same capacity to commit criminal offences as natural persons. Despite this, there is uncertainty about the correct test to apply to determine the criminal liability of corporate bodies. This uncertainty may have contributed to a lack of prosecutions in Ireland of corporate bodies for subjective fault based offences in particular, which include offences that would be used to target commercial or economic wrongdoing, such as theft, fraud and bribery offences.

38. The long-established common law identification doctrine attributes liability to a corporate body by requiring that the fault and conduct elements of the offence must be identified in a single natural person who operates high within its managerial structure, and is taken to have acted as the corporate body in committing the offence. This model has been subject to significant criticism as it works best in cases where it is needed least (small businesses where a single person can often be identified as the key decision-maker) and works worst in cases where it is needed most (large businesses where decision-making is necessarily delegated to many persons). This criticism of the identification doctrine is known as the “paradox of size”.

39. The Commission recommends that the identification doctrine should be replaced by a new test that reflects the reality of how modern corporate bodies, especially large ones, actually operate; that is, by delegating corporate policy-making not just to one senior manager but to many managers. The Commission therefore recommends that the new test of attribution should involve a “tracking” approach, which requires that the fault element of the secondary offender, whether a single senior manager or more than one senior manager, should track that of the principal offender, the corporate body. The precise calibration of this model will depend on the nature of the fault element of an offence; that is, whether it is a subjective fault offence, an objective fault offence, or a no-fault offence.

40. Modern corporate organisational structure and policy will result in certain senior managerial agents being delegated the authority to organise and implement the corporate body’s policies and activities. Where there is permission to use such authority for a criminal end, for the benefit of the organisation or within the scope of the agent’s activity

for the corporate body, the fault element of that agent may be attributed to the corporate body. An agent may delegate the conduct element of the offence where it falls within his or her authority. Alternatively, the agent may acquiesce to the conduct, where he or she apprehends it but fails to take sufficient preventative action.

41. The Commission also recommends that this proposed model should include a rebuttable presumption that the fault element of the offence has been satisfied when the prosecution has proved the conduct element has occurred, and that it could only have been committed by an agent of the corporate body. The corporate body may rebut this presumption by demonstrating that it acted reasonably, or that no agent with sufficient authority ordered, acquiesced to, or failed to prevent the criminal conduct.

42. For subjective fault based offences, the chapter thus recommends a model of attribution that takes account of modern corporate decision-making processes, where decision-making is often delegated. This approach is also often required under the statutory codes of many financial and economic regulators to ensure compliance with corporate statutory duties.

43. For objective fault based offences, the chapter recommends an attribution model based on the model recommended in the Commission's 2005 Report on Corporate Killing. The scheme contains separate provisions for offences based on an unreasonableness standard and those based on a gross negligence standard. The recommended scheme also clarifies how the existing law imposes liability for strict and absolute liability offences, which is through the imposition of direct liability on the corporate body.

Chapter 9: Liability of Corporate Managerial Agents

44. Chapter 9 considers both a generally applicable scheme of secondary criminal liability (the aids, abets, counsels or procures model) and offence-specific models of corporate officer derivative liability (the "consent, connivance and neglect" model, the most commonly used; and the "officer in default" model, found only in the *Companies Act 2014*). The chapter concludes that the complicity of managerial agents in corporate offending is at risk of under-criminalisation in circumstances where an offence-specific model does not apply. As such, the Commission recommends the introduction of a new statutory scheme.

45. This recommended scheme targets the complicity of certain managerial agents, who exercise a defined level of control or authority over the conduct of the corporate body and its agents. Where that control and authority operates in a manner that culpably contributes to corporate offending, this new scheme allows for the imposition of derivative criminal liability. The recommended scheme is intended to allow for derivative liability to be imposed on a managerial agent in relation to that agent's culpable contribution to any offending on the part of the corporate body. Under this scheme, upon proof of a managerial agent's culpable contribution to the substantive offending by the corporate body, a managerial agent shall be liable to be prosecuted on the same basis as if

he or she were guilty of the corporate offence. This approach represents the standard approach used in most existing statutory regimes.

46. In relation to fault-based offences (requiring proof of intention, knowledge or recklessness), the level of fault required to impose liability on a defendant must track the level of fault that would be required of a principal offender in a prosecution for the substantive offence. For no-fault offences, that is strict liability and absolute liability offences, no proof of culpability will be required of a managerial agent in order to impose derivative liability; but the managerial agent will have a defence where he or she can demonstrate either that the conduct element of the principal offence did not fall under his or her authority or control, or that he or she acted reasonably.

47. In order to impose liability under this approach, the prosecution will first be required to prove the commission of a substantive offence by a corporate body (although an actual prosecution or conviction of the corporate body will not be required). The prosecution must also demonstrate that the agent either acted to approve the substantive offending (either positively or tacitly), or failed to prevent the substantive offending.

48. The Commission also recommends that the prosecution will be able to raise a rebuttable presumption that the managerial agent has the required level of fault, and that they contributed to the substantive offending. In order to raise this presumption, the prosecution must prove (to the satisfaction of the evidential burden) that the managerial agent's duties included making decisions that, to a significant extent, could have affected the management, that is, the policy-making, of the corporate body. Where the offence involved is a fault-based offence, the agent may rebut this presumption by demonstrating that they did not in fact possess the requisite level of fault or that they did not perform the conduct element. Where the offence in question is a no-fault offence, the agent will rebut the presumption by proving that he or she did not satisfy the contributory conduct element of the offence.

Chapter 10: A Defence of Due Diligence

49. Chapter 10 analyses the current application of due diligence defences in Irish law. It then goes on to analyse the constitutionally permissible use of strict liability and absolute liability offences, and the scope of the use of due diligence defences. The Commission recommends that, having regard to the relevant constitutional provisions, a due diligence type defence should apply to strict liability offences.

50. The chapter goes on to consider the application of due diligence defences in two contexts:

    (1) corporate offending; and

    (2) individual offending in a corporate context.

51. With regard to corporate offending, the chapter first discusses whether a general due diligence defence should be introduced for certain corporate offences and concludes that a due diligence defence should apply to strict liability corporate offences. Second, the

chapter discusses whether a general “failure to prevent” liability scheme ought to be introduced. The chapter recommends that a failure to prevent liability model should be applied on a case-by-case basis, rather than as a general model.

52. In relation to individual offending in a corporate context, the chapter first considers whether a general due diligence defence should be made available to individual offenders for certain corporate offences. The Commission does not recommend a general due diligence defence, but rather that a due diligence type defence should be available to individual managers and officers for strict liability type offences. The Commission also recommends that a due diligence defence should apply to the proposed scheme of derivative managerial agent liability discussed in Chapter 9, also insofar as it relates to strict liability offences.

53. As to the role that legal advice should play in taking reasonable steps for the purposes of a due diligence defence, the chapter recommends that the general rule that ignorance of the law is not a defence should be retained. It also recommends that, in circumstances in which there is evidence to indicate that an individual or corporate body acted in good faith and believed their conduct to be lawful in relying on erroneous legal advice, such reliance on legal advice may be considered as a mitigating factor during sentencing.

54. The chapter recommends that, where “officially induced error” such as reliance on advice from a regulator, has not prevented the initiation of a criminal prosecution, it should be open to the defendant to raise this during the trial. Where the regulatory advice appears authoritative and reasonable, and where an individual or corporate body have sought in good faith to apply it within the law, the Commission recommends that the trial court should be empowered to make an order ending the trial in the form provided for in Head 2(4) of the Revised General Scheme of the Criminal Procedure Bill where the defendant raises officially induced error during the course of the trial.

55. Finally, the chapter recommends that the defence of duress or superior orders should be available in a corporate context only where a threat of death or serious immediate harm is directed towards any person.

Chapter 11: Existing Fraud Offences: The Fault Element and Recklessness

56. Chapter 11 examines whether current Irish fraud offences are sufficient to deal with all aspects of fraudulent criminal behaviour. The chapter analyses the main fraud offences in Irish law, notably those in the Criminal Justice (Theft and Fraud Offences) Act 2001, and the common law offence of conspiracy to defraud.

57. The Chapter also examines whether the current state of the law sufficiently criminalises reckless fraudulent behaviour, or the “egregiously reckless risk taking” referred to by a former Governor of the Central Bank. In particular, the Commission examines whether it is appropriate and necessary to amend the fault required for Irish fraud offences to include

subjectively reckless behaviour, whereas the current law appears to apply only where there is knowing or intentional behaviour.

58. The Commission concludes, and recommends, that the fault elements in the fraud offences in the Criminal Justice (Theft and Fraud Offences) Act 2001 should be expanded to include subjective recklessness. The fault element that corresponds to the conduct element of each offence would, under this proposal, be that a defendant must have acted "knowingly, intentionally, or recklessly" regarding the perpetration of the relevant conduct, or the bringing about of the relevant result. The Commission considers that this would clarify that egregiously reckless risk-taking would be clearly prohibited under the 2001 Act. This analysis is also linked to the Commission's approach to reckless trading in Chapter 12.

Chapter 12: Reckless Trading

59. Chapter 12 analyses whether reckless trading (trading that bears a substantial and unjustifiable risk of causing financial damage to creditors of a company as a result of the company becoming insolvent) should attract criminal liability. This may occur where a person:

    (1) uses his or her influence to cause the company to trade in a reckless manner;

    (2) is aware that such trading is reckless; and

    (3) some creditor actually suffers such damage.

60. The chapter notes that, in a market-based context, commercial risk-taking is important and beneficial. Encouraging commercial risk-taking is the reason why the law provides for limited liability and separate legal personality. The chapter considers that it would not be appropriate for the law to provide for sanctions (civil or criminal) for the majority of commercial risk-taking.

61. The chapter distinguishes between two different types of commercial risk-taking: entrepreneurial risk-taking and operational risk-taking. Where a company takes an entrepreneurial risk in trading, even if the trading activity fails to succeed, the loss that can result from this activity will not cause harm to creditors. Although there might be a risk of loss, this loss will not be sufficient to result in the company entering insolvency. The chapter notes that, even in circumstances where the entrepreneurial risk is substantial and unjustifiable, it cannot currently result in civil liability for reckless trading under the *Companies Act 2014*, and should not be subject to criminal liability.

62. Operational risk-taking involves risk-taking that, if the trading is unsuccessful, will result in the company either not being able to satisfy all its debts (where trading has caused it to become insolvent), or being in a worse position in relation to even partially satisfying its debts (where trading has caused its insolvent position to worsen). However, where a company takes an operational risk in trading and that trading succeeds, the outcome will be beneficial to the company in that it will either bolster the company's solvency, cause the company to become solvent, or bring it closer to solvency.

63. Even if the trading activity in question actually causes the company to fail, it may still not be appropriate to sanction operational risk-taking, due to the chilling effect that it would have on corporate risk-taking. The chapter therefore recommends that there should not be an offence of "reckless trading" as such. Instead, the Commission notes that undesirable instances of egregiously reckless trading would be open to possible prosecution under the expansion of the fault element in fraud offences recommended in chapter 12. These offences carry the advantage of being established and familiar provisions, and they will properly focus a court's attention on the elements of deception and the causation of a loss to creditors and others.

Chapter 13: Venue for Trials on Indictment for Corporate Offences

64. Chapter 13 considers whether there is a need to reform the current arrangements concerning the venue for trying corporate criminal offences on indictment, and concludes that there is not, and that they should remain in the Circuit Criminal Court.

65. The principal argument in favour of reform is that trial of such cases in the Central Criminal Court (the High Court) sends a message that the trials in question are being given to the highest first instance court in the State. This might be seen as sending a signal that the offences in question are of a particularly serious nature.

66. Notwithstanding this signalling value, the chapter points out that the experience to date is that the Circuit Criminal Court has been fully capable of dealing with complex corporate criminal trials on indictment, including those that arose from the banking crisis that emerged in 2008. The chapter also notes that there is little difference in practice between the Circuit Criminal Court and the Central Criminal Court. For example, to date, the jury panel for all such trials would have been the same whether the trial was in the Circuit Criminal Court or the Central Criminal Court because all such trials have occurred in Dublin. There is, therefore, no difference in the constitution of the ultimate decision-maker, the jury, in either court. It is also arguable that, at present, allocating more cases to the Central Criminal Court could lead to further trial delays, which are particularly undesirable in relation to serious and high profile offences.

67. The chapter therefore recommends that there should not be any change to the current arrangements for trying corporate criminal offences on indictment in the Circuit Criminal Court.

Appendix to Report: 4 Draft Schemes of Bills

68. The Appendix to the Report contains 4 Draft Schemes of Bills intended to implement the recommendations for reform in the Report. These are:

    (1) *Draft Scheme of Corporate Crime Agency Bill*, which refers to recommendations in Chapter 1.

(2) *Draft Scheme of Regulatory Powers Bill*, which refers to recommendations in Chapters 2 to 7.

(3) *Draft Scheme of Corporate Criminal Liability Bill*, which refers to recommendations in Chapters 8 to 10.

(4) Draft Scheme of Criminal Justice (Theft and Fraud Offences) (Amendment) Bill, which refers to recommendations in Chapters 11 and 12.

CHAPTER 1

OVERVIEW AND THE NEED FOR A CORPORATE CRIME AGENCY

A. Context: whether further reforms needed on regulatory powers and corporate offences

1.01 This chapter provides the general background and context for the Report and describes why the Report discusses both regulatory powers and corporate criminal liability.

1.02 In the wake of the financial and economic crisis that emerged in 2008, a number of studies have recognised that a combination of regulatory and corporate failings contributed, at least in part, to that crisis.

1.03 The crisis has raised the questions whether, for example, some regulatory and supervisory powers could have been more effectively implemented, whether the regulatory bodies were simply not properly resourced in certain respects and also whether in other instances there were gaps in their regulatory powers, their "regulatory toolkit."

1.04 It has also been questioned whether the law concerning corporate criminal liability – or "white collar crime"–was adequate, including whether the existing criminal law concerning fraud was adequate to address what the then Governor of the Central Bank Patrick Honohan described in 2015 as "egregiously reckless risk taking" by bankers.[1]

1.05 It is clear that, in order to put in place the best arrangements to avoid, as far as possible, any future comparable crisis – whether in financial services or other significant economic sectors – it is necessary to address in a systematic way both regulatory enforcement and supervision and also the appropriate scope of corporate criminal liability. This project and Report, one of the most wide-ranging undertaken by the Commission, has therefore addressed both these areas.

1.06 This Report is focused on reforms to financial regulatory powers and corporate criminal liability, but it is also clear that the financial and economic crisis that emerged in2008 – like other previous similar crises – had devastating adverse social effects on the lives of individual citizens and their families, including through unemployment, loss of family homes and adverse health effects, sometimes leading to premature death or suicide.

[1] 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 INET Annual Conference, 9 April 2015, available at *https://www.centralbank.ie/news/article/governor-patrick-honohan-at-inet-annual-conference*.

These social consequences for Irish society underline the importance of effective law reform solutions to prevent, as far as possible, similar crises in the future. At the time of writing (September 2018), while the Irish economy has recovered to a significant extent, it remains the case that future economic shocks cannot be ruled out, whether from the impact of Brexit or other international economic uncertainties. As noted below, historical experience indicates the need to have in place the most effective regulatory and enforcement regimes: they may not prevent future shocks, but their absence in the past has certainly been felt.

1. Regulatory and corporate failings internationally from earlier eras led to important reforms

1.07 It is clearly important that we do not forget the lessons to be learned from the regulatory and corporate failures that contributed to the crisis that emerged in 2008. It is also important to acknowledge that the 2008 crisis was not the first instance of regulatory and corporate failures, whether in Ireland or internationally, that have had significant devastating effects on the lives of citizens and on the economies of those countries. In many instances, studies of those previous crises led to significant reforms, and these crises and reforms influenced comparable reforms in Ireland.

1.08 While it has been already noted that, in Ireland, some of the pre-2008 reforms, notably in terms of regulatory powers, were not adequate for the task, it is also important to note that some of those reforms, including in the criminal law area, have been deployed to address aspects of the serious wrongdoing that emerged in the wake of the 2008 crisis. Moreover, the post-2008 reforms were built on those previous reforms rather than creating an entirely new structure. This Report necessarily takes account of and builds on those previous reforms.

1.09 Even a brief survey of relatively modern history reveals that corporate and financial services disasters, and the need to respond to them, has been a reality for many centuries. Holland's 17th century tulip bubble and Britain's 18th century South Sea Bubble, both of which led to corporate collapses on enormous scales and which stretched across national boundaries, were followed by inquiries and reforms to address some aspects of those failures.

1.10 Nonetheless, there were also a number of corporate and financial crashes in subsequent centuries. In the 20th century, the most well-known corporate and financial disaster was the Wall Street Crash of 1929, followed by the Great Depression of the 1930s. These disasters also led to further reform of the regulation of financial services and of relevant corporate criminal law.

1.11 Coming closer to the present era, in the US in the mid-1980s, more than 1,000 savings and loans institutions (S&Ls), about 25% of the total number, had become involved in offering complex financial products and ultimately collapsed with debts of about $150 billion. The US federal government had guaranteed all S&Ls, and it was therefore obliged to provide a bailout of the S&Ls on behalf of US citizens. A significant number of individuals were also convicted and imprisoned in connection with fraudulent activity concerning the S&L collapses.

1.12 In the UK in 1991, the Bank of Credit and Commerce International (BCCI) was put into liquidation by the Bank of England (then the UK's financial regulator) after it was found that BCCI's creditors had suffered losses of about $13 billion arising from widespread fraud, money laundering, bribery and tax evasion carried out by senior managers in BCCI.

1.13 In 1995, Baring's Bank went into liquidation following losses of £827 million on futures contracts in the bank's Singapore offices carried out by one of its traders, Nick Leeson, who was later convicted and imprisoned in connection with his fraudulent activity.

1.14 The financial and economic crisis that emerged internationally in 2008 can be traced, in part, to the bundling of housing loans and other financial products in the US in the early 2000s, which were sold on to other financial institutions. Many thousands of the borrowers later defaulted on the underlying loans, probably because they were never capable of servicing the loans in the first place. This could be described as another example of poor financial regulation and poor corporate lending practices; and in which the bundling of the loans amounted to an enormous "pyramid scheme" or "Ponzi scheme."[2]

1.15 Once these loan defaults became widespread, and the value placed on the associated bundled financial products fell close to zero, the financial institutions left holding the bundled products quickly became insolvent. This emerged most clearly with the collapse of Lehman Brothers in 2008. This necessitated a further enormous US federal bailout of banks and other financial institutions including some major US insurance companies. In terms of enforcement activity by US federal and state authorities, it appears that a great deal of this was, at least initially, directed at obtaining large financial settlements, often in the order of billions of dollars, from the bailed-out financial institutions, rather than criminal prosecutions of senior managers. The thinking behind this appears to have been that the conviction and imprisonment of S&L managers in the wake of the 1980s S&L collapses had not deterred the egregious behaviour of the early 2000s, and that it was preferable to have these institutions make financial reparation to the US taxpayers who had bailed them out. However, a number of significant criminal prosecutions were later initiated in the US arising from the collapses that emerged in 2008.

[2] The term "Ponzi scheme" refers to the American Charles Ponzi, who engaged in this form of fraud in the 1920s. The basis for such schemes is that initial investors are promised high returns on their "investment" which has no reality in fact, but those initial investors are indeed often paid. The payments to the initial investors then attract new investors, and these investors also get some payments, thus attracting further investors. These schemes ultimately collapse when there are too many new investors at the base of the pyramid for them to be paid anything. Charles Ponzi did not invent such schemes, and indeed they were common in the 19th century in England: see the discussion immediately following of the collapse of the Tipperary Bank in 1856.

1.16 In the context of an internationalised financial services system, it is not surprising that the US contagion spread to Europe, notably with a depositor run on the British bank Northern Rock. It also resulted in significant restrictions for a time on the availability of inter-bank credit internationally, and this in turn contributed in part to the banking collapse in Ireland and other European states. As discussed further below, the 2008 international financial and economic crisis has resulted in significant reforms aimed at preventing such a catastrophe from occurring in the future.

2. Regulatory and corporate failings in Ireland from earlier eras also led to important reforms

1.17 Turning from this brief international survey to the Irish experience, it is also the case that both before and after the foundation of the State in 1922, Ireland witnessed a number of corporate and financial services disasters long before 2008. In recent decades, these also led to important reforms in terms of regulation and also in connection with the related aspects of criminal law.

1.18 In the pre-Independence era, in 1856 the Tipperary Bank collapsed with huge losses. It emerged that the bank's leading promoter, John Sadleir MP, had engaged in a series of fraudulent activities, including encouraging people in Tipperary to deposit their savings in the bank, which he then used for his own purposes rather than for investments, and he ultimately built up an overdraft of £288,000 in the bank itself. As a result of this 19th century pyramid scheme, the bank became hopelessly insolvent, and it was wound up. By this time, it emerged that Sadleir had also sold forged shares in a Swedish railway company, and had fraudulently spent rents of properties he held in receivership and money he held as a solicitor. Immediately after this emerged, he committed suicide by poisoning.[3]

1.19 In the post-independence era, in the late 1950s investors in Shanahans Stamp Auctions Ltd suffered significant losses when the company went into liquidation; and it was alleged that this involved a pyramid-type scheme. One of the main directors of the company, Paul Singer, was subsequently prosecuted on fraud-related charges, but it is important to note that he was ultimately found not guilty on all charges.[4] While no criminal conviction followed from this case, there was a recognition of the need to regulate pyramid-type

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[3] The pyramid-scheme collapse of the Tipperary Bank, and Sadleir's suicide, was the basis for a number of fictional accounts, including the sub-plot involving the financier and fraudster Mr Merdle in Charles Dickens" *Little Dorrit* (1857).

[4] See *The People (Attorney General) v Singer* (1961) 1 Frewen 214 (appeal allowed against convictions for conspiracy and obtaining money by false pretences; re-trial ordered on fraudulent conversion charge); and *The People (Attorney General) v Singer (No.2)*, *The Irish Times,* 25 January 1962 (acquittal on fraudulent conversion charge by direction of the trial judge, Walsh J, after a 45 day trial, at that time the longest criminal trial in Ireland). See also Stewart, "The Paul Singer Affair" in Clare and Ní Chearbhaill (eds), *Trouble With the Law* (Woodfield Press 2007).

schemes, and this ultimately led to the enactment of the *Pyramid Selling Act 1980*, since repealed and replaced by Part 4 of the *Consumer Protection Act 2007*.

1.20 In terms of modern banking regulation, the *Central Bank Act 1971* conferred on the Central Bank for the first time statutory responsibility for the licensing and supervision of banks. In the early 1970s, Irish Trust Bank Ltd was granted a banking licence under the 1971 Act. After the licence was granted, the Central Bank sought to impose a condition under section 10 of the 1971 Act that the licence could be retained only if its managing director, Mr Ken Bates, resigned. In *Irish Trust Bank Ltd v Central Bank of Ireland* the bank and Mr Bates instituted High Court proceedings claiming that this condition was *ultra vires* and unconstitutional and, after a 5 day hearing in the High Court, the Court quashed the condition.[5] Mr Bates later resigned as managing director. By 1975, the bank had accumulated significant debts in property-related loans, and the Central Bank applied to have the bank wound up. On 19 February 1976 the High Court ordered the winding up of Irish Trust Bank Ltd, which was affirmed on 26 March 1976 by the Supreme Court. On foot of a promise made in advance of the 1977 General Election, the incoming Government agreed to pay in full all depositors in the bank.

1.21 In 1982, Merchant Banking Ltd was wound up with losses of £3 million and the High Court appointed a liquidator to the bank. A connected bank, Belfast Merchant Banking Ltd, had also been liquidated in Northern Ireland with losses of £3.5 million. Mr Patrick Gallagher was managing director of both banks. In Northern Ireland, Mr Gallagher was convicted of a series of fraud charges in connection with the collapse of Belfast Merchant Banking Ltd and was sentenced to 2 years imprisonment (and served 1 year). In 1991, the High Court ordered the liquidator's report into Merchant Banking Ltd to be sent to the Director of Public Prosecutions. The Director decided not to institute a criminal prosecution against Mr Gallagher. In 1992, the liquidator applied to the High Court under section 297 of the *Companies Act 1963* to make Mr Gallagher and another director Mr John Cousins personally liable for the debts of the bank on the basis that they had been involved in fraudulent trading. In 1996, the proceedings were settled on the reported basis that Mr Gallagher had agreed to pay a sum of money, that the proceedings against Mr Cousins be struck out and that the proceedings against Mr Gallagher be stayed with liberty to re-enter the matter in circumstances outlined in the agreement. It was also stated that Mr Gallagher and Mr Cousins undertook to the court not to become directors of any Irish company for a period of 5 years from the date of the settlement.[6]

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[5] *Irish Trust Bank Ltd v Central Bank of Ireland* 1972 No.1470P. See the judgment of the High Court (Parke J) concerning the review of the taxation of costs in connection with this challenge, *Irish Trust Bank Ltd v Central Bank of Ireland* [1976-7] ILRM 50. The judgment in this case was delivered on 12 March 1976. By this time, Irish Trust Bank Ltd had become insolvent, and on 19 February 1976 the High Court had already ordered the winding up of Irish Trust Bank Ltd, which was affirmed on 26 March 1976 by the Supreme Court.

[6] See "Merchant Banking Ltd dispute ends in High Court settlement" *The Irish Times*, 19 July 1996.

1.22 Following the collapse of Merchant Banking Ltd, it was noted that there had been what was described as "a long and troubled relationship" between the Central Bank and Merchant Banking Ltd.[7] It appeared that in 1973, the Central Bank had carried out an inspection of Merchant Banking Ltd and requested it not to advertise for deposits. It would appear, nonetheless, that Merchant Banking Ltd sought and obtained deposits from many individuals and corporate depositors, and that many of these depositors lost their money in the liquidation. Arising from its collapse, the Central Bank identified certain areas where its powers required strengthening, notably that when carrying out an investigation it had not until then been empowered to demand information from banks and their associated companies concerning individual accounts; such powers were subsequently conferred on the Central Bank by the *Central Bank Act 1989*. The 1989 Act also established for the first time a Deposit Protection Scheme to compensate small depositors with licensed banks if they failed from that time; but this did not apply retrospectively to compensate depositors in Merchant Banking.

1.23 In 1992, shortly after the Merchant Banking collapse, the Government established an Advisory Committee on Fraud, with the stated intention of addressing public concerns about "white collar crime."[8] The 1992 *Report of the Government Advisory Committee on Fraud* contained extensive proposals concerning the investigation and prosecution of fraud offences. The Report recommended the establishment of a National Bureau of Fraud Investigation to replace the Dublin-based Garda Fraud Squad, and this was implemented by the establishment of the Garda Bureau of Fraud Investigation (GBFI), since renamed the Garda National Economic Crime Bureau (GNECB). The Report recommended that the Bureau must be sufficiently resourced to address serious fraud of a corporate type. The Report also recommended that the existing laws on fraud and related matters should be reformed, largely along the lines recommended by this Commission in its *Report on Dishonesty*,[9] which had been completed just before the Committee had finalised its Report. The recommendations on reform of the law on fraud and dishonesty were, in large measure, implemented almost 10 years later in the *Criminal Law (Theft and Fraud Offences) Act 2001.* The Commission considers the scope of the fraud offences in the 2001 Act in Chapter 11 below.

1.24 In addition to these important reforms in the area of financial services and criminal law, by the end of the 1990s there was also a recognition that there were serious deficiencies in the enforcement of company law. The 1998 *Report of the Working Group on Company Law Compliance and Enforcement* (the McDowell Report) made the sobering comment that "Irish company law has been characterised by a culture of non-compliance and a failure by companies and their officers to meet their obligations in respect of the filing of

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[7] This paragraph is based on the discussion in *Dáil Éireann Debates*, 14 March 1990, Questions and Oral Answers (Minister for Finance), Banking Institutions.

[8] See *Report of the Government Advisory Committee on Fraud* (Pl9409, 1992), Appendix A (press statement by the then Minister for Justice on the establishment of the Committee).

[9] Law Reform Commission, *Report on the Law Relating to Dishonesty* (LRC 43-1992).

annual returns on time."[10] The Report noted in this respect that there was no effective corporate enforcement body in place in the State, and it recommended that such a body should be established. As a result, the *Company Law Enforcement Act 2001* was enacted and it established the Office of the Director of Corporate Enforcement (ODCE).

1.25 Since it was established, the ODCE has had a number of positive achievements to its credit, notably the increased compliance by companies with the requirement to make annual returns to the Companies Registration Office. The ODCE has also obtained a significant number of court-ordered restrictions and disqualifications of persons from acting as company directors arising from their serious non-compliance with company law requirements.

1.26 However, it is also clear that the ODCE was not sufficiently resourced to address complex criminal trial processes, and this led to the collapse of at least one lengthy prosecution on indictment related to the banking collapse that emerged in 2008. In the Government's 2017 policy document *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework*,[11] discussed below, it has been recognised that this requires a complete reorganisation of the ODCE. The Commission returns to that issue in Part B, below.

1.27 Shortly after the enactment of the 2001 Act, the *Central Bank and Financial Services Authority of Ireland Act 2003* amended the *Central Bank Act 1942* and conferred significant new regulatory and supervisory powers on the Financial Regulator (whose functions are now carried out by the Central Bank). These included the power to issue significant financial sanctions under the Administrative Sanctions Procedure (ASP). However, between 2003 and 2008, the Financial Regulator applied what was described as a "principles based" approach to its supervisory and regulatory functions, also known as "light touch" regulation. As noted below, it was also acknowledged in the wake of the crisis that emerged in 2008 that (rather like the ODCE), the Regulator had not been adequately resourced to carry out its functions effectively.

1.28 This brief survey of the regulation in recent decades of financial services and corporate law is relevant to the Report for a number of reasons.

- First, it underlines that the financial and economic crisis that emerged in 2008 was not the first occasion where the need to address corporate or "white collar" crime was considered. In recent decades, the reaction to the collapse of Irish Trust Bank in the 1970s and of Merchant Banking Ltd in the 1980s led to some limited, though important, reforms of banking and corporate regulation. It led, through the recommendations of the 1992 *Report of the Government Advisory Committee on Fraud*, to the establishment of the Garda Bureau of Fraud Investigation (GBFI) and to

[10] *Report of the Working Group on Company Law Compliance and Enforcement* (1998), at at(ii).

[11] *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework: Ireland combatting "white collar crime"* (November 2017), available at www.dbei.govie.

significant reform of fraud and related offences in the *Criminal Law (Theft and Fraud Offences) Act 2001.* The successor to the GBFI, the Garda National Economic Crime Bureau (GNECB) as investigating body, and the reformed fraud offences in the 2001 Act have been central to a number of prosecutions and convictions arising from the 2008 banking collapse.

- Second, prior to 2008, there had also been significant, albeit insufficient, reforms to address corporate failings through the enactment of the *Company Law Enforcement Act 2001* and the establishment of the Office of the Director of Corporate Enforcement (ODCE), although it has been since acknowledged that the ODCE was not adequately resourced to carry out the full range of its statutory roles.

- Thirdly, significant supervisory and regulatory powers were conferred on the Financial Regulator in 2003, but the "light touch" regulatory approach it adopted between 2003 and 2008, combined with limited resourcing, meant that these powers were not used effectively.

1.29 This survey therefore illustrates that, prior to 2008, some significant and effective reforms had been put in place, notably those concerning criminal investigation and reform of the criminal law, which were to prove important in the responses to fraudulent and other egregious behaviour that emerged after 2008. It also illustrates that other elements of the pre-2008 reforms were not adequate, in particular in terms of preventative regulatory and supervisory powers.

3. The 2008 crisis involved both regulatory failings and corporate failings.

1.30 The financial crisis that emerged in 2008 has led to enormous long-term financial and social costs: The 2008 bank guarantee and subsequent bailout alone have been estimated by the former Governor of the Central Bank of Ireland to have imposed a net cost of €40 billion.[12] Numerous reports by experts and inquiries have been undertaken in order to identify causes of the crisis and to recommend ways to address them.

1.31 The Government commissioned two preliminary reports (Regling and Watson, and Honohan)[13] and established a Commission of Investigation into the Banking Sector

[12] Oireachtas Committee of Inquiry into the Banking Crisis, evidence of Prof. Patrick Honohan, 15 January 2015.

[13] 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.bankinginquiry.govie/Preliminary_Reports.aspx*.

(Nyberg)[14] to explore the causes of the banking crisis, to restore international confidence in the Irish banking system and to prevent a recurrence. In 2015, the Oireachtas Banking Inquiry was established to examine the crisis again, and it reported in 2016.

1.32 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.[15] The Honohan Report found that the failure of financial regulation was "clearly of a systemic nature rather than related to any one individual."[16]

1.33 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,[17] as well as the prevalence of "herding"[18] and "groupthink".[19] 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.[20]

1.34 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.[21] Predicated on a "plain vanilla property bubble"[22] which was financed by the banks using wholesale market funding,[23] the banking crisis in Ireland was not directly caused by the kinds of complex financial instruments that caused the concurrent economic crisis in the United States.

1.35 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

[14] 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).

[15] Regling and Watson Report at 5.

[16] Honohan Report, paragraph 1.8.

[17] 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.

[18] "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).

[19] "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).

[20] Nyberg Report, at paragraph 2.11.1.

[21] Regling and Watson Report at 5.

[22] *Ibid* at 6.

[23] Nyberg Report, paragraph 5.3.1.

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."[24]

1.36 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 was "based on unduly positive assumptions concerning the behaviour of financial service providers."[25] 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.[26] 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".[27]

1.37 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.[28] 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, 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

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[24] Nyberg Report, paragraphs. 2.11 and 4.9.4.

[25] *Ibid.* 59, [4.49].

[26] *Ibid.*. 91, paragraph 5.2.14.

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

[28] *Ibid.* 8, [1.9-1.10].

was a serious example of what happens when regulation and the enforcement of the applicable legislation do not take place as they should. [29]

1.38 These findings were broadly reiterated in the 2016 *Report of the Oireachtas Banking Inquiry*,[30] which also made some significant recommendations for reform.[31] The Report concluded that in the years leading up to the crash in 2008 there had been two crises, a banking crisis and a fiscal crisis, and that these were directly caused by four key failures – in banking, regulatory, government and Europe. The Report stated that the theory of a "soft landing" or gradual slowdown for the Irish economy in 2008 was never substantially tested or challenged and that the idea of a State guarantee for the banks was not conceived on a single Monday night in September 2008. Among the Report's key findings were:

- The almost universal adoption of the "soft landing" theory, without any substantial test or challenge, must be regarded as a key failing;
- The "night of the guarantee" in September 2008 had become something of a myth: in reality the idea of a guarantee was considered as part of a range of options as early as January 2008;
- No independent in-depth "deep-dive" investigation of the banks had been commissioned by the authorities before September 2008 and the bank guarantee was decided upon in the absence of accurate information about the underlying health of financial institutions;
- By October of 2010 Ireland's entry into a bailout programme was inevitable;
- The crisis in the banks was directly caused by decisions of bank boards, managers and advisors to pursue risky business practices, either to protect their market share or to grow their business and profits.
- No single event or decision led to the failure of the banks in the lead-in period to the banking crisis, but rather it was a cumulative result of a series of events and decisions over a number of years. Ultimately, the result was that exposures resulting from poor lending to the property sector not only threatened the viability of individual financial institutions but also the financial system itself.
- The then Financial Regulator (which in 2008 was separate from the Central Bank) adopted a "light touch" and non-intrusive approach to regulation. The Central Bank

[29] Honohan Report [1.6-1.11].

[30] The Oireachtas Banking Inquiry was the first to be carried out under the *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013.* The Report is available at https://inquiries.oireachtas.ie/banking.

[31] The following is derived from the Executive Summary of the *Report of the Banking Inquiry*.

underestimated the risks to the Irish financial system. The Committee found that both institutions had the powers to intervene, but neither did so decisively.

- The Central Bank and Financial Regulator were aware as early as 2003 that the Irish banking sector was placing increasing reliance on lending to the property sector, and that different lending practices were being adopted. Neither the Central Bank (at a macroprudential level) nor the Financial Regulator (at a microprudential level) intervened decisively at the time or in the years prior to the crisis.
- Fiscal policy after 2001 was not focused on mitigating and managing property price increases. If steps had been taken, for example through reducing or abolishing property tax incentives, as originally planned from 2002 to 2004, the severe overheating from 2003 to 2007 could have been mitigated, at least to some degree.

1.39 The Report also made a number of recommendations with a view to minimising comparable risks in the future. Among the recommendations were:

- All members of bank boards should have requisite financial skill sets and experience to include banking, risk and governance.
- The risk of a mismatch between liabilities and assets in terms of composition, stability, currency and tenure should be reviewed regularly at bank board level.
- The capacity for direct reporting of critical business risk by an external auditor to the Central Bank as the regulatory authority should be strengthened.
- A detailed and comprehensive commercial property price register should be introduced.
- Membership of the board of the Central Bank, appointed by government, must include sufficient expertise and relevant direct experience in financial stability and prudential regulation.
- In situations where there are conflicts between the advice provided by the Department of Finance on matters where exceptional risks are involved and the decision proposed by the Minister, a formal process with clear procedures should be established through legislation.
- Bands should be set with regard to the proportion of the total State tax revenue accounted for by defined cyclical transaction taxes, which should also include triggers for action when breached.
- Oireachtas Committees should be reviewed and resources provided to increase their effectiveness.
- An independent budget office should be established to provide independent costings of budgetary and pre-election proposals made by political parties and members of the Oireachtas.

4. Significant reforms have been enacted to date, but further reforms are required

1.40 Many of the issues raised by these reports into the banking crisis fall far outside the scope of this Report, and are matters that have required separate analysis. However, it is also clear that the following matters fall within the Report's scope:

- Whether enforcement and supervisory powers available to financial and economic regulators are sufficient, and
- whether Irish criminal law is adequate to deal with fraudulent activity or "egregiously reckless risk taking" behaviour, whether by corporate bodies or their senior managers.

1.41 The Commission fully agrees with the conclusions expressed in these reports that a "light touch" or "principles-based" regulatory approach by the Financial Regulator prior to 2008 contributed, at least in part, to the financial crisis. It is also clear that, since 2010, a more robust, risk-based, approach to financial regulation has been put in place by the Central Bank. Allied to this, there has been significant reforms, both at national and at EU level, which have strengthened the regulatory regime in financial services in order to prevent as far as possible a repeat of the 2008 collapse of financial institutions.

1.42 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.[32] 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,[33] and the *European Union (Capital Requirements) Regulations 2014*[34] which set out revised capital ratio requirements and also contain detailed internal governance

[32] For an example of such a redress scheme, see the 2014 Settlement Agreement Between the Central Bank and Ulster Bank, discussed in Chapter 4, below.

[33] See Regulation No.1024/2013 and the *European Union (Single Supervisory Mechanism) Regulations 2014* (SI No.495 of 2014).

[34] SI 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* (SI No.395 of 1992) (as amended) and the *European Communities (Capital Adequacy of Credit Institutions) Regulations 2006* (SI No.661 of 2006), which had implemented pre-2013 capital ratio requirements.

requirements for financial institutions. These responses impose more defined and structured risk-appetite requirements than previously existed.

1.43 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 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.[35]

1.44 At the same time as the post-2008 financial services legislation was being enacted, 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[36] 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.[37] 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.

1.45 Nonetheless, further reforms are required, even in the area of regulation of financial services.[38] Moreover, the Government's November 2017 policy document *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework*[39] recognises that additional reforms are required related to economic regulatory activity and corporate offences, and it also notes that this may include reforms identified in this Report.

1.46 In addition to the major changes in regulatory enforcement since 2010, significant additional resources have been allocated to the Central Bank to ensure that it can effectively carry out its regulatory functions. However, it is also clear that other bodies,

[35] See paragraph 3.7 of the Code.

[36] McGrath "Sentencing White-Collar Criminals: Making the Punishment Fit the White-Collar Crime" (2012) 22(3) ICLJ 72.

[37] The offences are market abuse (section 1368 of the 2014 Act), the prospectus offence (section 1356) and the transparency offence (section 1382).

[38] See, for example, Central Bank of Ireland, *Behaviour and Culture Report* (July 2018), made under Section 6A of the *Central Bank Act 1942,* which is discussed further in Chapter 2, below.

[39] *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework: Ireland combatting "white collar crime"* (November 2017), available at www.dbei.govie.

such as the Office of the Director of Corporate Enforcement (ODCE), have not been sufficiently resourced and also require fundamental restructuring. The Government's 2017 policy document recognises this and contains significant proposals concerning the need for a multi-agency task force model to address serious corporate wrongdoing. In Part B of this chapter, the Commission commends this analysis, and includes some recommendations to complement those already made in the 2017 policy document.

1.47 This Report also addresses whether the existing powers of financial and economic regulators are sufficient to address corporate wrongdoing: in other words, whether such regulators possess a full "regulatory toolkit" to carry out their statutory mandates effectively. The Commission recognises that the Central Bank's statutory powers can rightly be described as the closest to a full regulatory toolkit. The Report therefore considers whether the Central Bank's powers could be extended to the financial and economic regulators considered by this Report. This includes the Central Bank's Administrative Sanctions Procedure (ASP), under which significant financial sanctions may arise.

1.48 As to the law on corporate criminal liability, significant reforms concerning criminal procedure as it applies to corporate offences were enacted in the *Criminal Justice Act 2011.* The Commission in this Report considers a wide range of matters not addressed to date. This includes the current general principles for attributing criminal liability to corporate entities and of the related criminal liability of senior managers. As already noted, another critical question is whether there are any gaps in current criminal law, notably the law on theft and fraud in the *Criminal Law (Theft and Fraud Offences) Act 2001*, in the sense that it has been argued the current law may not address behaviour of the "egregiously reckless risk taking" referred to by the then Governor of the Central Bank.[40]

1.49 This Report therefore takes account of reforms to date, and those proposed in the Government's 2017 policy document. As with those other reforms, the Commission's intention is to make a contribution to preventing a financial or economic crisis from emerging in the future, to the extent that law reform can do so.

5. Report has benefitted from discussions with 8 financial and economic regulators, and the recommendations might also be applied in other contexts

1.50 The Commission recognises that it is difficult to predict exactly how a future financial or economic crisis might arise. Indeed, it may be that, given the more robust, risk-based,

[40] 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 INET Annual Conference, 9 April 2015, available at ***https://www.centralbank.ie/news/article/governor-patrick-honohan-at-inet-annual-conference***.

regulatory regime in place since 2010 for financial services, a future comparable shock could arise from a non-banking sector. The brief history above of pre-2008 financial and corporate failings nationally and internationally shows that where banks and other financial institutions fail, they present significant risks for a country. Having in place effective and robust regulation of such institutions for the future is clearly of vital national importance. Equally, recent history illustrates that other major entities, whether national or international, pose potential serious economic risks. Thus:

- we have seen the adverse consequences for public health and economic activity generally of shortcomings in the regulation of emissions from motor vehicles;
- similarly, poor regulation of medical products, such as blood products and breast implants, has had catastrophic consequences for thousands of Irish citizens (and those of many other countries);
- poor supervision of standards in vital public health screening programmers, such as Cervical Check, have also had devastating consequences;
- the need to regulate personal data in general is clear, given that poor regulation in the past has facilitated financial fraud on an enormous scale and also serious invasions of personal privacy;
- in this digital information age, the need to ensure effective regulation of our telecoms system, on which virtually the entire economy is dependent, has proved problematic in the banking sector and could pose even wider potential risks in the future.

1.51 The purpose of setting out these examples is to underline the need for an effective regulatory regime across a broad range of financial and economic aspects of Irish society.

1.52 This Report does not, however, attempt to provide a single regulatory "solution" that can be applied across the board. The Commission has had the benefit of discussions with and submissions from 8 financial and economic regulators,[41] and the recommendations in this Report have been prepared with those regulators in mind. It is notable that, while those 8

[41] In preparing this Report, the Commission has had the benefit of discussions with and submissions received from the following financial and economic regulators: (1) the Central Bank of Ireland (the financial services regulator, including banking and insurance); (2) the Broadcasting Authority of Ireland (BAI); (3) the Commission for Aviation Regulation (CAR); (4) the Commission for Communications Regulation (ComReg); (5) the Commission for Regulation of Utilities (CRU, formerly, the Commission for Energy Regulation, CER); (6) the Competition and Consumer Protection Commission (the merged Competition Authority and Consumer Protection Agency); (7) the Health Products Regulatory Authority (formerly the Irish Medicines Board), and (8) the Office of the Director of Corporate Enforcement (ODCE, whose statutory status and functions are likely to undergo significant reform in the near future: see the discussion in Part C, below). These bodies have also been closely involved in other related policy developments, notably the Government's *White Paper on Crime*, its 2013 Policy Statement on Sectoral Economic Regulation, *Regulating for a Better Future* (which noted that this project was likely to form part of the Commission's then-draft *Fourth Programme of Law Reform*) and the 2017 policy document *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework*, referred to above and also below.

regulators could each be described as either financial or economic regulators, and therefore have many common attributes, the Commission has concluded that it is not possible, even for that limited number of regulators, to propose a single standard set of regulatory powers.

1.53 Nonetheless, as discussed in Chapter 2, it is possible to construct a general template of core regulatory powers that should be available to the 8 regulators contemplated by the Report, in addition to those already conferred on them. That template is derived from key principles of good regulation, as adopted in national policy documents such as the 2013 Policy Statement on Sectoral Economic Regulation, *Regulating for a Better Future.* These principles of good regulation in turn reflect internationally recognised principles, notably the OECD's 2012 Recommendation on Regulatory Policy and Governance. While the Commission is not in a position to express a view on the extent to which the core regulatory powers could be applied outside the 8 financial and economic regulators considered in this Report, the Commission hopes that because they reflect well-established principles they may prove useful to relevant policy makers when considering whether other regulators should be conferred with such powers.

B. The need for a multi-disciplinary and properly resourced body to deal with corporate offending

1. The *Fitzpatrick* Case (2017)

1.54 The defendant in *The People (DPP) v Fitzpatrick*[42] had been chairman of Anglo-Irish Bank, whose collapse in 2008 was, in turn, a central feature of the bank bailout and economic recession in the State that followed. The defendant had been prosecuted on indictment on various counts concerning the manner in which he had accounted for loans he had received from the bank as a director. After a trial that lasted 126 days, the longest criminal trial in the State's history (much of it involving legal argument during the *voir dire* in the absence of the jury), the trial judge ruled that he would direct the jury to find the defendant not guilty on all charges.

1.55 The basis for the trial judge's ruling in the *Fitzpatrick* case centred on failings in the process within the Office of the Director of Corporate Enforcement (ODCE) concerning the preparation of the prosecution. These included the following:

- one solicitor in the ODCE was given sole responsibility for preparing this enormously complex case, when it clearly required a much bigger team, whether within the ODCE or through recruitment of specific outside expertise;

[42] Circuit Criminal Court (Judge Aylmer and a jury), 23 May 2017, *The Irish Times*, 24 May 2017 (trial judge ruling that jury will be directed to find defendant not guilty), 24 May 2017, *The Irish Times*, 25 May 2017 (verdict of not guilty; and prosecution announcing that other charges dropped).

- the solicitor in the ODCE with responsibility for preparing the prosecution had no prior experience in criminal prosecutions on indictment;
- some prosecution witness statements (notably, those of the auditors to Anglo-Irish Bank) were drafted in violation of basic requirements of criminal procedure, in particular they were not prepared on foot of formal questioning processes but were drafted and redrafted (up to 40 drafts were prepared) by a number of people (leading the trial judge to refer to this as "drafting by committee");
- the solicitor in the ODCE, during a period of intense pressure in the course of preparing the case, shredded an unknown number of draft statements and other documents that had been compiled within the ODCE, in breach of the requirement on a prosecuting authority to retain relevant documents for the purpose of complying with the duty of disclosure of documents that may be of use to the defence;[43]
- during the course of preparing the prosecution case and prior to any charges being brought, the ODCE held discussions on its progress with the Department of Jobs, Enterprise and Innovation, which also underlined the failure in both the ODCE and the Department to understand that this was not appropriate in the context of preparing a criminal prosecution.

1.56 These were clearly fundamental failings in the preparation of the prosecution in the *Fitzpatrick* case. In light of the ruling of the trial judge that led to this acquittal, the question arises as to whether the current system is capable of taking effective action when serious corporate offending is discovered and when a criminal prosecution on indictment (as opposed to regulatory enforcement or summary prosecution) is the appropriate enforcement route.

1.57 Before considering this question, it is appropriate to note that some prosecutions connected with activities in Anglo-Irish Bank have resulted in important convictions. Thus, in *The People (DPP) v McAteer and Whelan* (2014)[44] the 2 defendants were convicted of offences under the *Companies Acts*. Even more significantly, in *The People (DPP) v Bowe, Casey and McAteer* (2016)[45] and *The People (DPP) v Drumm* (2018)[46] the defendants were

[43] See the Commission's 2014 *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014).

[44] Circuit Criminal Court (Judge Nolan and a jury), 9 April 2014, *The Irish Times*, 10 April 2014 (conviction by jury), 28 April 2014, *The Irish Times*, 29 April 2014 (sentencing). The defendants were sentenced to community service.

[45] Circuit Criminal Court (Judge Nolan and a jury), 1 June 2016, *The Irish Times*, 2 June 2016 (conviction by jury), 14 September 2016, *The Irish Times*, 15 September 2016 (sentencing). The first defendant (Bowe) was sentenced to 2 years imprisonment, the second defendant (Casey) was sentenced to 2 years and 9 months imprisonment, and the third defendant (McAteer) was sentenced to 3½ years imprisonment. On appeal by the first and second defendants, the Court of Appeal dismissed the appeal: *The People (DPP) v Bowe and Casey* [2017] IECA 250.

[46] Circuit Criminal Court (Judge O'Connor and a jury), 6 June 2018, *The Irish Times*, 7 June 2018 (conviction by jury), 20 June 2018, *The Irish Times*, 21 June 2018 (sentencing). The defendant was sentenced to 6 years imprisonment .

convicted of the common law offence of conspiracy to defraud and also for false accounting under the *Criminal law (Theft and Fraud Offences) Act 2001, and received significant custodial sentences.*

2. Role of ODCE since 2001

1.58 The ODCE was established in 2001 under the *Company Law Enforcement Act 2001* against the background of the absence up to that time of enforcement of either civil or criminal law enforcement mechanisms related to breaches of the Companies Acts. The statutory remit of the ODCE was and remains to ensure the enforcement of basic company law requirements, such as filing of annual company accounts and compliance with statutory duties of directors. It was not intended primarily as a body with responsibility for initiating prosecutions on indictment in complex corporate cases. It is true that the finding of not guilty in the *Fitzpatrick* case has cast a serious cloud over the role of the ODCE, but it is also important not to ignore some of the positive achievements of the ODCE.

1.59 As pointed out by Professor Niamh Brennan in the aftermath of the *Fitzpatrick* case,[47] in 1997, prior to the establishment of ODCE only 13 per cent of companies had filed their annual returns on time. Since the establishment of the ODCE, compliance with company law has greatly improved so that now almost 90 per cent of companies file their returns on time. The ODCE also acts on the hundreds of reports it receives annually from company liquidators, auditors, examiners, professional bodies and the general public concerning wrongdoing within companies. On foot of these, the ODCE applies to court to have restrictions or disqualifications imposed on hundreds of company directors each year. In addition, the ODCE uses its statutory powers under the 2001 Act to issue cautions, statutory demands for information, directions, demands for accounting records and make referrals to professional bodies for suspected failure to comply with relevant professional standards, such as those of auditors. Thus, as Professor Brennan points out, the ODCE has many achievements since its formation.

1.60 She also notes, however, that a view has been expressed that the ODCE "carefully selects" smaller corporate bodies and their directors against whom to initiate civil or proceedings. We might add that, where the ODCE chose to prosecute in a more complex case, the results were, to choose neutral language, mixed. The clear procedural failings in *The People (DPP) v Fitzpatrick* (2017), which involved prosecution costs of up to €3 million, indicate the need for a fundamental review of the process leading to such alleged corporate-related offending. Even where a conviction has resulted, such as in *The People (DPP) v McAteer and Whelan* (2014), *The People (DPP) v Bowe, Casey and McAteer* (2016) *and The People (DPP) v Drumm* (2018), the Commission is aware from its consultations

[47] *The Irish Times*, 26 May 2017, available at *http://www.irishtimes.com/opinion/don-t-scapegoat-odce-for-collapse-of-fitzpatrick-trial-1.3096362*.

that experienced prosecuting counsel became involved in the case after much of the preparatory work had been completed.

1.61 This experience leads to the conclusion (as also noted by Professor Brennan) that persons with an extensive mix of expertise concerning criminal trials on indictment are required at the earliest possible stage of such a complex corporate criminal trial. The question thus clearly arises as to whether there is a need for a designated agency, whether within an existing body or one that must be newly established, with sufficient expertise and appropriate level of resources to deal with major corporate criminal cases.

1.62 This expertise should involve a range of professionals, including at the least the following:

- experienced forensic accountants who can assess whether accounts-related frauds or other wrongdoing may have occurred;
- experienced Revenue Commissioners officials and Department of Employment Affairs and Social Protection officials who can assess whether taxation or social welfare related fraud or wrongdoing may have occurred;
- experienced members of An Garda Síochána who are familiar with the procedures to be put in place in the context of preparing a file for prosecution, including: the preparation of documents to form the book of evidence, retention of material that may need to be disclosed to the defence and formal questioning of potential accused persons;
- experienced criminal practitioners who can assess what precise offences may have occurred and what steps are needed to prepare a case for trial.

1.63 This mixture of experienced inter-disciplinary personnel is precisely the mix that has been included within the Criminal Assets Bureau (CAB) since its establishment under the *Criminal Assets Bureau Act 1996.* While the precise model used for the CAB may need to be further considered, its success in achieving the essential objectives laid down in the 1996 Act indicate that it is a model well worth considering.

1.64 The ODCE annual report for 2016 points to a number of key successes during the year, as follows: following the examination of reports submitted to the office by liquidators of insolvent companies, 90 company directors were restricted and 11 disqualified by the High Court; in keeping with the ongoing strategic shift towards the investigation of more serious indications of wrongdoing, five investigation files were submitted to the DPP; as an alternative to formal enforcement actions, cautions were issued to a total of 61 companies; 108 directions were issued to relevant parties requiring them to comply with their statutory obligations under company law; and the securing of the rectification on a non-statutory basis, of suspected infringements of the *Companies Act 2014*, in regard to directors’ loans in 60 cases, to an aggregate value of €17 million approximately.

1.65 In terms of prosecutions, the Director of Corporate Enforcement is only statutorily empowered to initiate summary prosecutions, that is, prosecutions of relatively minor offences in the District Court. More serious alleged breaches of company law are prosecuted on indictment in the Circuit Court and only the Director of Public Prosecutions, DPP, can direct that charges be preferred on indictment. The ODCE was also involved in the prosecutions and convictions referred to above. The total number of staff employed by the ODCE at the beginning of 2018 was 35 (32.5 full time equivalent). The funding allocation for the Office of the Director of Corporate Enforcement (ODCE) for 2017 was €4.895 million of which €3 million and €5.057m in respect of 2018.[48]

3. Proposals in Government's 2017 policy document to Enhance Ireland's Corporate, Economic and Regulatory Framework

1.66 In the wake of the *Fitzpatrick* case, in November 2017 the Government published a detailed policy document, *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework*,[49] which identified the measures taken to date to address corporate or "white collar" crime, and which also included a further series of legislative and other measures aimed at enhancing Ireland's corporate, economic and regulatory framework. The policy document identified a range of measures that had already been put in place and in respect of which further measures were proposed:

(1) Organisational and procedural reform.

(2) Corporate governance.

(3) Enhancing the powers of the authorities to identify and combat economic and regulatory offences in the financial sector.

(4) Countering Money Laundering and Corruption

1.67 In connection with the investigation of serious corporate or "white collar" crime, the policy document proposed:

- Establishing the Office of the Director of Corporate Enforcement (ODCE) as an independent company law compliance and enforcement agency, with the ability to recruit and enlist expert staff;
- Piloting a Joint Agency Task Force to tackle corporate or white collar crime. The policy document stated that the pilot would address payment fraud (including invoice redirection fraud and credit card fraud). The policy document stated that this pilot will be evaluated and, if it is deemed effective, it would introduce Joint Agency Task Forces for other areas of concern.

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[48] *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework* (November 2017), available at *https://dbei.govie/en/Publications/Publication-files/Measures-Enhance-Irelands-Corporate-Economic-and-Regulatory-Framework.pdf*.

[49] *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework: Ireland combatting "white collar crime"* (November 2017), available at *www.dbei.govie*.

1.68 As to legislative reform, the document proposed:

- Enacting the Criminal Justice (Corruption Offences) Bill, which has since been enacted as the Criminal Justice (Corruption Offences) Act 2018;
- Enacting the Criminal Procedure Bill, which will, among other things, streamline criminal procedures to enhance the efficiency of criminal trials;
- Implementing the Markets in Financial Instruments Directive II (MiFID II) to improve the functioning of financial markets, making them more efficient, resilient and transparent and strengthen investor protection;
- Evaluating the Protected Disclosures Act 2014, to ensure that the legislation has been effective in line with its objectives; and to identify how it might be improved if necessary.

4. Proposed Multi-Disciplinary Corporate Crime Agency and Dedicated Prosecution Unit

1.69 The remaining 12 Chapters in the Commission's Report identify a wide range of recommendations concerning regulatory powers and corporate criminal liability. The Commission recognises that, while these recommendations are intended in themselves to achieve further improvements in the operation of the law, it is also necessary to have in place more effective processes to investigate and prosecute serious corporate criminal offences. Indeed, as noted above, this has been identified in *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework*,[50] in which the Government proposes to "establish a new independent Agency to greater enhance the State's ability to undertake modern, complex corporate law enforcement." The Government's proposal also includes the establishment on a pilot basis of a multi-agency task force to investigate specified corporate and organised criminal offences.

1.70 The Commission supports and commends these developments. The Commission considers that the Agency identified in *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework* should comprise multi-disciplinary personnel and that this should be similar to, though not identical to, the multi-disciplinary model used when the Criminal Assets Bureau was established under the *Criminal Assets Bureau Act 1996.* The Commission considers that such a multi-disciplinary approach, with the mix of expertise found in CAB, or as identified in paragraph 1.62, above, is required to deal with the complexity of issues that inevitably arise in the context of corporate offending. Such an Agency is also required in order to investigate effectively any corporate offending that may come to the attention of relevant financial and economic regulatory bodies, such as the Central Bank or the Competition and Consumer Protection Commission.

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[50] *Ibid* at 8.

1.71 These regulatory bodies have specific statutory roles to investigate matters under their remit, but the Commission notes that they may not be in a position to identify or recognise corporate wrongdoing that falls outside their statutory remit. Such regulators may, from time to time, identify some matters that require separate investigation, and therefore they may on occasion refer such matters to the proposed Agency, with whom they should and would have suitable coordination and cooperation arrangements, discussed in Chapter 6 of the Report, below.

1.72 Nonetheless, it is important to recognise that the proposed Agency should have its own statutory mandate to investigate corporate criminal offences independently of any referrals from financial or economic regulators, and the Commission so recommends. The Commission has also concluded that the Agency should be established, without any undue delay, on a statutory basis. While the precise level of resourcing required for such an Agency is outside the expertise of the Commission, it is clear from experience that the Agency must be sufficiently resourced to carry out its functions, and the Commission recommends that this be a key aspect of its establishment.

1.73 To complement the investigative role of the proposed multi-disciplinary Agency to address serious criminal offences, it is vital that this is accompanied by a dedicated unit, sufficiently resourced, to prosecute corporate offences where prosecution on indictment is the appropriate response, that is, in cases where the regulatory and other enforcement mechanisms identified in the later chapters of this Report do not suitable address the wrongdoing involved. Where prosecution on indictment is required, the Commission has concluded that a dedicated prosecution unit for corporate offences should be established to work in close liaison with the proposed Agency. The Office of the Director of Public Prosecutions has long-established experience and expertise in bringing prosecutions on indictment, and it has also established important communications and liaison arrangements with relevant regulators. The Commission has concluded that, in order to ensure that the work of the proposed Agency is fully effective, it is necessary and important that a fully resourced unit is established, preferably in the Office of the Director of Public Prosecutions, to ensure that the most efficient processes are in place to prepare a prosecution on indictment in accordance with the relevant principles and rules applicable to a trial on indictment.

R 1.01 The Commission commends the proposal in the November 2017 document Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework[51] to "establish a new independent Agency to greater enhance the State's ability to undertake modern, complex corporate law enforcement." The Commission recommends that the proposed Corporate Crime Agency should be established, without undue delay, on a statutory basis and should comprise multi-disciplinary personnel similar to, though not identical

[51] *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework: Ireland combatting "white collar crime"* (November 2017), at 8.

to, the multi-disciplinary model used when the Criminal Assets Bureau was established under the *Criminal Assets Bureau Act 1996*.

R 1.02 The Commission recommends that the proposed Agency should have its own statutory mandate to investigate corporate criminal offences independently of any referrals it may receive from financial or economic regulators, with whom there should be suitable co-ordination and cooperation agreements (see Chapter 6 of the Report). The Commission also recommends that, in light of experience, the proposed Agency must be sufficiently resourced to carry out its functions.[52]

R 1.03 The Commission also recommends that a dedicated prosecution unit for corporate offences should be established, ideally within the Office of the Director of Public Prosecutions, to work in close liaison with the proposed Agency, to ensure that the most efficient processes are in place to prepare a prosecution on indictment for corporate offences in accordance with the relevant principles and rules applicable to a trial on indictment. The Commission also recommends that, in light of experience, the proposed unit must be sufficiently resourced to carry out its functions.[53]

[52] The precise level of resourcing required for the proposed Agency is outside the expertise of the Commission.

[53] The precise level of resourcing required for the proposed unit is outside the expertise of the Commission.

CHAPTER 2

A STANDARD TEMPLATE FOR REGULATORY POWERS

A. The Regulatory Landscape in Ireland

2.01 Regulation has developed rapidly as a feature of the Irish legal landscape. According to one estimate, the number of regulatory agencies operating in Ireland between 1990 and 2010 grew exponentially, doubling from approximately 40 to 80.[1] If the net is widened to include those bodies the functions of which are not necessarily principally regulatory (and excluding local authorities), the number increases to approximately 100.[2] Another report,[3] adopting a relatively strict definition,[4] concluded that there were some 213 regulatory bodies operating in Ireland (including local authorities).[5]

2.02 Because of this growth, the number and variety of regulators and regulatory powers in Ireland has expanded dramatically. This expansion has occurred in a somewhat haphazard manner, and has occasionally resulted in regulatory bodies with substantially similar powers being established on different statutory footing.

2.03 The OECD's 2010 report *Better Regulation in Europe: Ireland* noted a longstanding issue of needing to simplify a complex statute book in this jurisdiction.[6] One notable aspect of this criticism in the present context was the OECD's observation that the process for making regulations in Ireland was in some respects suboptimal; piecemeal change to a parent Act that may undergo dozens of revisions (including those that do not obviously by their titles

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[1] Brown and Scott, "Regulation in Ireland: History, Structure, Style and Reform" *UCD Geary Institute Discussion Paper Series* (2010) at 13. This figure tracks agencies whose principal function was regulation.

[2] Economist Intelligence Unit, *Review of the Regulatory Environment in Ireland* (2009) at 28.

[3] Department of the Taoiseach, *Bodies in Ireland with Regulatory Powers* (2007).

[4] *Ibid* at paragraphs 2.5 and 2.6, where it is stated: "A 'regulatory body' has … statutory recognition, and has functions in at least two of the following three areas of activities: 1. The formulation of goals, the making of rules, [and/or] the setting of standards; 2. Monitoring, gathering information, scrutiny, inspection, audit and evaluation; 3. Enforcement, modifying behaviour, applying rewards and sanctions. [Additionally], to qualify for inclusion a regulatory body also has to have the following features: 1. It is an independent organisation, separate from any other body; 2. It has some capacity for autonomous decision-making; 3. There is some expectation of continuity over time; 4. It has some personnel and financial resources."

[5] *Ibid* at paragraph 4.2.

[6] OECD, *Better Regulation in Europe: Ireland* (2010) at 116.

relate to the Act being amended) can lead to difficulty in ascertaining regulatory requirements in a particular area.[7]

2.04 One potential solution to these difficulties would be to enact a piece of legislation providing for a set of standard regulatory powers. This chapter will explore first whether such legislation would be possible in the Irish legal system, and second whether there would be merit in establishing such a set of powers for regulators in the monitoring and enforcement fields.

2.05 The impetus for this is that, although regulators do in general already possess such powers, the statement of these powers varies between statutes. The argument for standardisation is that it would mitigate negatives such as these variations between regulatory powers (which also has the potential to create unnecessary duplication amongst regulators). A standardised approach might also be thought to promote cooperation, and reduce confusion amongst regulated entities.[8] It is also arguable that having a standard set of powers would better ensure certain regulators are not left without a particular power that may become necessary for effective enforcement.

2.06 Comparative analysis is helpful in considering these issues. Both Australia and the United Kingdom have enacted legislation with some standardising impact on regulatory powers. This chapter assesses these initiatives with a view to determining if they may be of value in helping to formulate approaches to reform in Ireland. The Commission ultimately concludes that these precise models may not be suitable for the current Irish situation but that they provide useful general support for a standardised template approach to achieve greater alignment among regulatory powers.

B. Overview of Literature on Regulation

2.07 Before considering legislative models for standardised powers in more detail, this section first outlines some basic considerations from the literature on regulation. First, it considers the enforcement pyramid, which is a way of hierarchically ordering regulatory powers relating to monitoring and enforcement. Second, it indicates some difficulties under the current Irish approach to allocating powers to regulators; that is, through each regulator having a parent Act that may be subject to a series of later amendments.

1. The Enforcement Pyramid

2.08 In 2011, the National Economic and Social Council (NESC) published a report that contained a wide-ranging review of the literature, national and international, on

[7] *Ibid* at 121.

[8] General issues around the coordination of regulators are considered in chapter 6 of this Report.

regulatory powers and enforcement.[9] The NESC report noted that effective regulation is much more than rules and compliance. Both effective regulation and standards focus on performance and outcomes, and adopting a collaborative problem-solving approach. The NESC noted that the evidence suggests the need to build on strengths as well as focusing on problems, while reserving sanctions for non-compliance. It pointed out that thinking on regulation has moved beyond traditional approaches to regulation. These have included "command and control" approaches that involved setting down statutory rules, with the addition of regulatory inspections and the possibility of a criminal prosecution. Another traditional approach has been "self-regulation", which effectively involves "moral suasion" or "light touch" approaches.

2.09 The NESC 2011 report noted that, based on the analysis by John and Valerie Braithwaite in Australia and Ian Ayers in the United States, the term "responsive regulation" has been developed. The Ayers and Braithwaite analysis of responsive regulation has developed a series of regulatory supervisory and enforcement approaches, illustrated by variation of an "enforcement pyramid", with self-regulation and voluntary approaches at the bottom, "regulation of self-regulation" (meta-regulation) in the middle and sanctions at the apex of the pyramid.

2.10 This analysis of regulation has also been adopted in the United Kingdom in the 2006 report of Professor Richard Macrory *Regulatory Justice: Making Sanctions Effective*,[10] from which the following enforcement pyramid has been adapted:

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[9] National Economic and Social Council, *Quality and Standards in Human Services in Ireland: Overview of Concepts and Practice* (December 2011, No. 124) available at *http://files.nesc.ie/nesc_reports/en/NESC_124_2011.pdf*.

[10] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office 2006) at chapter 2.

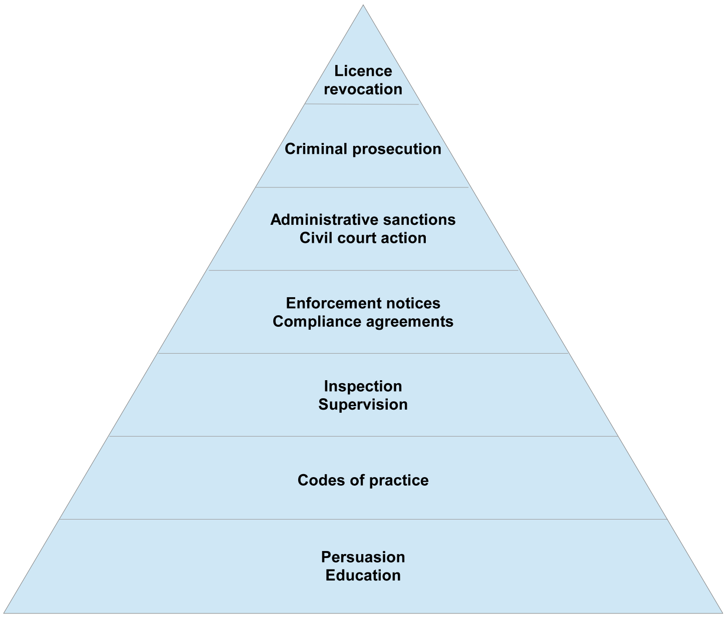

Figure 2.1 Enforcement Pyramid (adapted from Macrory, Regulatory Justice: Making Sanctions Effective (2006))

2.11 Figure 2.1 illustrates 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. Middle level powers are 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.

2.12 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.

2. Misalignment in the Powers of Irish Regulators

2.13 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 (ComReg). On the other hand, many of the functions performed by regulators, particularly those related to supervision, 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.[11] However, the terms of the legislation that confer these powers can vary from one regulator to another[12] and even as between different legislative provisions that apply to a single regulator.[13] 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.[14]

2.14 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 a 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 nor ultimately useful."[15]

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[11] See section 11 of the *Electricity Regulation Act 1999* and section 42 of the *Aviation Regulation Act 2001*, 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 interviewed.

[12] 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*.

[13] 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* (SI 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.

[14] 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.

[15] 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*.

2.15 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 the power to issue binding codes of practice,[16] fitness and probity regimes,[17] civil/administrative financial sanctions[18] and regulatory enforcement/compliance agreements.[19]

2.16 If some, or all, of such measures were to be made more widely available, the concerns expressed above about uniformity of inspections and search powers would, it might be argued, also arise: creating a number of similar but not identical regulatory powers could undermine the effectiveness of the regulators that seek to exercise them. However, the submissions received by the Commission suggest that the divergent nature of regulatory functions, even in the restricted context of the 8 financial and economic regulators considered in this Report, lead to the conclusion that it may not be appropriate, at least at this point, to recommend that a single statutory regime of regulatory powers would be practical or, indeed, effective.

2.17 The submissions have suggested, and the Commission agrees, that it is more appropriate to have in place a general template of "core" regulatory powers, based around the enforcement pyramid, that financial and economic regulators should have. The submissions received also suggested, and the Commission agrees, that different regulatory functions will necessarily require different "add on" powers that would not be appropriate for all regulators. To take a simple example, not all regulators should be licensing authorities, while some regulators should, of necessity, be licensing authorities. It would not be suitable to suggest that a single regulatory powers legislative framework be developed that would imply that all regulators be awarded licensing powers. Similarly, while a pre-appointment "fitness and probity" requirement for senior managers in the financial services sector is appropriate, such a regime would not be suitable as an across-the-board statutory regime, even for the 8 financial and economic regulators envisaged in this Report. Nonetheless, the Commission has concluded that it is appropriate to have in place a template of core powers that financial and economic regulators should have.

2.18 The template approach to core powers would have the following features and advantages:

[16] Section 117 of the *Central Bank Act 1989*.

[17] Part 3, Chapter 2 of the *Central Bank Reform Act 2010*.

[18] Part IIIC, Chapter 2 of the *Central Bank Act 1942*. Civil/administrative financial sanctions are discussed in greater detail in Chapter 3, below.

[19] Section 33AV of the *Central Bank Act 1942*. Regulatory enforcement/compliance agreements are discussed in greater detail in Chapter 4, below.

- it would avoid any unnecessary differences of statutory language so that comparable regulators would be able to apply their powers in similar ways, thus assisting regulated businesses to understand their obligations across comparable statutory regimes;
- regulators could also apply court rulings on the application of such comparable powers, thus building up a set of statutory precedents that could assist in consistent enforcement activity;
- it would also ensure any necessary gap-filling, such as any lessons from court challenges to regulatory powers, a case study of which, discussed immediately below, is the 2017 Supreme Court decision in *CRH Plc, Irish Cement Ltd v Competition and Consumer Protection Commission.*

2.19 A useful case-in-point of the benefit of standardisation both in general and with respect to enhanced regulatory coordination is the case of *CRH Plc, Irish Cement Ltd v Competition and Consumer Protection Commission*.[20] This case highlights how certain problems could be “standard’ across regulators and the need for consistent statutory language.

2.20 This case concerned a dawn raid of the respondents’ (CRH plc, Irish Cement Ltd) premises by officers of the Competition and Consumer Protection Commission and the Garda Síochána. This search was undertaken pursuant to a warrant obtained under section 37 of the *Competition and Consumer Protection Act 2014*. During this inspection, the CCPC procured 96 gigabytes of digital data. Of particular relevance was the e-mail account of Seamus Lynch. The respondents argued successfully in the High Court that as a significant proportion of Mr Lynch’s e-mails were likely irrelevant to the investigation, the CCPC should be barred from examining them.

2.21 The High Court (Barrett J) held that the CCPC had acted *ultra vires* in seizing the entire e-mail account. There remained, however, the problem that the 2014 Act made no provision for what was to be done with material that had been illegally seized. The closest analogue was the provision on material subject to legal professional privilege, but this would fail to cover the material in Mr Lynch’s e-mail account.

2.22 The respondents alleged that any attempt by the CCPC to sift through the material themselves would breach their right to privacy, as guaranteed by both the Irish Constitution (Article 40.3)[21] and the European Convention on Human Rights (ECHR) (Article 8).[22] This was accepted by the High Court, which awarded an injunction preventing the

[20] [2017] IESC 34.

[21] This is an unenumerated right that was established in *Kennedy v Ireland* [1987] IR 587.

[22] With the further consequence that CCPC had breached its obligation under section 3 of the *European Convention on Human Rights Act 2003* to perform its functions “in a manner compatible with the State’s obligations under the Convention provisions”.

CCPC from reviewing the material and invited the parties to agree among themselves an appropriate manner to resolve the situation.

2.23 The CCPC unsuccessfully appealed to the Supreme Court. The Court's analysis is useful for underscoring the potential generality of the issues that arose in this case and thus the potential benefits of standardising regulatory powers. The case largely turned on the assertion of privacy rights both by Mr Lynch and by the companies themselves.[23] The balancing of privacy concerns against search and seizure provisions is something with which every investigative regulatory power must contend. It must, however, be stressed that the Court was keen to underline that the CCPC had not breached any privacy rights by *gathering* the information in the way that it did; privacy rights were only relevant to the *review* of the illegitimately obtained information.[24]

2.24 The lack of a provision to deal with non-legally privileged[25] but illegally obtained material was characterised as a legislative oversight by the Court.[26] This issue could equally affect other legislative schemes: as Laffoy J noted in her judgment there does not appear to be any statutory procedure for any regulator in CCPC's position.[27] One solution to this difficulty would require the Oireachtas to enact separate remedial provisions for each affected regulator, but an alternative approach would be to include a general power concerning this in the forthcoming *Criminal Procedure Bill*.[28]

2.25 A further difficulty is that 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, these 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,

[23] Corporate entities have privacy rights both under the Irish Constitution (*Competition Authority v Irish Dental Association* [2005] 3 IR 208; *Digital Rights Ireland Ltd v Minister for Communications* [2010] 3 IR 251) and the European Convention on Human Rights (*Niemetz v Germany* (1993) 16 EHRR 97).

[24] [2017] IESC 34, at paragraph 68 (Laffoy J), and paragraph 33 (Charleton J).

[25] It seems that only material that is subject to *legal professional privilege* specifically can be covered by such provisions. For example, in *Glackin v Trustee Savings Bank* [1993] 3 IR 55, the High Court found that in the context of a request by an inspector to produce books and documents under section 10(2) of the *Companies Act 1990*, the fact that material could be subject to the confidentiality that obtains between a consumer and a bank was an insufficient ground to refuse to comply with the inspector's request.

[26] [2017] IESC 34, at paragraph 40 (MacMenamin J), and paragraph 34 (Charleton J).

[27] "[N]o statutory provision exists which would enable an issue in relation to the seizure of documents that are unrelated to the investigation to be addressed, for example, in the manner in which seizure of privileged legal material is addressed in accordance with s. 33". [2017] IESC 34, at paragraph 83 (Laffoy J).

[28] In 2014, the government published the *Scheme of a Criminal Procedure Bill*. The November 2017 policy document, *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework,* discussed in chapter 1 above, states that a Criminal Procedure Bill is to be published in the near future. The Governments' Legislation Programme, Autumn Session 2018 (September 2018) includes the Criminal Procedure Bill in the list of Priority Bills for publication.

section 39(3) of the *Communications Regulation Act 2002* (as amended by section 16(i) of the *Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010*) 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*. This raises a concerning question of whether similar difficulties could arise with respect to a dawn raid by ComReg, with the exception that the regulator's behaviour could no longer be characterised as *ultra vires* a warrant.

2.26 As it stands, the defect found in the *Irish Cement* case could be remedied by the insertion of an appropriate provision into the *Competition and Consumer Protection Act 2014*. However, this would still leave similar search and seizure powers vulnerable to the same issue. It might also be argued that the legal precedent set by the *Irish Cement* case now only applies to the power under the *Competition and Consumer Protection Act 2014* and not to similar powers with different statutory bases. This is true, although it is not something that would present a major difficulty in practice: given the high degree of similarity between such powers, and the fact that *Irish Cement* is a Supreme Court decision, it would likely be easily asserted as binding on similar provisions in other statutes.

2.27 The impetus on the Oireachtas to fill the legislative lacuna identified here would doubtless be greater if the power stood to affect more regulators. Much of the Supreme Court's commentary focused on a requirement of "actual and effective" judicial review pursuant to searches and seizures that was derived from European Court of Human Rights decisions.[29] This suggests a more general requirement to be met in order for Irish regulatory authorities to comply with the ECHR. Standardisation would help to achieve this by making it easier to apply this change to all regulators simply by amending one piece of legislation.

2.28 It is arguable that this problem would be addressed by enacting a standard provision on such searches in the forthcoming *Criminal Procedure Bill*. While the *Irish Cement* case underlines the need for a common *approach* to issues likely to be faced by many comparable regulatory bodies, the Commission does not consider that this makes a compelling case by itself for the enactment of a standardised *Regulatory Powers Act*.

3. Regulatory Policy

(a) Developments in regulatory policy and practice since the 1990s

2.29 The Commission emphasises that this Report does not involve an examination of what might be regarded as "best regulatory policy" but it is nonetheless important to have

[29] *Delta Pekárny v Czech Republic* [2014] ECHR 1014; *Vinci Construction v France* (App No 63629/10 and 60567/10, 2nd July 2015). See discussion in the *Irish Cement* case [2017] IESC 34 at paragraphs 79 to 114 (MacMenamin J), and paragraphs 19 to 87 (Laffoy J).

regard to the available literature in order to place in context the recommendations in this Report as to what may constitute an effective or complete regulatory toolkit.

2.30 In recent decades, considerable literature has developed concerning how regulatory policy can achieve best results. At one time, this was seen as a debate between, on the one hand, the public-interest calls for "more regulation" and, on the other hand, business calls for "de-regulation". In the early 1990s, Ayres and Braithwaite presented an alternative approach called "responsive regulation"[30] which argued that regulatory policy should, and often did, involve a range of regulatory measures, including advice and guidance, inspection and search regimes, enforcement orders (including "cease and desist" or prohibition orders), criminal prosecution and (where relevant) licence revocation. This analysis also gave rise to the "enforcement pyramid" under which most regulatory activity would occur at the base of the pyramid (advice and guidance, inspection and search, enforcement orders) aimed at regulating relatively minor contraventions, with the top of the pyramid (criminal prosecutions and licence revocation) being reserved for major contraventions.

2.31 Since the 1990s, there has been further ongoing debate and analysis concerning best regulatory practice.[31] Important government-sponsored reports in this area include the 2006 Macrory report, *Regulating Justice: Making Sanctions Effective*,[32] which greatly influenced the development of regulatory guidance documents such as the UK *Regulators' Code*[33] and the enactment of the UK *Regulatory Enforcement and Sanctions Act 2008.*

2.32 As noted in Chapter 1, in Ireland the failures of "light-touch" or "principles only" financial services regulation in the first decade of the 21st century have been replaced by a "risk-based" regulatory approach. Regulatory failures in other areas, such as product safety (for example, the worldwide PIP breast implants scandal) or building standards (in Ireland, fire safety hazards and pyrite in building products requiring extensive remedial action) have also led to reforms in response to what appeared to involve "self-regulation" regimes.

(b) Behavioural and risk-based approaches to regulation

2.33 It is not the case that past regulatory failures can be analysed with a view to presenting a "one size fits all" approach to future financial or economic regulation. Nonetheless, it

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30 Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992).

31 For an overview of developments in regulatory policy since the 1990s see, for example, Baldwin, Cave and Lodge, *Understanding Regulation: Theory, Strategy, and Practice* 2nd ed (OUP 2013), Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation,Enforcement, Compliance and Ethics* (Hart Publishing 2015), Whish and Bailey, *Competition Law*, 8th ed (OUP 2015) and Hodges and Voet, *Delivering Collective Redress: New Technologies* (Hart Publishing 2018).

32 Macrory, *Regulating Justice: Making Sanctions Effective* (HM Treasury, 2006).

33 The *Regulators' Code* was first published in 2007 under the UK *Legislative and Regulatory Reform Act 2006* and provides a high level risk-based framework for how regulators should engage with those they regulate. At the time of writing (October 2018), the most recent edition of the *Regulators' Code* was published in 2014: available at https://www.gov.uk/government/publications/regulators-code.

would appear that significant general changes have occurred in regulatory policy in recent decades.[34] In the past, good regulatory policy (that is, that did not fall into a "light touch" approach) was characterised by a focus on compliance with rules, supported by inspection regimes aimed at achieving certain goals. In the context of financial services regulation, this would involve well-structured markets, including the maintenance of banks' capital reserves or suitably priced insurance products. In the case of product safety or occupational safety, this would involve a measurable level of "safety" such as lower levels of market recalls of unsafe products or lower levels of workplace accidents.

2.34 These regulatory policy goals remain valid, of course, but there has been a shift towards a behaviour-based approach, one that seeks to change the behaviour or culture within regulated entities. In addition, as already noted, regulators have also adopted a risk-based approach to regulation combined with the view that, where non-compliant behaviour leads to consumer loss or injury, there is an effective redress scheme put in place, based on fundamental principles of restitution or restorative justice.

2.35 Building on the "responsive regulation" approach pioneered by Ayres and Braithwaite in the early 1990s, and taking account of the pivot towards a behaviour-based and risk-based approach adopted by a number of regulators, Hodges and Voet have set out the following sequence for what they describe as "the most effective regulatory systems":[35]

1. Establishment of clear rules and their interpretation.

2. Identification of individual and systemic problems.

3. Decision on whether behaviour is illegal, unfair or acceptable.

4. Cessation of illegality.

5. Identification of the root cause of the problem and why it occurs.

6. Identification of which actions are needed to prevent the reoccurrence of the problematic behaviour, or reduction of the risk.

7. Application of the actions (a) by individual actors and (b) by other actors.

8. Dissemination of information to all (a) firms, (b) consumers, (c) other markets.

9. Redress.

10. Sanctions.

[34] Hodges and Voet, *Delivering Collective* Redress (Hart Publishing 2018) at 9.

[35] *Ibid*.

11. Ongoing monitoring, oversight, amendment of the rules.

(c) Central Bank's 2018 Behaviour and Culture Report

2.36 Echoing these developments in the literature on regulation, it is notable that, in 2018, the Central Bank, at the request of the Minister for Finance, published a *Behaviour and Culture Report*[36] into the main Irish retail banks. This Report appears to reflect the general move identified above towards a behaviour and risk-based approach to regulation. The *Behaviour and Culture Report* noted that the Nyberg Report (discussed in Chapter 1, above) found that cultural failings within the banking sector were a significant contributory factor in the financial crisis that emerged in 2008. The Report also noted that cultural failings were also a trigger for the Central Bank's Tracker Mortgage Examination (discussed in Chapter 4, below, in the context of the Central Bank's redress scheme on tracker mortgages), which found that such failings, in addition to poor systems, weak internal controls and poor governance, caused detrimental and in some cases devastating impacts on consumers. That Examination was also the context for the Minister's request to the Central Bank, under section 6A of the *Central Bank Act 1942*, to prepare the *Behaviour and Culture Report*. The Report was prepared by the Central Bank in collaboration with the Dutch financial services regulator, De Nederlandsche Bank.

2.37 The Report stated that the Central Bank "expects banks to act in their customers' best interests in tandem with fulfilling their prudential obligations." The Report found that some banks were, as of 2018, more advanced in moving towards a consumer-focused organisational culture than others, and that "they all have a distance to travel." Among the challenges found in the Report were that some executive committees displayed "firefighting behaviour", focussing on urgent and short-term issues as well as over-optimism regarding the successful transition to a consumer-focused culture.

2.38 The Report also recommended the enactment of a new "Individual Accountability Framework", applying to banks and other regulated financial services providers, which would go significantly beyond the current requirements for staff to be fit and proper, set conduct standards for staff, and ensure clearer lines of accountability within firms. The Report stated that, if conduct issues materialised, the Central Bank would conduct more frequent, targeted supervision of financial services firms that pose the greatest potential harm to consumers, including robust challenge of boards and executive management.

2.39 It is notable that the Central Bank's general approach to regulation identified in the 2018 *Behaviour and Culture Report* involves a combination of a behaviour-based approach and a risk or harm-based approach. As already noted, this Report does not assess the appropriateness or otherwise of any particular approach to regulation, still less whether a particular approach could, or should, be applied across the board to other financial or

[36] Central Bank of Ireland, *Behaviour and Culture of the Irish Retail Banks* (July 2018), available at https://www.centralbank.ie/docs/default-source/publications/corporate-reports/behaviour-and-culture-of-the-irish-retail-banks.pdf?sfvrsn=2.

economic regulators encompassed in this Report. That remains a matter for each regulator to consider in the context of its own regulatory role and functions.

C. Current Powers of Regulators in Ireland

2.40 In considering what a standardised approach to regulatory powers in Ireland might look like, it is helpful to consider what powers are already allotted to regulators. The Australian *Regulatory Powers (Standard Provisions) Act 2014* was largely a consolidation of powers that already existed on the statute book, rather than an expansion or redefinition of such powers.

2.41 Many of the investigation and monitoring powers of regulators are given effect through appointed authorised officers. If any regulatory power is suitable for standardisation at all, it is likely those powers, which are common to many regulatory regimes. Therefore, in the summary of regulatory powers to follow, particular attention is drawn to the powers allotted to authorised officers.

2.42 It should be stressed that there is no undisputed definition of what constitutes a "regulatory" power. At its simplest, that phrase could refer to any power that a body that is designated as a regulator possesses. Given that this would encapsulate a regulator's ability to, say, own property, this definition seems overbroad. Delineating more finely what powers regulators have that are specifically "regulatory" powers is more difficult and is an area that could be subject to much disagreement and dispute. The powers outlined below are particularly salient powers possessed by the regulators considered here, but the list does not purport to be exhaustive. For the purposes of the analysis in this chapter, it suffices to examine those powers that are both commonly distributed among regulators and which seem particularly pertinent to regulatory tasks of monitoring and enforcement.

1. Central Bank of Ireland (CBI)

2.43 The Central Bank of Ireland has the widest remit of any financial regulatory authority in Ireland and it has the broadest set of regulatory powers available to it; that is, the Bank possesses the most complete 'regulatory toolkit' of any Irish financial regulator. The Bank's structure and powers were reformed by the *Central Bank Reform Act 2010*, which developed its role as a central bank and financial regulator. Its enforcement powers were then further enhanced by the *Central Bank (Supervision and Enforcement) Act 2013*.

2.44 Currently, the Bank's powers include:[37]

(1) Setting conditions on the grant of a banking licence.[38]

(2) Revocation of a banking licence (with the approval of the Minister for Finance).[39]

(3) Directing the holder of a banking licence to suspend their business.[40]

(4) Application for an order in the High Court to prohibit the continuance of certain contraventions (of the 1971 Act).[41]

(5) Summary prosecution of people who breach a condition or fail to comply with a direction.[42]

(6) Application to the High Court to wind up a banking licence holder.[43]

(7) Administrative sanctioning powers (the maximum penalties were increased by the 2013 Act).[44]

(8) Direction to a regulated provider to make redress to customers where there has been 'widespread or regular relevant defaults'.[45]

(9) Application to a court to restrain a person from engaging in conduct that would contravene financial services legislation[46] or directions issued by the Central Bank.[47]

(10) The making of regulations.[48]

(11) Direction to take enforcement action against certain significant credit institutions[49] from the European Central Bank.[50]

(12) A 'gatekeeper' role in respect of appointments to certain controlled functions; the approval of the Central Bank is required for such appointments—the Bank

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[37] A useful summary of the Bank's current powers, and their evolution since 1992, is contained in Appendix 8 of the *Report of the Joint Committee of Inquiry into the Banking Crisis* (2016) at 407–14. Report available at *https://inquiries.oireachtas.ie/banking/wp-content/uploads/2016/01/02106-HOI-BE-Report-Volume1.pdf*.

[38] Section 9 of the *Central Bank Act 1971*.

[39] Section 11 of the *Central Bank Act 1971*.

[40] Section 21 of the *Central Bank Act 1971*.

[41] Sections 28 and 29 of the *Central Bank Act 1971*.

[42] Section 58 of the *Central Bank Act 1971*.

[43] Section 29 of the *Central Bank Act 1971*.

[44] Part IIIC of the *Central Bank Act 1942*, as inserted by section 10 of the *Central Bank and Financial Services Act 2004*. This is discussed in greater detail in Chapter 3, below.

[45] Section 43 of the *Central Bank (Supervision and Enforcement) Act 2013*.

[46] Section 52 of the *Central Bank (Supervision and Enforcement) Act 2013*.

also has power to demand certain documents or attendance of persons at interview in order to perform this function.[51]

(13) Power to issue a notice to require a financial services provider to furnish a report on any matter by an appropriately skilled person.[52]

(14) The appointment of authorised officers,[53] who may:

(a) Enter premises.[54]

(b) Search and inspect premises.[55]

(c) Require a person to provide records, or access thereto.[56]

(d) Summon persons to give information, provide records, or provide explanations of decisions, courses of action, or practices.[57]

(e) Inspect records found in the course of searches.[58]

(f) Take copies or extracts of records.[59]

(g) Retain records for a reasonable period to allow for further examination (contingent on those records only being kept for 14 days, whereafter a

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[47] Section 45 of the *Central Bank (Supervision and Enforcement) Act 2013*.

[48] Section 48 of the *Central Bank (Supervision and Enforcement) Act 2013*.

[49] Allied Irish Banks plc; Permanent TSB Group Holdings plc; Bank of Ireland (the Governor and Company of); Ulster Bank Ireland Ltd.

[50] *European Union (Single Supervisory Mechanism) Regulations 2014*.

[51] Part 3 of the *Central Bank Reform Act 2010*.

[52] Section 9 of the *Central Bank (Supervision and Enforcement) Act 2013*.

[53] Section 24 of the *Central Bank (Supervision and Enforcement) Act 2013*.

[54] Section 26 of the *Central Bank (Supervision and Enforcement) Act 2013*.

[55] Section 27(1)(a) of the *Central Bank (Supervision and Enforcement) Act 2013*

[56] Section 27(1)(b) of the *Central Bank (Supervision and Enforcement) Act 2013*

[57] Section 27(1)(c) of the *Central Bank (Supervision and Enforcement) Act 2013*

[58] Section 27(1)(d) of the *Central Bank (Supervision and Enforcement) Act 2013*.

[59] Section 27(1)(e) of the *Central Bank (Supervision and Enforcement) Act 2013*.

copy must be provided to the person who is entitled to possession of the record).[60]

(h) Secure records, or data equipment containing records, for later inspection.[61]

(i) Secure premises for later inspection, where this is necessary to preserve records found there.[62]

(j) Require a person to answer questions and make a declaration of truth in respect of answers to those questions.[63]

(k) Require a person to provide an explanation of a decision, course of action, system, practice, or the nature or content of any records.[64]

(l) Require a person to provide a report on any matter about which the authorised officer reasonably believes the person has relevant information.[65]

(m) In the event that a person required to provide a record is unable to do so, require that person to state, to the best of their knowledge, where the record is located or how it may be obtained.[66]

(n) Require that any information given to the authorised officer is to be certified as accurate and complete by such persons as the officer may require.[67]

(o) Where records are not in legible form, the officer may operate data equipment or have a person accompanying them operate such

[60] Sections 27(1)(f) and 27(3) of the *Central Bank (Supervision and Enforcement) Act 2013*.

[61] Section 27(1)(g) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[62] Section 27(1)(h) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[63] Section 27(1)(i) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[64] Section 27(1)(j) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[65] Section 27(1)(k) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[66] Section 27(1)(l) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[67] Section 27(1)(m) of the *Central Bank (Supervision and Enforcement) Act 2013.*

equipment,[68] or require a person to facilitate the officer in accessing those records.[69]

(p) Have other authorised officers, or members of the Garda Síochána, accompany them.[70]

(q) Require a person to provide the officer with their name and address.[71]

(r) Apply for a warrant to enter premises that would ordinarily fall outside the remit of the officer's statutory powers of entry.[72]

(s) Attend meetings relating to the business of a regulated financial service provided, if the officer considers it necessary to assist the Central Bank in the performance of any of its legislative functions.[73]

2.45 These powers have largely been extended to cover Building Societies as well, with some variations to some powers.[74]

2. Competition and Consumer Protection Commission (CCPC)

2.46 The Competition and Consumer Protection Commission is an amalgamation of the Competition Authority and the National Consumer Agency. The function of the CCPC is broadly to enforce competition and consumer protection law. This involves assessing the impacts of mergers on competition, the promotion of consumer and economic welfare, and the maintenance of certain safety standards in consumer products.

2.47 The powers of the CCPC, as provided for in the *Competition and Consumer Protection Act 2014*, include:

(1) The power to compel parties to disclose information, even where this information may be legally privileged (material that is subject to privilege must be

[68] Section 27(2)(a) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[69] Section 27(2)(b) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[70] Section 27(5) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[71] Section 27(6) of the *Central Bank (Supervision and Enforcement) Act 2013.*

[72] Section 28 of the *Central Bank (Supervision and Enforcement) Act 2013.*

[73] Section 29 of the *Central Bank (Supervision and Enforcement) Act 2013.*

[74] *Building Societies Act 1989*.

first assessed by the High Court; if it is privileged, the CCPC may not have regard to it).[75]

(2) Bringing summary prosecutions.[76]

(3) Share information with other investigatory bodies such as the Garda Síochána, Director of Corporate Enforcement, and Revenue Commissioners.[77]

(4) Request data from a telecommunications provider, where it is satisfied that the data may be required for the prevention, detection or prosecution of a competition offence.[78]

(5) The power to appoint authorised officers[79] who may:

  (a) For the purposes of enforcing statutory provisions other than those under the *Competition Act 2002*:[80]

    i. Enter any place at which there are reasonable grounds to believe that any trade or business has been carried on and inspect that place and any documents therein.[81]

    ii. Secure for later inspection any books, documents or records.[82]

    iii. Remove and retain books, documents or records relating to trade or business activity for further examination.[83]

    iv. Require any person who carries on a trade or business (or an employee of the trade or business) to:

      1) Produce their name, home address, and occupation.[84]

      2) Provide books, documents or records relating to activities within that person's power or control,

[75] Section 33 of the *Competition and Consumer Protection Act 2014.*

[76] Section 11(5) of the *Competition and Consumer Protection Act 2014*.

[77] Section 24 of the *Competition and Consumer Protection Act 2014.*

[78] Section 89 of the *Competition and Consumer Protection Act 2014.*

[79] Section 35 of the *Competition and Consumer Protection Act 2014.*

[80] Section 2 of the *Competition and Consumer Protection Act 2014* provides that "relevant statutory provision" for the purposes of the 2014 Act carries the same meaning as that term bears in the *Consumer Protection Act 2007*. Section 2 of the 2007 Act itself defines "relevant statutory provision" as (among other things) "existing enactments" which are a list of specified consumer protection Acts and Regulations set out in the 2007 Act.

[81] Section 36(1)(a) of the *Competition and Consumer Protection Act 2014.*

[82] Section 36(1)(b) of the *Competition and Consumer Protection Act 2014.*

and to produce information or records upon request.[85]

v. Inspect and take copies of books, documents or records.[86]

vi. Require specified persons to produce information that the officer might reasonably require in relation to a trade, business or activity (including, in the case of unincorporated bodies, information in regard to the membership, committee of management, or controlling authority of that body).[87]

vii. Require the production of data equipment and to be afforded access to information connected with that data.[88]

viii. Summon any other person in connection with a trade, business, or activity to give information required by the officer.[89]

ix. May enter premises[90] and remove goods from them.[91]

x. Apply for a warrant.[92]

xi. Where there is an advertisement in relation to the supply or provision of a product that does not include the name and address of the person who procured publication of the

[83] Section 36(1)(c) of the *Competition and Consumer Protection Act 2014.*

[84] Section 36(1)(d)(i) of the *Competition and Consumer Protection Act 2014.*

[85] Section 36(1)(d)(ii) of the *Competition and Consumer Protection Act 2014.*

[86] Section 36(1)(e) of the *Competition and Consumer Protection Act 2014*.

[87] Sections 36(1)(f) and 36(1)(g) of the *Competition and Consumer Protection Act 2014*.

[88] Section 36(1)(h) of the *Competition and Consumer Protection Act 2014*.

[89] Section 36(1)(i) of the *Competition and Consumer Protection Act 2014.*

[90] Other than a private dwelling, for which a warrant is required: section 36(3) of the *Competition and Consumer Protection Act 2014*.

[91] Section 36(2) of the *Competition and Consumer Protection Act 2014*.

[92] Section 36(4) of the *Competition and Consumer Protection Act 2014*.

advertisement, the officer may require the publisher of the advertisement to procure this information.[93]

(b) For the purposes of enforcing statutory provisions under the *Competition Act 2002* (on production of a warrant):[94]

i. Enter (by reasonable force, if required) a place where business, the supplying of goods or provision of a service is occurring.[95]

ii. Search a place occupied by a director, manager, or member of staff where they believe there may be books, documents or records relating to the carrying on of an activity.[96]

iii. Seize and retain books and take any steps that appear necessary to preserve and prevent interference with those books.[97]

iv. Require a person who carries on an activity (or their employee) to:

1) Provide the officer with their name, home address and occupation.[98]

2) Provide books, documents or records relating to activities within that person's power or control, and to produce information or records upon request.[99]

v. To inspect and take copies or extracts from books, documents or records.[100]

vi. Require specified persons to produce information that the officer might reasonably require in relation to a business, goods supplier or service provider (including, in the case of unincorporated bodies, information regarding the membership,

[93] Section 36(1)(c) of the *Competition and Consumer Protection Act 2014*.

[94] Section 37(1) of the *Competition and Consumer Protection Act 2014*.

[95] Section 37(2)(a) of the *Competition and Consumer Protection Act 2014.*

[96] Section 36(2)(b) of the *Competition and Consumer Protection Act 2014.*

[97] Section 37(2)(c) of the *Competition and Consumer Protection Act 2014*.

[98] Section 37(2)(d)(i) of the *Competition and Consumer Protection Act 2014*.

[99] Section 37(2)(d)(ii) of the *Competition and Consumer Protection Act 2014.*

[100] Section 37(2)(e) of the *Competition and Consumer Protection Act 2014.*

committee of management, or controlling authority of that body).[101]

vii. Question individuals (in the presence of a member of the Garda Síochána) who have been arrested and detained under section 4 of the *Criminal Justice Act 1984*.[102]

3. Commission for Communications Regulation (ComReg)

2.48 The Commission for Communications Regulation (ComReg) was established under the *Communications Regulation Act 2002*. ComReg has responsibility for regulating the electronic communications (including telecommunications, radio communications, broadcasting transmission and premium rate services) and postal sectors.

2.49 The powers allocated to ComReg under current legislation include:

(1) Requiring persons to give evidence or produce documents.[103]

(2) The appointment of authorised officers who may:[104]

(a) Enter any premises, vehicle or vessel where activity relating to electronic communications, networks, postal services, or premium rate services[105] occurs and inspect the location and any books, documents, or records.[106]

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[101] Section 37(2)(e) of the *Competition and Consumer Protection Act 2014.*

[102] Sections 37(5)–37(12) of the *Competition and Consumer Protection Act 2014.*

[103] Section 38A of the *Communications Regulation Act 2002*, as inserted by section 10 of the *Communications Regulation (Amendment) Act 2007*.

[104] Section 39 of the *Communications Regulation Act 2002*.

[105] Inserted by section 16(i) of the *Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010*.

[106] Section 39(3)(a) of the *Communications Regulation Act 2002*.

(b) Require a person to produce books, documents or records.[107]

(c) Secure premises for later inspection.[108]

(d) Bring summary prosecutions.[109]

(e) Inspect and take extracts or copies of books, documents or records.[110]

(f) Remove and retain books, documents, or records.[111]

(g) Require a person to maintain books, documents or records.[112]

(h) Require a person to provide information.[113]

(i) Make inspections, tests, and measurements of machinery on the premises.[114]

(j) Require a person in charge of machinery or an apparatus/appliance to provide the officer with assistance with that device.[115]

(k) Take photographs of activity.[116]

(l) Apply for a warrant to enter premises.[117]

4. Commission for Regulation of Utilities (CRU)

2.50 The functions of the Commission for Regulation of Utilities (CRU, formerly the Commission for Energy Regulation) are very broad, and are outlined in section 9 of the *Electricity Regulation Act 1999* (as amended). The powers of the CRU are derived from a variety of statutory bases, including the: *Electricity Regulation Act 1999*, *Gas (Interim Regulation) Act 2002*, *Energy (Miscellaneous Provisions) Act 2006*, *Electricity Regulation (Amendment) (Single Electricity Market) Act 2007*, *Petroleum (Exploration and Extraction) Safety Act 2010*, *Water Services Act 2013*, and *Water Services (No. 2) Act 2013*.

[107] Section 39(3)(b) of the *Communications Regulation Act 2002*.

[108] Section 39(3)(c) of the *Communications Regulation Act 2002*.

[109] Sections 43, 44 of the *Communications Regulation Act 2002*.

[110] Section 39(3)(d) of the *Communications Regulation Act 2002*.

[111] Section 39(3)(e) of the *Communications Regulation Act 2002*.

[112] Section 39(3)(f) of the *Communications Regulation Act 2002*.

[113] Section 39(3)(g) of the *Communications Regulation Act 2002*.

[114] Section 39(3)(h) of the *Communications Regulation Act 2002*.

[115] Section 39(3)(i) of the *Communications Regulation Act 2002*.

[116] Section 39(3)(j) of the *Communications Regulation Act 2002*.

[117] Section 39(4) of the *Communications Regulation Act 2002*.

2.51 Given the breadth and complexity of the CRU's ambit, it is simpler to break down its powers by area than attempt to deal with them all at once. They are grouped below under the headings 'general powers', 'electricity', 'water & gas' and 'safety'.

(a) General Powers

(1) Administrative sanctioning powers.[118]

(2) Licencing powers.[119]

(3) Prosecution of summary offences.[120]

(4) Appointment of inspectors[121] who may:

(a) Inspect, examine and search any premises of specified bodies.[122]

(b) Inspect, examine and search a dwelling occupied by a specified body, or a director, manager, or member of staff of a specified body where there is reason to believe that records, books, or accounts are being kept in such a dwelling.[123]

(c) Require a person found in any of the aforementioned premises or dwellings to produce records, books, or accounts where it is necessary for the purpose of the inspector's investigation.[124]

(d) Require a person found in any of the aforementioned premises or dwellings to afford assistance as reasonably necessary to enable the inspector to exercise their powers.[125]

(e) Require a person on whose behalf data equipment has been used in connection with certain specified activities to afford the inspector reasonable assistance in respect of its use.[126]

(f) Require a specified body or its employee to give authority in writing addressed to any bank required by the inspector for the purpose of

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[118] Part IX of the *Energy Act 2016*.

[119] Section 9JE (petroleum safety) and 14 (generation and supply of electricity) of the *Electricity Regulation Act 1999*.

[120] Section 6 of the *Electricity Regulation Act 1999*.

[121] Section 56 of the *Electricity Regulation Act 1999*, as inserted by the *Energy Act 2016*.

[122] Section 58(1)(a) of the *Electricity Regulation Act 1999*, as inserted by section 5 of the *Energy Act 2016*. Specified bodies are defined under sections 55(a) to 55(e). These refer to various classes of improper conduct with respect to licence holders under the Act.

[123] Section 58(1)(b) of the *Electricity Regulation Act 1999*.

[124] Section 58(1)(c) of the *Electricity Regulation Act 1999*.

[125] Section 58(1)(d) of the *Electricity Regulation Act 1999*.

[126] Section 58(1)(e) of the *Electricity Regulation Act 1999*.

enabling the inspection of any account opened by the specified body at that bank.[127]

(g) Be accompanied by a member of the Garda Síochána if there is reasonable cause to apprehend any serious obstruction in the performance of any of the inspector's functions.[128]

(h) Apply for a warrant.[129]

(5) The imposition of minor and major[130] sanctions.[131]

(b) Electricity

(1) Appointment of electrical investigation officers,[132] who may:

(a) Make inspections, inquiries, and carry out tests as they think fit.[133]

(b) Take any verbal or written statement, measurement or photograph, or make any electrical or electronic reading they consider necessary for their inspection.[134]

(c) Take samples of electrical cabling or fittings or any other part of an electrical installation that they consider necessary for their inspection.[135]

(d) Require any relevant person in authority to produce to him or her documents, records or materials in their control that pertain to the investigation.[136]

(e) Inspect and copy or extract information from documents, records, or materials produced to them.[137]

(f) Carry out designated works or take measures they consider appropriate (such as requiring that a supply of electricity be disconnected) for the

[127] Section 58(1)(f) of the *Electricity Regulation Act 1999*.

[128] Section 58(1)(g) of the *Electricity Regulation Act 1999*.

[129] Sections 58(13) and 58(14) of the *Electricity Regulation Act 1999*.

[130] Major sanctions must, however, be confirmed by the High Court: section 61 of the *Electricity Regulation Act 1999*, as inserted by section 5 of the *Energy Act 2016*.

[131] Section 60 of the *Electricity Regulation Act 1999*.

[132] Section 9EA(1) of the *Electricity Regulation Act 1999*, as inserted by section 6 of the *Energy (Miscellaneous Provisions) Act 2012*.

[133] Section 9EA(1)(2)(a) of the *Electricity Regulation Act 1999*.

[134] Section 9EA(1)(2)(b) of the *Electricity Regulation Act 1999*.

[135] Section 9EA(1)(2)(c) of the *Electricity Regulation Act 1999*.

[136] Section 9EA(1)(2)(d) of the *Electricity Regulation Act 1999*.

[137] Section 9EA(1)(2)(e) of the *Electricity Regulation Act 1999*.

protection of any person or property from danger arising out of electrical works.[138]

(g) Issue completion certificates for works.[139]

(h) Instruct a person to perform or refrain from performing any act, the performance of which is necessary for the purposes of preserving evidence or reduce the danger arising from electricity.[140]

(c) Gas & Water

(1) Appoint registered gas installers.[141]

(2) Appoint registered officers for gas or water inspections, with the following powers:[142]

(a) Enter premises owned or occupied by a person [to whom this section applies] for the purposes of exercising any of their powers.[143]

(b) Require a person to produce books, documents, or records that are in their control to the officer, or to provide the officer with information that the officer may reasonably require in relation to those records.[144]

(c) Require a person to give the officer any other information, oral or written, that the officer may require in order to determine whether there has been misconduct under the *Electricity Regulation Act 1999*, the *Gas (Interim) (Regulation) Act 2002*, or the *Water Services (No 2) Act 2013*.[145]

[138] Section 9EA(1)(2)(f) of the *Electricity Regulation Act 1999*.

[139] Section 9EA(1)(2)(g) of the *Electricity Regulation Act 1999*.

[140] Section 9EA(1)(2)(h) of the *Electricity Regulation Act 1999*.

[141] Section 9F(22) of the *Electricity Regulation Act 1999*.

[142] Section 11(4) of the *Electricity Regulation Act 1999*, as amended by section 44(1)(b)(i) of the *Water Services (No 2) Act 2013* and section 18(b) of the *Gas (Amendment) Act 2000*.

[143] Section 11(4)(a) of the *Electricity Regulation Act 1999*.

[144] Section 11(4)(b) of the *Electricity Regulation Act 1999*.

[145] Section 11(4)(bb) of the *Electricity Regulation Act 1999*.

(d) Inspect and take extracts from, or make copies of, books, documents, and records[146] and require that these books be maintained for such period of time as the officer directs.[147]

(e) Apply for a warrant where entry to premises is prevented.[148]

(d) Energy Safety

(1) Regulate the activities of electrical contractors with respect to safety.[149]

(2) Regulate for safety in natural gas.[150]

(3) Appoint gas safety officers, with inspection powers.[151]

(4) Regulate for safety in the use of petroleum.[152]

(5) Appoint petroleum safety officers, with inspection powers.[153]

(6) Issue emergency directions where there is an immediate and substantial risk to human life or safety arising from the condition of any petroleum infrastructure.[154]

5. Health Products Regulatory Authority (HPRA)

2.52 The Health Products Regulatory Authority (HPRA, formerly the Irish Medicines Board) was established by the *Irish Medicines Board Act 1995*, as amended by the *Health (Pricing and Supply of Medical Goods) Act 2013*. The HPRA has responsibility for protecting public and animal health by regulating medicines, medical devices, health products, and cosmetics.[155]

2.53 The powers of the HPRA include:

[146] Section 11(4)(c) of the *Electricity Regulation Act 1999*.

[147] Section 11(4)(d) of the *Electricity Regulation Act 1999*.

[148] Sections 11(5) and 12 of the *Electricity Regulation Act 1999*.

[149] Sections 9C and 9D of the *Electricity Regulation Act 1999*.

[150] Sections 9(1)(ec), 9F and 9H of the *Electricity Regulation Act 1999*.

[151] Section 9J of the *Electricity Regulation Act 1999*.

[152] Part IIA of the *Electricity Regulation Act 1999*.

[153] Section 13W of the *Electricity Regulation Act 1999*.

[154] Section 13X of the *Electricity Regulation Act 1999*.

[155] The website of the HPRA website (*http://www.hpra.ie/homepage/about-us*) provides a list of some areas of competence allocated to it, which include: human medicines, veterinary medicines, clinical trial, medical devices, controlled drugs, blood and blood components, tissues and cells, cosmetic products, the protection of animals used for scientific purposes, and organs intended for transplantation.

(1) Licencing of manufacture, preparation, importation, distribution and sale of medicinal products.[156]

(2) A power to appoint authorised persons who may:[157]

   (a) Enter and inspect premises.[158]

   (b) Remove books and records from the premises.[159]

   (c) Carry out tests and examinations of the premises or anything on the premises.[160]

   (d) Require assistance and cooperation from a person on the premises.[161]

   (e) Procure samples of any relevant thing found on the premises.[162]

   (f) Direct that a relevant thing found on the premises not be distributed or moved.[163]

   (g) Inspect and copy information.[164]

   (h) Require or permit a person to break open a container, package or vending machine.[165]

   (i) Require the assistance of anyone who operates post office boxes, telecommunications or e-mail addresses to give assistance or information.[166]

6. Broadcasting Authority of Ireland (BAI)

2.54 The remit and powers of the Broadcasting Authority of Ireland (BAI) are set down in the *Broadcasting Act 2009*. The remit of the BAI extends to: licensing radio and television services additional to those provided by RTÉ, TG4, the Houses of the Oireachtas Channel

[156] Section 4(1) of the *Irish Medicines Board Act 1995*.

[157] Section 32B(1) of the *Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

[158] Section 32B(3)(a) of the *Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

[159] Section 32B(3)(c) of the *Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

[160] Section 32B(3)(d) of the *Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

[161] Section 32B(3)(e) of the *Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

[162] Sections 32B(3)(f) and 32C *of the Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

[163] Section 32B(3)(g) of the *Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

and the Irish Film Channel; making broadcasting codes and rules; reviewing the performance of RTÉ and TG4; providing funding for programming and archiving relating to Irish culture and heritage; monitoring and enforcing compliance of the licensed broadcasters with the broadcasting codes and rules and/or with their broadcasting contracts; deciding on complaints from viewers and listeners regarding broadcast content on all Irish broadcasting services; and supporting the development of the broadcasting sector.

2.55 The powers of the BAI include:

(1) Licencing of television services (aside from those provided by RTÉ, TG4, the Houses of the Oireachtas, and the Irish Film Channel).[167]

(2) Setting broadcasting codes and rules.[168]

(3) Investigative powers.[169]

(4) Administrative sanctioning powers.[170]

(5) Power to apply for a search warrant to investigate breaches of the *Wireless Telegraphy Acts* or the *Broadcasting (Offences) Acts*.[171]

(6) The appointment of investigators for the purposes of looking into offences under the Act committed by broadcasters.[172]

7. Commission for Aviation Regulation (CAR)

2.56 The Commission for Aviation Regulation (CAR) was established under the *Aviation Regulation Act 2001*. The CAR licences the air travel trade in Ireland, as well as airlines. It is also the appointed regulator in Ireland for implementing European Union legislation on air passenger rights and assistance to passengers with reduced mobility.

2.57 The following are the statutory powers of the CAR:

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[164] Section 32B(3)(l) of the *Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

[165] Section 32B(3)(m) of the *Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

[166] Section 32B(3)(n) of the *Irish Medicines Board Act 1995*, as inserted by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*.

[167] Sections 59 and 60 of the *Broadcasting Act 2009*.

[168] Sections 42 and 43 of the *Broadcasting Act 2009*.

[169] Section 50 of the *Broadcasting Act 2009*.

[170] Section 55(3) of the *Broadcasting Act 2009*.

[171] Section 8 of the *Broadcasting Act 2009*.

[172] Section 53 of the *Broadcasting Act 2009*.

(1) The making of regulations and licencing.[173]

(2) Appointment of authorised officers,[174] who may:

   (a) Enter any premises or place owned by a person to whom the 1993 Act applies, search those premises, and inspect any documents or books on the premises.[175]

   (b) Require a person to whom the act applies to produce books, documents, or records.[176]

   (c) Secure for later inspection any premises in which books, documents, or records are kept.[177]

   (d) Inspect and take extracts or make copies of books, documents, or records.[178]

   (e) Remove and retain books, documents, or records.[179]

   (f) Require a person to maintain books, documents, or records.[180]

   (g) Require a person to give the officer information.[181]

   (h) Require a person in charge of the operation of data equipment or associated apparatus to afford the officer assistance.[182]

   (i) Application for a warrant.[183]

8. Office of the Director of Corporate Enforcement (ODCE)

The Office of the Director of Corporate Enforcement (ODCE) was established under the *Company Law Enforcement Act 2001,*[184] and its functions are now set out principally in

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[173] Sections 58 and 60 of the *Irish Aviation Authority Act 1993*; *Irish Aviation Authority (Personnel Licensing) Order 2000* (SI No.333 of 2000).

[174] Section 42 of the *Aviation Regulation Act 2001*, as amended by section 24 of the *State Airports Act 2004*.

[175] Section 42(3)(a) of the *Aviation Regulation Act 2001*.

[176] Section 42(3)(b) of the *Aviation Regulation Act 2001*.

[177] Section 42(3)(c) of the *Aviation Regulation Act 2001*.

[178] Section 42(3)(d) of the *Aviation Regulation Act 2001*.

[179] Section 42(3)(e) of the *Aviation Regulation Act 2001*.

[180] Section 42(3)(f) of the *Aviation Regulation Act 2001*.

[181] Section 42(3)(g) of the *Aviation Regulation Act 2001*.

[182] Section 42(3)(h) of the *Aviation Regulation Act 2001*.

[183] Sections 42(5) and 43 of the *Aviation Regulation Act 2001*.

Part 15 of the *Companies Act 2014* (as amended). The Director's main functions, as set out in s.949 of the 2014 Act, are:

> (a) to encourage compliance with the 2014 Act,
>
> (b) to investigate instances of suspected offences under the Act or other non-compliance,
>
> (c) to enforce the Act, including by the prosecution of offences by way of summary proceedings,
>
> (d) at his or her discretion, to refer cases to the Director of Public Prosecutions where the Director has reasonable grounds for believing that an indictable offence under the Act has been committed,
>
> (e) to exercise, insofar as the Director considers it necessary or appropriate, a supervisory role over the activity of liquidators and receivers in the discharge of their functions under the Act,
>
> (f) for the purpose of ensuring the effective application and enforcement of obligations, standards and procedures to which companies and their officers are subject, to perform such other functions in respect of any matters to which the Act relates as the Minister for Jobs, Enterprise and Innovation considers appropriate and may by order confer on the Director,
>
> (g) to act under Part 25, Chapter 2, of the 2014 Act as a member of the Irish Auditing and Accounting Supervisory Authority and, if appointed as a member of the Supervisory Authority under section 907 of the 2014 Act, act as a director of that body and
>
> (h) to perform such other functions for a purpose referred to in paragraph (f) as may be assigned to him or her by or under the 2014 Act or any other Act.

2.58 The powers of the ODCE to discharge these functions under the 2014 Act (originally set out in Part 3 of the 2001 Act) are quite extensive and include, but are not limited to:

(1) Investigations:

(a) To determine the true persons involved or interested in membership or control.

[184] The origins of the ODCE are discussed in chapter 1, above, where it is also noted that the Government's November 2017 policy document, *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework*, proposes significant reform of the role and function of the ODCE.

(b) Regarding interests in shares or debentures.

(c) Regarding books or documents.

(d) Regarding share or debenture dealings.

(2) Appointed inspectors may exercise the following powers:

(a) Compel the production of books or documents (subject to material covered by legal professional privilege),[185] and to have officers and agents of the company otherwise assist the inspector with their investigation.

(b) The examination of persons on oath.

(c) Apply to a court in the event of non-cooperation.

(d) Make interim and final reports.

(3) The Director may, as an alternative to appointing an inspector, conduct an inquiry.

(4) The Director has the power, before an investigation has been commenced, to require the production of specified books and documents in order to make a determination as to whether an investigation is necessary. The Director may make and keep copies of documents and may require persons to provide explanations of their contents.

(5) The Director may conduct an inquiry.

(6) The Director may apply to have a director of a company restricted.

(7) The prosecution of summary offences.

(8) The imposition of financial penalties (sometimes referred to as “on-the-spot fines”).

(9) Application for an injunction for a company officer in default to make good their default.

(10) Application to freeze a company’s assets.

9. Summary and Comparison of 8 Regulators’ Powers

2.59 The following table summarises the various regulatory powers of the 8 financial and economic regulators discussed above.

[185] This does not necessarily extend to other duties of privilege as strictly: *Glackin v Trustee Savings Bank* [1993] 3 IR 55.

Type of Power	Central Bank	ComReg	CCPC	CRU	HPRA	BAI	CAR	ODCE
Investigation/Inquiry	✓	✓	✓	✓	✓	✓[186]	✓	✓
Powers of Search and Investigation (Authorised Officers)	✓	✓	✓	✓	✓	×	✓	✓
Warning / Compliance Notice (Negative Enforcement)	✓	✓	✓	✓	✓	✓	×	✓
Civil Financial Sanctions	✓	×	×	✓	×	✓	×	×
Summary Prosecution	✓	✓	✓	✓	✓	×	✓	✓
Contract/Licencing Actions	✓	✓	×	✓	✓	✓	✓	✓

Table 2.2 Summary of 8 Regulators' Powers in Ireland

2.60 There is relative uniformity in the *types* of powers possessed by the 8 regulators considered here. Broadly speaking, their authorised officers are afforded powers of entry, search, and investigation. However, with respect to the specifics of each power, there are some anomalies. Consider the search power of the Health Products Regulatory Authority (HPRA) under section 32B of the *Irish Medicines Board Act 1995*:

> "(3) For the purposes of this Act, an authorised officer may…
>
> > (m) require a person, having authority to do so, to break open any container or package, or to open any vending machine, or to permit him or her to do so, as he or she may reasonably require for the purposes of his or her functions under this Act…"

2.61 There is a high level of specificity here in authorising the relevant office to open packages or vending machines. This is, of course, justified on the basis of sector-specific concerns, where medical products are contained in packages or dispensed in vending machines. It does not seem that any other regulator of the 8 considered in this chapter has the power to direct a regulated entity to open a package. Whether or not the powers would actually be construed so strictly is open to debate, but the inclusion of this provision in the *Irish Medicines Board Act 1995* sharpens the contrast when this power is absent from other regulatory schemes.

[186] However, it is worth noting that the investigative powers given to the Compliance Committee of the Broadcasting Authority of Ireland are less extensive than those afforded to other bodies considered here.

2.62 Consider, for example, a very similar power afforded to ComReg under the *Communications Regulation Act 2002*:[187]

> "(3) For the purposes of the exercise by the Commission of its functions under this Act, a transferred function or any regulations made under the Act of 1972, an authorised officer may…
>
> > (i) require any person on the premises or vessel or at the place or in the vehicle having charge of, or otherwise concerned with the operation of, any machinery, apparatus, appliance or other equipment (including data equipment) or any associated apparatus or material, to afford the officer all reasonable assistance in relation thereto…"

2.63 Again, it might be that these differences may be attributable to discrete sectoral requirements. It is true that different sectors will require authorised persons to interact with different objects in different ways. Nevertheless, there are still some differences that are more difficult to explain: an authorised officer under the *Communications Regulation Act 2002* has the power to take photographs of activity[188] but there is no comparable power afforded to authorised persons under either the *Irish Medicines Board Act 1995* or the *Irish Aviation Act 1993*.

D. Comparative Experience

2.64 There have been two significant attempts by other common law jurisdictions to standardise the powers of regulators into one parent Act. These have been undertaken by Australia and the United Kingdom. This section explores these efforts and outlines some of their distinctive features. This will allow for a later contrast of these efforts against idiosyncratic concerns in the Irish legal context.

1. Australia

2.65 Pursuant to the Commonwealth Government's Clearer Laws Project undertaken in 2011, the Access to Justice Taskforce produced its *Strategic Framework for Access to Justice* Report.[189] One of the recommendations of this Report was to develop clearer laws to

[187] This provision is also notable for its similarity to section 42(3)(h) of the *Aviation Regulation Act 2001*: "[An authorised officer may] require any person on the premises or place having charge of, or otherwise concerned with the operation of, the data equipment or any associated apparatus or material, to afford the officer all reasonable assistance in relation thereto."

[188] *Communications Regulation Act 2002*, section 39(3)(j).

[189] Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

reduce the volume and complexity of regulatory legislation.[190] This recommendation ultimately led to the enactment of the *Regulatory Powers (Standard Provisions) Act 2014*, which created a standardised legislative framework for regulatory powers, including inspection and investigation functions, civil sanctions, infringement notices, enforceable undertakings and injunctions.

2.66 Prior to the *Regulatory Powers (Standard Provisions) Act 2014,* similar regulatory enforcement powers were drafted slightly differently in each statute, as currently happens in Ireland. Walsh has noted three process issues that contributed to the inconsistency and incoherence of regulatory powers prior to the 2014 Act:[191]

(1) Poor communication between drafters and policy officials;[192]

(2) Poor communication between different agencies consulted on the Bill;

(3) The fresh re-examination of the issues in Parliament, which occasionally results in knee-jerk reactions to issues contemporary to that debate making it into legislation.

2.67 The provisions of the *Regulatory Powers (Standard Provisions) Act 2014* were intended to reduce the time and resources required to draft regulatory enforcement provisions in Australian legislation. It accomplishes this by containing standardised common enforcement provisions that can be inserted by reference, where appropriate, into both new and existing legislation to ensure that 'functions and powers that are frequently used by regulatory agencies are carried out under uniform provisions'.[193] The 2014 Act is not intended to standardise *all* regulatory powers, however. It was acknowledged that some regulators will still require powers that are particular to their responsibilities, functions and competencies, and that would not be appropriate for wider application by all regulators.[194]

2.68 The stated aims of the 2014 Act's consolidation of regulatory powers were to streamline Commonwealth regulatory powers and improve access to justice in regulatory matters. It also presents the advantage to businesses that they can more easily understand their

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[190] Other legislative initiatives taken on foot of the Clearer Laws Project include the *Acts and Instruments (Frameworks Reform) Act 2015*, which was commenced in early 2016. The Act improves the usability and efficiency of the existing legislative instruments framework and brings the registration and publication of Commonwealth Acts into that framework.

[191] Walsh, "The relationship between complexity in legislation and the processes by which legislation is created" (2017) *CALC July Newsletter*, at 20.

[192] "Even if a drafter used a precedent, the drafter would ask policy questions as if they had never been asked and policy officials (often inexperienced) would answer them as if they had never been answered." *Ibid* at 20.

[193] Biddington and Ferris, "Regulatory Powers (Standard Provisions) Bill 2012" (Parliament of Australia Library, Law and Bills Digest Section 2013) Bills Digest No. 99, 2012-13, at 8.

[194] Biddington and Ferris, "Regulatory Powers (Standard Provisions) Bill 2012" (Parliament of Australia Library, Law and Bills Digest Section 2013) Bills Digest No. 99, 2012-13, at 8, fn. 30.

regulatory obligations, and therefore it is easier and more cost-effective for them to comply with those regulations.[195] In its submission to the Senate Legal and Constitutional Affairs Committee, the Law Council pointed to four potential benefits of the standardisation scheme:[196]

> (1) Greater ease for businesses dealing with multiple regulatory agencies to understand their rights and responsibilities;
>
> (2) The potential for agencies to rely on common training materials and operational manuals, and to share lessons learned and innovations between themselves;
>
> (3) More consistent best practice as to when and how regulatory powers are employed;
>
> (4) A more consistent body of case law of broader application on the exercise of regulatory powers and their limitations.

2.69 The Law Council also addressed some points of concern in its separate submission to the Parliamentary Joint Committee on Law Enforcement that are of general interest.[197] They raised particular concerns over (among other things): privacy rights in searches of digital material;[198] adequate provision for the privilege against self-incrimination and legal professional privilege; the rigour of procedure around the grant of warrants; an overbroad definition of 'evidential material'; and, various time periods such as the duration of warrants and the duration for which seized evidence may be retained.

(a) Structure of the Act

2.70 The 2014 Act is split into several discrete Parts, which each contain a set of provisions pertaining to a different aspect of regulation:

- Part 2 of the 2014 Act creates a framework for monitoring whether the provisions of an Act or legislative instrument have been complied with. It also establishes as

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[195] Second Reading Speech, Michael Keenan MP, Hansard Thursday 20 March 2014, at 2576 available at: *http://parlinfo.aph.govau/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F82b1971c-010c-45a2-b5cf-5d6fc99e9724%2F0009%22*.

[196] Law Council, Submission to the Senate Legal and Constitutional Affairs Committee (23 January 2013) at 7-11. Available at: *http://www.aph.govau/DocumentStore.ashx?id=be8278e6-feb9-49d2-a92e-5d69d50be04f*.

[197] Law Council, Submission to the Parliamentary Joint Committee on Law Enforcement (9 November 2012) at 6. Available at: *http://www.aph.govau/DocumentStore.ashx?id=be8278e6-feb9-49d2-a92e-5d69d50be04f*.

[198] This was precisely the issue in the *Irish Cement* case, considered above.

standard the conditions required for an authorised person to enter premises to discharge monitoring functions.

- Part 3 of the 2014 Act concerns standardised investigative powers to facilitate the gathering of material and evidence of an alleged statutory contravention.
- Part 4 of the 2014 Act creates a framework for the use of pecuniary civil penalties enforced through court-ordered civil penalty orders.
- Part 5 of the 2014 Act establishes standard provisions for infringement notices, which are comparable to fixed penalty notices in Irish law. Part 5 provides that infringement notices apply to statutory provisions that are strict liability offences or civil penalty provisions to which the 2014 Act itself applies. Part 5 also sets out the circumstances in which a regulatory body[199] may serve an infringement notice.
- Part 6 of the 2014 Act provides for standardised enforceable undertakings. A regulatory body may accept three types of undertakings to seek compliance with an enforceable provision: (i) a written undertaking to take specified action, (ii) a written undertaking to refrain from taking specified actions, or (iii) a written undertaking to take specified action to ensure that the person does not, or is unlikely to, contravene an enforceable provision in the future.[200] If the undertaking made under Part 6 has not been withdrawn or cancelled, and if an authorised person considers that it has been breached, the authorised person may apply to a court for an order: (i) to comply with the undertaking, (ii) to pay an amount to the Australian Commonwealth up to the amount of any financial benefit that the person has obtained that can reasonably be attributed to a breach of the order, (iii) to compensate any person who has suffered loss or damage as a result of the breach, (iv) for any other thing that the court considers appropriate.[201]
- Part 7 of the 2014 Act contains provisions on injunctions to enforce provisions. These include restraining injunctions, performance injunctions and interim injunctions.

(b) Issues During the Passing of the 2014 Act

2.71 In a submission to the Legal and Constitutional Affairs Legislation Committee,[202] the Law Council raised several concerns with the provisions of the Bill as it stood in 2012.[203] It noted the potentially intrusive nature of the powers of entry to premises, search and seizure, saying these should only be granted where reasonable and proportionate. There was also an expression of concern over the interaction between certain powers and the

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199 Referred to in this part of the Act as an "infringement officer".

200 Section 114 of the *Regulatory Powers (Standard Provisions) Act 2014*.

201 Section 115(2) of the *Regulatory Powers (Standard Provisions) Act 2014*.

202 This is distinct from its earlier submission to the Parliamentary Joint Committee on Law Enforcement. The concerns it raised in that submission do not appear to have been addressed, as mentioned above.

203 Law Council of Australia, *Submission to Legal and Constitutional Affairs Legislation Committee*.

common law protections against self-incrimination and legal professional privilege. This concern was an instantiation of a general concern in Australia at that time that too many statutes were encroaching upon these privileges.[204]

2.72 These concerns were ultimately addressed in the Act as passed. Sections 17 and 47 now confirm that nothing in the Act operates to abrogate those common law protections. It is important to note, however, the concern that wide-ranging regulatory powers must be balanced against other interests and legal rights and that a codified body of regulatory powers should not be open to challenge on these grounds.

2.73 Concern was also raised over how the Act's provisions could be triggered by secondary rather than primary legislation. This is what is sometimes known as a Henry VIII clause;[205] that is, a clause allowing for the amendment of primary legislation by secondary legislation. The danger of such a power in the regulatory context is that it might lead to a proliferation of coercive powers, general power creep for regulators, and a lack of parliamentary oversight.[206] In general, the Law Council's concerns centred around the lack of concrete stipulation or information on who would use the powers under the Act and how.

2.74 This concern was also addressed in the Act as enacted. The ability to trigger provisions by secondary legislation was removed by Government amendments in the House of Representatives.[207] A part of the 2014 Act can only operate if it is triggered by a provision in another Act.

2.75 A third concern arises over the extent to which provisions of the 2014 Act could be triggered in a piecemeal way.[208] There is an open question as to what the basic 'unit' of the Act is for the purposes of subsequent activation: individual provisions, or parts. The drafting directions issued by the Office of Parliamentary Counsel[209] and the Act itself[210]

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204 See the Report of the Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC 129, 23 December 2015).

205 The reaction to this is comparable to the reaction in the UK to provisions of the *Legislative and Regulatory Reform Act 2006*. The power to reform legislation was afforded to Ministers by this legislation, which prompted some severe backlash. One MP described it as the "Abolition of Parliament Bill": David Howarth, "Who Wants the Abolition of Parliament Bill" *The Times* (21 February 2006).

206 *Report of the Legal and Constitutional Affairs Committee on the Regulatory Powers (Standard Provisions) Bill 2012*, at 1.

207 Murphy, "Regulatory Powers (Standard Provisions) Bill 2014 (Parliament of Australia Library, Law and Bills Digest Section) Bills Digest No. 73, 2013-14, at 3.

208 This concern is explored in great detail in the Digest of the 2014 Bill, at 13-15.

209 Drafting Direction 2012, No 3, at 3, 15 and 19.

210 Many clauses of the 2014 Act refer to the part in which they appear as a cohesive whole, using phrases such as "purpose of this Part", "for this Part to operate" and "investigation under this Part". See sections: 6-8, 36-38, 77-79, 98-100, 109-111, 116-118.

both seem to support the interpretation that the 2014 Act must be triggered on a part-by-part basis.

2.76 If this is the case, then triggering legislation must engage the 2014 Act on a part-by-part basis in order to be valid. Exceptions or modifications to the 2014 Act's scheme would then have to be provided for in specific sections of the triggering Act.

2.77 The alternative interpretation is motivated by the doctrine of parliamentary sovereignty and general rules of statutory interpretation. In this context, parliamentary sovereignty refers to the inability of a parliament to bind its successors. This, in turn, motivates the general rule of statutory interpretation (*generalia specialibus non derogant*) that general provisions do not take priority over specific provisions in cases of conflict.[211] If this rule were to operate in the case of conflict between the 2014 Act and a triggering Act, it would supposedly favour the latter over the former, as the triggering Act would be considered a more specific enactment than the 2014 Act.

2.78 The importance of this distinction is that it bears on the ability of the 2014 Act to safeguard certain procedural and rights protections. A search and seizure power might come with certain safeguards on its use, for example, but if the provisions can be cherry-picked then the substance of these protections is eroded. Additionally, if provisions could be mixed in this way, it would undermine the consistency of approach that is one of the goals of a standardising regulatory Act.

(c) Impact of the 2014 Act

2.79 Implementation of the 2014 Act's provisions has been relatively slow. It was initially envisaged by the Australian Attorney General that the Act would be rolled out in three stages: (1) prompting the triggering of the Act's monitoring, investigation and enforcement powers through new law; (2) recent legislation drafted using precedents based on the Bill would be amended to remove those provisions and instead trigger provisions in the 2014 Act, and; (3) existing legislation with monitoring, investigation and enforcement provisions *may* be reviewed or amended to trigger the relevant provisions in the 2014 Act.[212]

2.80 There has been some success with the first of these goals. Parts of the 2014 Act have been applied in the following schemes:[213]

[211] Additionally, in cases where there is conflict between two statutory provisions, the later in time is usually taken to prevail. This, again, would favour the triggering Act over the 2014 Act.

[212] Murphy, "Regulatory Powers (Standard Provisions) Bill 2014 (Bills Digest No. 73, 2013-14).

[213] Raymond, "Regulatory Powers (Standardisation Reform) Bill 2016 (Bills Digest no. 42, 2016–17), at 11.

- *Aged Care Act 1997*, chapter 7.
- *Biosecurity Act 2015*, chapter 9.
- *Enhancing Online Safety for Children Act 2015*, part 6.
- *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*, part 8C.
- *Foreign Acquisitions and Takeovers Act 1975*, part 5, division 4.
- *Future Fund Act 2006*, section 67A.
- *Healthcare Identifiers Act 2010*, part 5A.
- *My Health Records Act 2012*, part 6.
- *Higher Education Support Act 2003*, part 5-8
- *Migration Act 1958*, sections 140K, 140RA.
- *Narcotic Drugs Act 1967*, chapter 4, part 3.
- *National Cancer Screening Register Act 2016*, section 24.
- *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, sections 249, 284, 286A.[214]

2.81 The use of the Act's provisions for these regulatory enactments points to a good degree of success in establishing it as the basic template to follow for future regulatory schemes.

2.82 The second and third aspects of the rollout of the 2014 Act took rather longer than might have been anticipated to achieve. In 2016, the *Regulatory Powers (Standardisation Reform) Bill 2016* was introduced, which aimed to implement the 2014 Act in place of certain provisions of 15 older pieces of legislation. This Bill lapsed with the dissolution of the Australian Parliament in May 2016, but a substantially identical Bill was introduced to the Senate in October 2016 and was ultimately enacted as the *Regulatory Powers (Standardisation Reform) Act 2017*.[215]

2.83 The development of the 2014 Act was substantially influenced by drafting directions that were issued by the Office of Parliamentary Counsel and had been in use for approximately

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[214] *Offshore Petroleum and Greenhouse Gas Storage Amendment (Regulatory Powers and Other Measures) Act 2014*.

[215] The legislation which is amended by the 2017 Act includes: the *Australian Sports Anti-Doping Authority Act 2006*; the *Building Energy Efficiency Disclosure Act 2010*; the *Coal Mining Industry (Long Service Leave) Administration Act 1992*; the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992*; the *Defence Act 1903*; the *Defence Reserve Service (Protection) Act 2001*; the *Greenhouse and Energy Minimum Standards Act 2012*; the *Horse Disease Response Levy Collection Act 2011*; the *Illegal Logging Prohibition Act 2012*; the *Industrial Chemicals (Notification and Assessment) Act 1989*; the *Paid Parental Leave Act 2010*; the *Personal Property Securities Act 2009*; the *Privacy Act 1988*; the *Tobacco Plain Packaging Act 2011*; the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*.

2 years before the Act was ultimately passed.[216] This had the effect that even legislation that was passed before the 2014 Act came into effect was still substantially similar to the new provisions. It is no coincidence that 7 Acts that were developed in the context of these drafting directions were among the first candidates for replacement by the 2014 regime.[217]

2.84 Concerns about rollout aside, Walsh has identified several benefits of the 2014 Act, including:[218]

(1) Enabling the Attorney General's department to exercise greater influence in preventing unnecessary variation between legislative schemes;

(2) Official scrutiny of drafts is focused more on variations from the standard provisions;

(3) Encouraging Parliament to demand more from officials when it comes to justifying departures from the standard approach;

(4) Focusing Parliamentary debate on whether the standard provisions should be used and whether variations are actually necessary.

2. The United Kingdom

2.85 In the mid-2000s, the UK government became increasingly concerned about the burdens placed on businesses by regulation. This concern led to the commission and publication of the 2005 Hampton report, *Reducing Administrative Burdens: Effective Inspection and Enforcement*.[219] This report was focused chiefly on the burdens imposed on businesses by regulatory regimes. It proposed several recommendations (the 'Hampton principles') on inspection and enforcement:[220]

> (1) Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most;

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[216] Drafting Direction 2012, No 3.5A Regulatory Powers; Parliamentary Joint Committee on Law Enforcement, *Regulatory Powers (Standard Provisions) Bill 2013* (20 November 2012) at 1.

[217] Digest of the *Regulatory Powers (Standardisation Reform) Bill 2016*, 12. These acts are: the *Australian Sports Anti-Doping Authority Amendment Act 2013*; the *Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011*; the *Greenhouse and Energy Minimum Standards Act 2012*; the *Horse Disease Response Levy Collection Act 2011*; the *Illegal Logging Prohibition Act 2012*; the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*; the *Tobacco Plain Packaging Act 2011*.

[218] Walsh, "The relationship between complexity in legislation and the processes by which legislation is created" (2017) *CALC July Newsletter* at 20.

[219] Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (2005) available at: *https://web.archive.org/web/20090704105121/http://www.hm-treasury.govuk/d/bud05hamptonv1.pdf*.

[220] *Ibid* at 7.

(2) Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take;

(3) All regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all interested parties should be consulted when they are being drafted;

(4) No inspection should take place without a reason;

(5) Businesses should not have to give unnecessary information, nor give the same piece of information twice;

(6) The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions;

(7) Regulators should provide authoritative, accessible advice easily and cheaply;

(8) When new policies are being developed, explicit consideration should be given to how they can be enforced using existing systems and data to minimise the administrative burden imposed;

(9) Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work; and

(10) Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.

2.86 The Hampton Report was followed by the 2006 Macrory Report, which set out 6 penalty principles for regulatory enforcement:[221]

(1) Aim to change the behaviour of the offender;

(2) Aim to eliminate any financial gain or benefit from non-compliance;

(3) Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;

(4) Be proportionate to the nature of the offence of the harm caused;

(5) Aim to restore the harm caused by regulatory non-compliance, where appropriate; and

(6) Aim to deter future non-compliance.

[221] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive 2006) at 10 and chapter 2.

2.87 The findings of the Hampton and Macrory Reports ultimately led to (among other reforms) the enactment of the UK *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 non-compliance is remedied), enforcement undertakings (similar to a negotiated compliance agreement) and civil financial sanctions.

2.88 The 2008 Act created a 'revolution in regulation'[222] by establishing standardised civil sanction provisions in response to the recommendations of the 2006 Macrory Report.[223] The Macrory Report argued that regulation should be 'transparent, targeted, effective and proportionate, that a wider range of non-court sanctions should be created, and that agencies should be prepared to take strong deterrent action when less coercive sanctions do not work (thus leaving prosecution as a last resort)'.[224]

2.89 Part 3 of the *Regulatory Enforcement and Sanctions Act 2008* confers on regulatory bodies named in the schedule to the Act standardised powers in the imposition of civil sanctions, including civil financial sanctions, the issuance of stop notices and enforcement undertakings in relation to specific offences. These standardised sanctions, coming as they do from a single statutory source, may result in consistent application between regulatory bodies and across sectors. This is of particular benefit where multiple regulatory bodies have oversight of the same area of regulation. The standardised civil sanctions in the *Regulatory Enforcement and Sanctions Act 2008* are intended to create a 'more flexible and proportionate regulatory framework, whilst at the same time reducing the administrative burden for all of dealing with regulatory non-compliance issues.'[225] The potential of the integrated approach adopted in the *Regulatory Enforcement and Sanctions Act 2008* has been viewed positively, particularly in the area of environmental regulation.[226]

(a) Structure of the 2008 Act

2.90 The 2008 Act is split into four parts:[227]

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[222] *Civil Sanctions for Offences against Nature* (2008) 405 ENDS Report 34, at 34

[223] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive 2006).

[224] Galbiati and Garoupa, "Keeping Stigma out of Administrative Law: An Explanation of Consistent Beliefs" (2007) 15 *Supreme Court Economic Review* 273, at 242. This latter sentiment is echoed in Law Commission of England and Wales, *Criminal Liability in Regulatory Contexts: A Consultation Paper* (2010).

[225] Carriage and Ennis, *The Regulatory Enforcement and Sanctions Act 2008* (Mills & Reeve LLP 2008) 1.

[226] *Reid, "Integrated Framework of Environmental Regulation"* 152 *Scottish Planning and Environmental Law* 75. Pedersen, "Editorial: What Happened to Environmental Justice?" (2014) 16 *Environmental Law Review* 87, at 90.

[227] The description of the parts is taken from the Department for Business Enterprise & Regulatory Reform guidance to the Act, available at: *http://webarchive.nationalarchives.govuk/+/http:/www.berr.govuk/files/file47135.pdf*.

- Part 1 establishes the Local Better Regulation Office (LBRO), which promotes better regulation among local authorities.
- Part 2 seeks to secure coordination and consistency in regulatory enforcement by local authorities by establishing a Primary Authority scheme. This designates an authority that provides advice and guidance to the regulated entity as well as to other regulators that share the same function and that have jurisdiction over the same regulated entity. Regulators other than the primary authority must notify the primary authority where they seek to take an enforcement action against an entity over which they both have authority. The aim of this is to provide businesses that operate in more than one local authority area with more consistent advice and enforcement on standards such as trading, environmental health, licencing and fire and rescue services.
- Part 3 advances a suite of civil sanctions in response to cases of regulatory non-compliance. This is intended to remove financial benefits from businesses gained through non-compliance with regulatory burdens, while also incentivising increased compliance.
- Part 4 creates a duty that requires regulators to review their functions, not to impose unnecessary burdens, and unless disproportionate or impracticable, to remove burdens that are found to be unnecessary.[228]

(b) Amendment of the 2008 Act

2.91 There has been no formal impact assessment of the 2008 Act to date (September 2018). However, some of the teething problems experienced by the Act can be gleaned by the number of amendments made to it since its enactment.

2.92 The first major amendment to the 2008 Act was the *Enterprise and Regulatory Reform Act 2013*. Sections 67 and 68 of this Act amend certain provisions in Part 2 of the 2008 Act. These amendments were intended to reform aspects of the Primary Authority Scheme (PAS). In 2012 the Local Better Regulation Office was dissolved and its functions in relation to this scheme were transferred to the Secretary of State.[229] The effect of the amendments contained in the 2013 Act is to widen the eligibility requirements for the Primary Authority Scheme. As originally enacted, the scheme was available only to businesses that carried out activity in the area of two or more local authorities and were subject to regulatory

[228] The duty applies to Gas and Electricity Markets Authority (OFGEM), the Office of Fair Trading (OFT), the Office of Rail Regulation (ORR), the Postal Services Commission (Postcomm), and the Water Services Regulation Authority (OFWAT) immediately. Ministers can apply the duty to other regulators by order where it will further the Government's better regulation agenda.

[229] *Local Better Regulation Office (Dissolution and Transfer of Functions, Etc.) Order 2012* (SI No 246 of 2012). These functions would ultimately be transferred again to the Better Regulation Delivery Service. In 2016, the Better Regulation Delivery Service was merged with the National Measurement and Regulation Office into one new body, the Regulatory Delivery Directorate.

enforcement by trading standards in both of those authorities' areas. The 2013 amendment extends the PAS to businesses who share an approach to regulatory compliance, such as the members of a trade association, even if not all of them operate in the area of more than one local authority.

2.93 Section 68 of the 2013 Act also amends the 2008 Act by strengthening inspection plans. The amendment allows primary authorities that exercise an inspection function to draw up inspection plans in respect of the regulated person with whom they have a relationship. The intention behind these plans was to allow for better cooperation between different local authorities that may all be carrying out investigations in relation to the same entity or conduct.[230]

2.94 Another significant reform was affected by the *Enterprise Act 2016*. Part 3 of this Act substitutes the original Part 2 of the 2008 Act. It replaces the Primary Authority Scheme with a wider scheme that allows the Secretary of State to make legislation that can bring regulators other than local authorities within the scope of the scheme.

2.95 Most of the issues around the 2008 Act have pertained to the Primary Authority Scheme. Relatively few amendments have materially affected the civil sanction provisions in Part 3.

(c) Impact of the 2008 Act

2.96 As stated above, there has been no impact assessment of the effects of the 2008 Act. In the absence of such an assessment, it is not easy to calculate what the impact of the 2008 Act reforms has been.

2.97 One of the chief aims of the Act in implementing the Hampton principles (which are of particular relevance to this chapter) was in harmonising *local authority* regulatory structures specifically.[231] The issue here was therefore not a lack of harmony in powers, but it was a lack of harmony in policy with respect to how those powers were to be applied. It effectively accomplishes this through appointing a lead agency, in the form of a Primary Authority. Lead agency approaches to regulatory coordination are discussed further in Chapter 6, below. This reform effected by the 2008 Act is, however, not relevant for the question at issue in this chapter.

2.98 Of particular relevance for this Report, and for the Irish context generally (where there is less regulation undertaken by local authorities than in the United Kingdom), are the civil sanction provisions contained in Part 3.[232]

2.99 There are three types of regulator that can exercise powers under Part 3:

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[230] Explanatory Memorandum to the 2013 Act, at paragraph 456.

[231] Explanatory Memorandum to the 2008 Act, at paragraph 6.

[232] These are considered in more detail in Chapter 3, below.

(1) Any one of 28 designated regulators set out in schedule 5 of the 2008 Act;[233]

(2) Any regulator that enforces an offence contained in any Act listed in schedule 6 of the 2008 Act;

(3) Any regulator that enforces offences in secondary legislation made under enactments listed in schedule 7 of the 2008 Act.

2.100 Regulators of these classes do not have automatic access to the civil sanctioning provisions in the 2008 Act, however. The powers must be awarded by Ministerial order. There are certain restrictions on the Minister in how this award may be made. There must be evidence that the regulator is in compliance with the principles of 'good regulation' (transparency, accountability, proportionality, consistency, necessity). The Minister must then also seek the agreement of the Panel for Regulatory Accountability and hold a public consultation. A level of Parliamentary scrutiny is also provided in that the order is subject to a vote in both Houses of Parliament.[234]

2.101 The merits and demerits of civil financial sanctions (or 'administrative financial sanctions', as they are termed in this Report) are considered in Chapter 3, below.

2.102 The foregoing suggests that the experience of the UK with the 2008 Act is not particularly helpful in considering the attenuated issue of the standardisation of regulatory powers, as this is not something the Act sets out to accomplish. The Act sets out to facilitate and promote regulatory coordination and efficacy in other ways that are more properly dealt with elsewhere in this report.

3. Comparing and Contrasting the UK and Australia

2.103 One of the points of contrast between the 2008 Act in the UK and the 2014 Act in Australia is that the UK Act allows for powers under the standardising Act to be assigned to regulators by secondary legislation (and specifically, only administrative sanctioning powers), whereas the Australian Act only allows for regulatory powers to be triggered by a subsequent Act of Parliament. The importance of this distinction was already discussed

[233] This list includes the: British Hallmarking Council; Charity Commission for England and Wales; Coal Authority; Competition Commission; Countryside Council for Wales; Environment Agency; Financial Services Authority; Food Standards Agency; Forestry Commissioners; Gambling Commission; Gangmasters Licencing Authority; Health and Safety Executive; Hearing Aid Council; Historic Buildings and Monuments Commission for England; Housing Corporation; Human Fertilisation and Embryology Authority; Human Tissue Authority; Information Commissioner; Natural England; Office of Communication; Office of Fair Trading; Office of Rail Regulation; Pensions Regulator; Security Industry Authority; The Sports Grounds Safety Authority; Statistics Board.

[234] Department for Business, Enterprise and Regulatory Reform, *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act* (2008) at 30. Available at: *http://webarchive.nationalarchives.govuk/+/http:/www.berr.govuk/files/file47135.pdf*.

under the 2014 Act above. How this distinction might bear on Ireland is discussed below in section D.

2.104 It is worth noting that the United Kingdom's economic model is comparatively more competitive and less regulated in both the product market and employee protection sectors than either Ireland or Australia.[235] Whether or not this is desirable, it at least raises the question as to whether the United Kingdom model would translate smoothly to Ireland. Another salient difference is the level of regulatory responsibility allocated to local councils is greater in the United Kingdom than in Ireland. Or, at the very least, the focus on regulation by local authorities is more pronounced in the United Kingdom. The decentralisation achieved through initiatives such as the (now-dissolved) Local Better Regulation Office would be difficult to transplant to the Irish context.

2.105 These differences may be attributable to the United Kingdom adopting, in the lead up to the enactment of the 2008 Act, a 'self-regulation' approach.[236] That approach can be contrasted with a more traditional approach to regulation, the 'command and control' approach,[237] which is grounded in deterrence of undesirable behaviour through appropriate threat of sanction. More recently, a 'risk based' approach to regulation has been developed.[238] It is certainly arguable that prior to 2008 Ireland practiced a version of 'self-regulation', sometimes referred to as 'principles-based' or 'light-touch' regulation, in the financial services sector. Since at least 2010 a 'risk based' approach to financial regulation, and indeed other areas of economic regulation, has been in place in Ireland.

2.106 Adjudicating between these different models of regulation in general does not bear directly on the question of standardisation of powers, which is the chief concern of this chapter. It does, however, situate the reform efforts of the United Kingdom in a wider context. Whether or not Ireland should embrace similar changes is a question outside the scope of this Report. The difference of the United Kingdom model may, however, caution against the piecemeal adoption of initiatives from that jurisdiction.

2.107 Even these arguable discrepancies in regulatory approach aside, the United Kingdom's 2008 Act is not a standardisation of pre-existing regulatory powers of the kind under consideration in this chapter. It had the aim of increasing cooperation and unified thinking between local authorities, and introducing civil financial sanctions for a number of

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[235] See generally: Koske (et al), "The 2013 Update of the OECD's Database on Product Market Regulation: Policy Insights for OECD and non-OECD Countries" *OECD Economics Department Working Papers No 1200* (OECD Publishing 2015) available at: ***http://dx.doi.org/10.1787/5js3f5d3n2vl-en***.

[236] Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (OUP 2015) at 173. Citing Bartle and Vass, *Self-Regulation and the Regulatory State—A Survey of Policy and Practice* (Centre for the Study of Regulated Industries 2005) and OECD, *United Kingdom, Challenges at the Cutting Edge* (2002).

[237] See generally Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (OUP 2015) at 166.

[238] The Central Bank's Probability Risk and Impact SysteM (PRISM) is an example of a risk-based approach to regulation.

regulators. Neither of these major initiatives responded to a fragmentation of prior regulatory powers. For this reason, the 2008 Act provides only limited assistance on the standardisation issues considered here.

2.108 The Australian model is much more straightforwardly a codification of pre-existing regulatory powers onto one statutory footing. The 2008 Act in the United Kingdom was only designed to codify *enforcement* mechanisms. Nowhere in the Act is there any provision for inspection or monitoring functions. For this reason, it is likely that an application of the Australian model in Ireland would be comparatively more useful with reference to the specific issues considered in this chapter.

E. Arguments For and Against Standardisation

2.109 There are some potential benefits and disadvantages to standardising regulators' powers along one statutory baseline. In general, the contesting values of greater harmonisation and rationalisation must be balanced against costs to specialisation and individualised expertise. The discussion below attempts to unpack these arguments more, before considering the ultimate recommendations of the chapter.

2.110 The submissions received by the Commission were generally in favour of the standardisation of regulatory powers. It was noted that this would achieve greater parity between regulators, which is particularly useful where an investigation into a state of affairs is conducted by more than one regulator. However, it was also noted that regulators require flexibility on an individual basis in order to discharge their statutory remit. Certain powers may not be suitable for all regulators, such as fitness and probity powers and licencing powers. The arguments in favour and against standardisation given below have been informed by these submissions.

1. Advantages of Standardisation

2.111 The potential benefits of standardising regulators' powers in one statute include: ensuring the sufficiency of a particular power across the board for all regulators; consistency in the exercise, use, and limits of particular powers as used by regulators, and certainty and predictability in respect of court treatments of challenges to those powers across regulatory contexts.

(a) Uniformly Sufficient Powers

2.112 A main advantage of standardising powers would be that it would help to ensure that all regulators had powers sufficient to fulfil their regulatory remit. It would provide a certain minimum standard of regulatory powers under certain thematic groupings ('monitoring' or 'enforcement', for example).

2.113 This system would further allow for a situation where if any regulator happened to lack a certain power to fully monitor compliance, or had a gap in its enforcement pyramid, the standardisation of powers would ensure that if a regulator had a power necessary to its remit that it lacked, it would be able to lobby the relevant political entities to get that power. It is much simpler to be able to point to an existing power and have it assigned than it is to lobby for a new power to be drafted from scratch.

2.114 Many materially similar powers are now subject to different limitations, which are occasionally contingent differences based on the social and political context in which the parent statute was enacted, rather than tailored differences between regulators.

2.115 For example, the Pensions Authority may appoint authorised officers to inspect and investigate pension schemes under section 18 of the *Pensions Act 1990*. Under this provision, the officer may request information by way of notice, enter the premises of persons supervised by the Authority, inspect documents, require persons to provide information, and apply to the District Court for a warrant. Under Part 2 of the *Central Bank (Supervision and Enforcement) Act 2013*, the Central Bank also has certain inspection and investigative powers, which additionally include the power to: require information in a particular form or manner, require a person to prepare a report, require a person providing information to an authorised officer to certify the accuracy and completeness of information (non-compliance being a criminal offence), and attend meetings of regulated entities.

2.116 Both the Central Bank and the Pensions Authority function as financial regulators, but following the 2013 Act there is now a disparity of power between them. A standardisation regime would contribute towards eliminating this kind of accidental discrepancy between regulators. Alternatively, where the discrepancy is intentional, it would highlight the disparity for increased scrutiny and principled justification.

2.117 In a similar vein, the Royal Institute of the Architects of Ireland (RIAI) has suggested that inconsistency in interpretation of planning regulations by local authorities has contributed to inefficiency in the housing market.[239] To resolve this difficulty, they have suggested a centralised agency to process planning applications on behalf of local authorities and a national referrals body for the resolution of disputes about the regulations. Strictly speaking, the issue here is one of rationalisation of agencies[240] rather than one of standardisation of powers; the planning regulations are standard, but their interpretation and application is not. This is similar to the issue that the 2008 Act in the UK was created to solve.

2.118 The important point to take from this is that standardised and predictable *application* of rules is what is important to good regulation. Given that the role envisaged by the RIAI here for the national referrals authority is already performed by the courts in the context of monitoring and inspection regulatory powers, the principal remaining difficulty in

[239] Burke-Kennedy, "Regulatory and Planning Issues 'Delaying Delivery' of New Housing" *Irish Times* (19 Sept 2017).

[240] The issue of coordinated thinking among and between regulators is considered further in Chapter 6, below.

constructing unified and consistent precedents would be the disparate sources of regulatory powers on the Irish Statute book.

2.119 The Australian Law Reform Commission noted that, with respect to a similar standardisation proposal, a standardised suite of powers would also have the advantage of signalling departures from the standard powers more clearly.[241] As departures from the standard baseline would require special attention and affirmative statement in the legislation of the exceptional departure, it would encourage greater parliamentary oversight over these delegations of power.

(b) Coordination and Consistency

2.120 Powers of inspection and investigation that are drafted in a uniform manner would provide certainty and consistency in the approach of regulators. In some respects, this is the inverse of the benefit described above: standardisation would help to both restrain and empower regulators more consistently.

2.121 A unified statutory scheme would also assist regulators in coordinating their activities where an investigation or inspection falls under the remit of one or more regulators. Taking pensions as an example once more: the Central Bank, Revenue Commissioners, and Pensions Authority all have responsibility for different regulatory aspects of pensions. This is not to say that all those authorities should necessarily have access to all of the same powers, but where they are each exercising one power, it would be helpful if they were each subject to the same limits on that power. This is particularly the case where all the regulators share a broad remit, as in this case where all the regulators can be considered financial regulators.

(c) How A Standard Template for Regulatory Powers Assists Statutory Interpretation

2.122 In order to understand how a more standardised approach to drafting regulatory powers might influence their interpretation, it is important first to understand how courts approach interpretation of legislation in general. In *Inspector of Taxes v Kiernan*[242] the Supreme Court (Henchy J) held that, where possible, words in statutes should be given their plain meaning. If, however, that fails, the court might be required to "seek to identify the intent of the Legislature".[243] Other Supreme Court decisions have stressed that the intention of the Oireachtas may only be obtained from the statutory enactment itself and it is improper for the court to speculate as to legislative intention.[244]

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[241] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report 95, 2003) at 260.

[242] [1981] IR 117.

[243] *Texaco (Ireland) v Murphy* [1991] 2 IR 449, at 456.

[244] *Howard v Commissioner for Public Works* [1994] 1 IR 101.

2.123 The primary objective of a court in interpreting a statutory provision is to ascertain the legislative intention behind the enactment.[245] Where the plain meaning of words is ambiguous, or fails to make the application of the section sufficiently precise, the court will have recourse to determining the legislature's intention. In so doing, the court may have regard to similar statutory provisions or statutes that are considered "*in pari materia*" ("on the same matter") as these may highlight the significance of certain inclusions and omissions.[246]

2.124 The extent to which different regulatory statutes can be considered to share a statutory context in this way is contestable. In *Murphy v Dublin Corporation*[247] the Supreme Court refused to interpret the *Housing Act 1966* and the *Local Government (Planning and Development) Act 1963* together, for example. Similarly, in *Irish Agricultural Machinery Ltd v Ó Culacháin*,[248] the Supreme Court declined to interpret the *Finance Act 1975* and the *Value Added Tax Act 1972* together, considering that they could not be considered *in pari materia*.

2.125 *Greene v Hughes Haulage Ltd*[249] would seem to be particularly relevant to the issue of construction of similar regulatory powers as might be assigned to authorised officers. In this case, the High Court (Geoghegan J) used section 50 of the *Civil Liability Act 1961* as an interpretive aid to construe section 2 of the *Civil Liability (Amendment) Act 1964*. The Court remarked that:

> [Section] 50 of the 1961 Act is largely a re-enactment of earlier statutory provisions in the interpretation of which the courts have held that the deceased need not be a party to the contract of insurance and need not have paid the premiums. It seems reasonable in the circumstances to assume that s.2 of the 1964 Act was intended by the Oireachtas to be interpreted similarly to s.50 of the 1961 Act…[250]

2.126 This might suggest that similarities in policy aims may justify the comparison of one set of statutory provisions with another. If this is done between the sets of powers granted to authorised officers of different regulators, then the argument that the specific inclusion of

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[245] This is discussed further in the Commission's *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61–2000) at 55.

[246] *The State (Sheehan) v Government of Ireland* [1987] IR 550; *Irish Leathers Ltd v Minister for Labour* [1986] IR 177; *Cronin v Youghal Carpets (Yarns) Ltd* [1985] IR 312; *Mogul of Ireland Ltd v Tipperary (North Riding) County Council* [1976] IR 260.

[247] [1976] IR 143.

[248] [1990] 1 IR 535.

[249] [1998] 1 ILRM 34. See also *Monahan v Dunnes Stores* [2013] IEHC 79 at paragraph 38 (Irvine J endorsing this interpretation of the *Civil Liability Act 1961*).

[250] [1998] 1 ILRM 34, at 41.

a power for the purposes of one regulator implies the specific absence of that power for another.

2.127 The balance here is a delicate one. The language of certain powers will need to be sector specific on some level: the types of object the authorised officer can interact with will need to be rendered clear so that their power is not overbroad. On the other hand, there seems to be a plausible legal argument that would attach considerable weight to the omission of a specific power in one legislative scheme when contrasted with another. A more standardised approach to drafting may reduce these difficulties by providing a standard reference point for the interpretation of certain basic powers, while allowing for flexibility in the interpretation of sector-specific powers.

2.128 Whether a standardised approach would produce a single, pan-contextual meaning of terms common to several sectors is unlikely, given sector-specific considerations. As the powers of authorised officers are often constrained with flexible and context-sensitive criteria such as 'reasonableness', it seems likely that the powers of different authorised officers acting on behalf of different agencies would vary. What is reasonable for a food health inspector may not necessarily be what is reasonable for a competition law inspector. That different sectors will call for different standards is unavoidable.

2.129 However, this is not to make the point that a context-sensitive criterion such as 'reasonableness' is entirely inappropriate. It is appropriate to use such open-textured terms in order to facilitate flexibility in accommodating the diverse range of actions that different regulators might be required to take in order to fulfil their statutory remits. Thus, there is a good argument to suggest that although there may not be a compelling case for *unifying* regulatory powers under one statutory banner, there is still much to be gained from standardising the formal and structural components of regulatory powers, including the language in which they are typically framed. If one regulator is subject to a 'reasonableness' standard in the exercise of, say, a particular search and seizure power, then *all* regulators exercising that power or a closely related power should also be subject to the same reasonableness test.

2.130 Given this, the Commission is of the view that the benefits to be gained by strict 'standardisation' in the codifying Act sense are outweighed by the cost and difficulty of reform in this area of law. However, the Commission considers that there is considerable merit in the standardisation of regulatory powers in terms of adopting, as far as practicable, a standard approach or template that may provide greater clarity and harmony in regulatory powers.

(d) Conclusions on Statutory Interpretation

2.131 The approach used in the Australian model, described in detail in the following section, is instructive. The powers standardised in the Australian Act are quite general. Instead of providing for broad powers (like a general template for search and seizure) it instead provides for more niche matters. Take, for example, the general investigative powers in section 49 of the *Regulatory Powers (Standard Provisions) Act 2014*:

(a) if entry to the premises is with the occupier's consent—the power to search the premises and any thing on the premises for the evidential material the authorised person suspects on reasonable grounds may be on the premises;

(b) if entry to the premises is under an investigation warrant:

(i) the power to search the premises and any thing on the premises for the kind of evidential material specified in the warrant; and

(ii) the power to seize evidential material of that kind if the authorised person finds it on the premises;

(c) the power to inspect, examine, take measurements of or conduct tests on evidential material referred to in paragraph (a) or (b);

(d) the power to make any still or moving image or any recording of the premises or evidential material referred to in paragraph (a) or (b);

(e) the power to take onto the premises such equipment and materials as the authorised person requires for the purpose of exercising powers in relation to the premises;

(f) the powers set out in subsections 50(1) and (2), subsection 51(2) and section 52.[251]

2.132 While the powers in sub-clauses (c) to (f) are quite general, they only apply in the circumstances of possessing a warrant or entering premises by consent. In the Irish context, these would be quite narrow grounds, usually entry to a dwelling. Statutory powers seem to be sufficient for most other premises. However, a warrant can specify evidential material on a case-by-case basis (as envisaged in the Australian scheme here); general statutory powers do not enjoy this luxury. It seems likely that the generality of the Australian model can only operate where warrants are more standard practice. This would not integrate well with the general Irish preference for broad statutory powers, reinforced with provisions to apply for warrants in the case of entry to certain classes of premises or in cases where forceful entry to premises as a matter of right is required.[252]

2.133 In general, these powers are less detailed than many comparable provisions in existing Irish regulatory arrangements.[253] Specificity is a necessary price to pay for generality. Designing more specific powers with potentially general application would risk endowing some regulators with overbroad powers. In effect, it would raise the baseline of regulatory

[251] These provisions relate to electronic material and the seizure of evidential material.

[252] Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing 2009) at paragraphs 3.057, 6.159, 8.084.

[253] Some of these arrangements are described below.

monitoring and enforcement to the level required by the regulators with the most wide and crucial remits.

2.134 These concerns would preliminarily suggest that any standardising Act could only act as a very basic framework. It is unlikely that there will be a 'one-size-fits-all' approach to regulatory powers that would satisfy the needs of every regulator.

2. Disadvantages of Standardisation

2.135 Although there are some advantages to the proposal, there are also some possible disadvantages to putting a standard set of basic regulatory powers into one statute. These are considered in the sub-sections below.

(a) Bracket Creep

2.136 One of the difficulties pointed to in the public hearings on the Australian 2014 Act was the problem of 'bracket creep'.[254] This is the suggestion that codification of regulatory powers will only serve to enhance the powers of existing regulators, potentially to a level inappropriate to their sector. This might be seen as a downside of clearer regulations that are easier to enforce. The most straightforward way of achieving this goal is to draft broad powers that leave significant discretion to the regulator. However, this can have negative effects for businesses. The threat of powerful enforcement may have a chilling effect, even where it is never actually used. Broad powers being exercised by a variety of regulators may also lead to a lack of certainty in how the regulations are to be applied.

2.137 Submissions received in response to the Issues Paper seem to indicate their openness to the possibility of new or expanded powers but resistance to any perceived diminution of their current powers.

2.138 Standardisation may increase the availability and use of coercive powers overall.[255] However, the extent to which this is true is more likely to be a result of the political implementation of the standardised regulatory powers than the framing of any standardising Act.[256] The allocation of powers to regulators is ultimately a choice for the Oireachtas to make. Nevertheless, it is worth noting a potential cost or risk of an attempt to standardise regulatory powers.

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[254] Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Regulatory Powers (Standard Provisions) Bill 2012* (26 February 2013) at 1.

[255] This concern was also raised with respect to the 2014 Act in Australia: Police Federation of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Regulatory Powers (Standard Provisions) Bill 2012* available at: *http://www.aph.govau/DocumentStore.ashx?id=9f0d0652-b5fd-42c6-a9d1-fc9e84ffcd54*.

[256] Attorney-General of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Regulatory Powers (Standard Provisions) Bill 2012* available at: *http://www.aph.govau/DocumentStore.ashx?id=473ce3e2-c1e4-4bf6-bf68-b7266f5babd2*.

(b) Effectiveness of Streamlining Precedent and Legal Interpretation

2.139 It might be questioned just how effectively a standardised powers act would rationalise judicial interpretation of regulatory powers. If different regulators are using a single power, this may still justify different interpretations of the limits of that power being applied to different authorised officers.

2.140 Regulatory powers will often utilise standards such as ‘what is *reasonably* required’ for an authorised officer in exercise of their functions. It is plausible that different officers authorised by under different sections (corresponding to different regulatory remits) could be held to different standards of reasonableness. What is reasonable for an authorised officer investigating competition law crime may be different to what is reasonable for an authorised officer investigating compliance with electrical safety best practice.

(c) Generality at the Cost of Specificity

2.141 A statute aligning regulatory powers would not be without its limitations, some of which are inherent in its attempting to be a law of general application over numerous diverse pre-existing schemes. Each of these schemes reflects their own logic and few, if any, of were developed with any view to consistency across the various fields which have come to be regulated.[257]

2.142 This is not a limitation that can be ignored, but it is one that can be accommodated. If the powers that are drafted in the standardisation act are a baseline from which deviation is permitted, then sector-specific needs may still be accommodated. If the act is to strike the balance between consistency and flexibility correctly, it will need to identify broad frameworks for general regulatory powers. These can then be supplemented by additional detail or powers for specific regulators.

F. Conclusions and Recommendations

1. A Standardised Template for Regulatory Powers

2.143 It is important to bear in mind that standardisation only makes regulatory regimes better as rules, it does not make any individual regulation itself a ‘better rule’; put another way, standardisation can make a particular regulatory regime more effective, but it does not make it better at securing specific policy outcomes. Nor does it solve all coordination difficulties. Having all regulators singing from the same ‘regulatory hymn sheet’ is only one aspect of regulatory coordination, and legislation alone cannot guarantee consistency of

[257] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (2002) available at: *http://www.alrc.govau/report-95*.

approach. One can therefore only expect so much from what is to be gained through reform of this type.

2.144 As explained above, the Commission is not of the view that there would be much to be gained through a standardising regulatory powers act. The principal difficulty, which such an act would avoid, would be irrational or unintentional discrepancy between regulators with respect to a substantially similar regulatory power. The Commission is of the view that this issue could be avoided in a less onerous and more cost-effective way by introducing a draft template of certain common regulatory powers, which would then be followed each time new regulatory legislation is drafted.

2.145 Ultimately, therefore, what is proposed is a standardisation of *approach* when it comes to the drafting and design of regulatory powers. The same or similar language should be used between regulators where possible, and a standard template for particular generic powers may go some way to providing this. This will help to ensure that disparities that arise between regulators are the result of deliberate action in recognition of the policy objectives of the regulator and not an accident or anomaly due to evolving drafting practice.

R 2.01 The Commission recommends that a common legislative template of powers – a "core regulatory toolkit" – be developed for all similarly situated financial and economic regulators.

R 2.02 The Commission recommends that the common legislative template of powers should include at least the following list of core powers:

(1) Power to issue a range of warning directions or notices, including to obtain information by written request and "cease and desist" notices;

(2) Power to enter and search premises and take documents and other material, for example where relevant for product testing purposes;

(3) Power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or produce documents (including provision for determining issues of privilege);

(4) Power to impose administrative financial sanctions (subject to court oversight, to ensure compliance with constitutional requirements);

(5) Power to enter into wide-ranging regulatory compliance agreements or settlements, including consumer redress schemes;

(6) Power to bring summary criminal prosecutions (prosecutions on indictment are referred to the Director of Public Prosecutions).

R 2.03 The Commission recommends that the common legislative template of powers should be used to facilitate the use of a common formula of words when conferring financial and economic regulators with particular powers, and to avoid any gaps identified

through case law such as in *CRH plc, Irish Cement Ltd v Competition and Consumer Protection Commission.*

R 2.04 **The Commission recommends that the common legislative template of powers in Recommendation 2.01, above, could form the basis for a single *Regulatory Powers Act* (as has been enacted in some jurisdictions) but the Commission does not consider that such an Act is appropriate at this time.**

2. A Regulatory Guidance Office

2.146 This Report, including this chapter, does not seek to prescribe a particular type of regulatory policy or approach to financial or economic regulation. This is a policy matter that falls outside the Commission's capacity. Nonetheless, the Commission recognises that the recommendations already made in this chapter on the need for a standard template for regulatory powers, which include recommending that the financial and economic regulators encompassed by this Report should be conferred with the additional regulatory powers, necessarily have a policy-related aspect.

2.147 Submissions received by the Commission have argued that, assuming such recommendations arise from this Report (which they now do), they would also consequently require a whole-of-government approach to policy formation. These submissions also argued that this would involve the need for an oversight body or office that would provide such a whole-of-government approach. This, it is argued, is because those with the policy-making responsibility, whether within Government or the Oireachtas, for determining the extent to which these recommendations should be implemented, would benefit from the availability a shared common approach. The Commission accepts the approach expressed in this analysis.

2.148 Although for the reasons already given the Commission is not engaged in this Report in a prescriptive approach to regulatory policy, this analysis is also consistent with best international practice on regulatory policy and governance. Notably in this respect, in 2012, the OECD published a Recommendation on Regulatory Policy and Governance, which sets out 12 Key Principles. These 12 principles can be summarised as follows.

(1) Commit at the highest political level to an explicit whole-of-government policy for regulatory quality. The policy should have clear objectives and frameworks for implementation to ensure that, if regulatory legislation (which includes related statutory codes and guidance) is used, the economic, social and environmental benefits justify the costs, the distributional effects are considered and the net benefits are maximised.

(2) Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulatory legislation serves the public interest and is informed by the legitimate needs of those interested in and affected by it. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft statutory proposals and to the quality of the supporting analysis. Governments should

ensure that regulatory legislation is comprehensible and clear and that parties can easily understand their rights and obligations.

(3) Establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality.

(4) Integrate Regulatory Impact Assessment (RIA) into the early stages of the policy process for the formulation of new regulatory legislative proposals. Clearly identify policy goals, and evaluate if legislation is necessary and how it can be most effective and efficient in achieving those goals. Consider means other than legislation and identify the trade-offs of the different approaches analysed to identify the best approach.

(5) Conduct systematic programme reviews of the stock of significant regulatory legislation against clearly defined policy goals, including consideration of costs and benefits, to ensure that the legislation concerned remains up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives.

(6) Regularly publish reports on the performance of regulatory policy and reform programmes and the public authorities applying the legislation concerned. Such reports should also include information on how regulatory tools such as Regulatory Impact Assessment (RIA), public consultation practices and reviews of existing legislation are functioning in practice.

(7) Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence.

(8) Ensure the effectiveness of systems for the review of the legality and procedural fairness of regulatory legislation and of decisions made by regulatory bodies with sanctioning powers. Ensure that citizens and businesses have access to these systems of review at reasonable cost and receive decisions in a timely manner.

(9) As appropriate, apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulatory legislation to ensure that it is targeted and effective. Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies.

(10) Where appropriate, promote regulatory coherence through co-ordination mechanisms between the supranational, the national and subnational levels of government. Identify cross-cutting regulatory issues at all levels of government, to promote coherence between regulatory approaches and avoid duplication or conflict of relevant regulatory legislation.

(11) Foster the development of regulatory management capacity and performance at sub-national levels of government.

(12) In developing regulatory legislation, give consideration to all relevant international standards and frameworks for co-operation in the same field and, where appropriate, their likely effects on parties outside the jurisdiction.

2.149 Since these principles have been developed by the OECD as a good guide for best practice in this area, the Commission considers that they form a suitable template for this purpose. The question then arises as to what mechanism or vehicle might be used to achieve the whole-of-government approach underlined by the first principle set out by the OECD.

2.150 As already noted, in 2011 the National Economic and Social Council (NESC) published a report that contained a wide-ranging review of the literature, national and international, on regulatory policy.[258] That report noted that the OECD had, in 2010, commended the positive contribution made at that time to regulatory policy in Ireland by the Better Regulation Unit (BRU), which had been located within the Department of the Taoiseach. The BRU's functions reflected many of those referred to in the OECD's 2012 Recommendation on Regulatory Policy and Governance such as, for example, the approach to the deployment and format of pre-legislative Regulatory Impact Analysis (RIA). In 2011, many of the functions of the BRU were absorbed into the Department of Business, Enterprise and Innovation, although it is also the case that since 2011 the BRU no longer has a distinct existence as such.

2.151 As a result, it would appear that the whole-of government approach identified in the OECD's 2012 Recommendation, and which had clearly been within the remit of the BRU, does not currently have an identifiable focal point. The Commission agrees with the analysis in the submissions received that, to complement the recommendations on the standard template of regulatory powers already made in this chapter, an oversight body or office should be in place which would have a function at least comparable to the BRU. The Commission has accordingly concluded that a Regulatory Guidance Office should be established, with membership drawn from Government Departments and Regulators, with a remit to provide guidance and information on the type of regulatory matters identified in the OECD's 2012 Recommendation. This would thus include: national and international best practice in economic regulation, the content of Regulatory Impact Assessments (or comparable documents) and lessons learned from relevant case law.

R 2.05 The Commission recommends that a Regulatory Guidance Office, with membership drawn from Government Departments and Regulators, should be established with a remit to provide guidance and information on regulatory matters, including: national and international best practice in economic regulation, the content of Regulatory Impact Assessments (or comparable documents) and lessons learned from relevant case law.

[258] National Economic and Social Council, *Quality and Standards in Human Services in Ireland: Overview of Concepts and Practice* (December 2011, No. 124) available at *http://files.nesc.ie/nesc_reports/en/NESC_124_2011.pdf*, discussed at paras 2.08ff, above.

CHAPTER 3

ADMINISTRATIVE FINANCIAL SANCTIONS

A. Introduction

3.01 Of the tools available to a regulator to secure regulatory compliance, the power to impose administrative financial sanctions is one of the most effective. Administrative financial sanctions involve placing an obligation on a regulated entity to pay a sum of money because the entity has breached its governing regulations. Administrative financial sanctions are therefore enforcement type powers, and the purpose of such a sanction generally is to coerce behaviour to ensure compliance and to deter similar conduct in the future.

3.02 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 misleading; however, because this is more properly associated with criminal sanctions. In this Report, the Commission has used the term "administrative financial sanctions" to make clear that such sanctions are to be distinguished from fines imposed on foot of a criminal conviction.

3.03 Administrative financial sanctions are a subset of the wider category of administrative sanctions, such as issuing a caution or an infringement notice, as discussed in Chapter 2. 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 probabilities" standard rather than the "beyond reasonable doubt" standard required in criminal cases. Broadly speaking, administrative sanctions are imposed by regulators rather than courts; however, they are often subject to some form of appeal to, or review by, a court.

B. The Place of Administrative Financial Sanctions in the Regulatory Toolkit

3.04 The ability of a regulator to impose administrative financial sanctions is viewed as a crucial element in the "enforcement pyramid."[1] Such sanctions constitute an effective means of

[1] John Braithwate, "The Essence of Responsive Regulation" Lecture Delivered at University of British Columbia, 21 September 2010.

responding to conduct that involves a breach, but for which criminal prosecution would be unduly harsh.[2]

3.05 They are not intended to replace criminal enforcement of the law, but rather to complement it. As discussed in the Macrory Report, administrative financial sanctions are parallel, but connected to, criminal responses.[3] Both can be made available as sanctions for the same regulatory non-compliance, with the elements of the breach being determined by the requisite evidential standard. Where a criminal sanction is pursued, the regulator would need to meet the criminal standard; "beyond reasonable doubt." On the other hand, should the regulator choose to pursue an administrative financial sanction, the evidence should meet the civil standard of the balance of probabilities.

3.06 Where possible and appropriate, the employment of civil enforcement regimes has numerous advantages over criminal enforcement, which are outlined below. In addition to being an option for a regulator as a response to regulatory breaches covered by both civil and criminal sanctions, the use of criminal prosecutions would remain appropriate for serious breaches where there is evidence of intentional or reckless or repeated flouting of the law, or where the actual or potential consequences of the breach are so serious (such as a death or serious injury) that the public interest demands a criminal prosecution.[4]

3.07 Administrative financial sanctions can be perceived as a lenient alternative to criminal punishments, allowing corporate bodies to treat the cost of financial sanctions as part of the "cost of doing business". Therefore, in order to be effective, the maximum statutory levels of such sanctions need to be sufficiently high to deter non-compliance by signalling that the costs of infringement exceed those of compliance.[5] They must also constitute a proportionate response to the non-compliance that they seek to address. In cases in which the maximum financial sanction available is not considered severe enough to reflect a suitable sanction for non-compliance, the most appropriate enforcement action will be criminal prosecution.

3.08 While administrative financial sanctions must be set at a level that is sufficient to deter non-compliance, imposing sanctions of significant monetary amounts may potentially be considered punitive, and therefore, a criminal matter. The Constitution and Article 6 of the European Convention on Human Rights (ECHR) require that there be a number of legal

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[2] Comreg, the BAI, the CCPC, the HPRA, the CRU, *Submission to the Law Reform Commission, Enforcement of Competition of Regulatory Law, the Case for Reform*, at paragraph 19 observe that administrative sanctions can complement criminal enforcement powers and that, affording regulators with the discretion to use the appropriate tool can effectively secure compliance and the achievement of the regulators' statutory objectives.

[3] Macrory *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)) at paragraph 3.33.

[4] *Ibid* at paragraph 3.6.

[5] Comreg, the BAI, the CCPC, the HPRA, the CRU, *Submission to the Law Reform Commission*, *Enforcement of Competition of Regulatory Law, the Case for Reform* (2012), at paragraph 8, makes this observation.

and procedural protections available to those accused of committing crimes. While previously it was arguable that administrative financial sanctions could require such protections, a 2016 decision of the High Court, discussed further below, has definitively demonstrated that administrative financial sanctions do not constitute a criminal prosecution.[6]

1. General Benefits

3.09 There are a number of advantages to a regulator having the ability to impose, directly or indirectly, administrative financial sanctions on its regulated entities. The possibility of the regulator imposing a monetary sanction can itself encourage better compliance.[7] Administrative financial sanctions provide an intermediate option for the regulator between minor cautions on one end of the spectrum, and criminal sanctions on the other. Administrative financial sanctions may be appropriate for breaches that have serious consequences (in terms of, for example, damage caused or illegitimate savings made) but that may have occurred for the first time or have been unintentional. Further, such sanctions provide a regulator with the ability to signal to its regulated entities that a financial sanction, of a certain level, will be its next response should the compliance issues recur or continue. This constitutes a transparent and proportionate regulatory model.

3.10 There are numerous advantages to the availability of administrative financial sanctions as an enforcement tool. Such advantages are, of course, general, and administrative financial sanctioning powers may have particular benefits in the context of the markets to which they are to be applied. However, the following advantages can be regarded as being common for any regulator possessing such powers.

(a) They are easier to impose

3.11 Criminal prosecutions often constitute the most effective mechanism to ensure regulatory compliance. However, in some cases, criminal prosecution may not be practical or appropriate due to the evidentiary requirements, the complex economic analysis required and the criminal standard of proof that is necessary. The procedure to impose administrative financial sanctions, on the other hand, is likely to be quicker and cheaper when compared to criminal proceedings. The relevant regulatory authority can potentially take a measure that is immediately applicable, so that the infringement can be tackled in

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[6] *Purcell v Central Bank of Ireland* [2016] IEHC 514. The courts have also previously found the confiscation of the proceeds of crime through civil procedures to be constitutional, as it did not constitute in actuality a means of punishment of criminal behaviour. See *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185.

[7] Macrory *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)) at paragraph 3.25.

the shortest timeframe, even though the regulated entity could challenge such a decision before a court, or on appeal.[8]

(b) They constitute a realistic threat

3.12 Regulated entities are equally aware of the costs and difficulties involved for the regulator in securing a prosecution. As a result, a market participant may not view criminal prosecution as likely; therefore, the risk of prosecution may not act as a realistic deterrent in such cases. Thus, as noted above, administrative financial sanctions may be more practical and appropriate, in circumstances where criminal prosecution would be excessive or unduly costly or time-consuming. In fact, a regulator’s ability to use a wide range of enforcement tools, including administrative financial sanctions, can potentially act as a strong deterrent to regulated entities considering a regulatory breach.

3.13 A common feature of regulatory enforcement regimes is the opportunity for the regulated entity to enter into a settlement agreement with the regulator. The Commission refers to such agreements as “regulatory enforcement agreements” or “REAs”. Regulatory enforcement agreements are discussed further in Chapter 4 of this Report.

3.14 Regulatory enforcement agreements generally involve the regulated entity accepting that a regulatory non-compliance occurred and, as a result, will receive an administrative financial sanction at a discounted level for early cooperation. The presence of sanctioning powers in this way encourages the use of regulatory enforcement agreements. A regulated entity will have a far greater incentive to enter such an agreement if it considers that it may receive an increased administrative financial sanction if, following the particular process, it is found to have breached the legislation in question. If the particular regulator does not possess administrative sanctioning powers, the regulated entity may be less likely to enter an agreement because the potential regulatory response will be at the lower level of the enforcement pyramid. Such sanctions may include a warning notice or the initiation of a criminal prosecution, which, as discussed above, is likely to be more difficult for the regulator to successfully impose.

(c) Superior targeting and calibration of sanction

3.15 The application of administrative financial sanctions enables the regulator's expertise, including knowledge of the facts, sectors and national markets, to be fully utilised. The regulated entity will usually be linked to the regulator through some relationship, such as a licencing arrangement or other reporting obligations. Therefore, the decision whether to impose, and, if so, the calculated level of any sanction, will be made on the basis of an informed decision. Any sanction can be calibrated to be proportionate to the harm caused, the nature of the market or undertaking, the turnover of the entity or the

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[8] See, for example, Comreg, *Response to “Regulatory Enforcement and Corporate Offences” Issues Paper from the Law Reform Commission* (2016), at paragraph 4.1. Comreg notes that administrative financial sanctions are a quick and efficient method of regulatory enforcement.

economic benefit gained from the breach. This targeted calibration of sanction can also enhance the sanction's deterrent effect. The specialist knowledge of the regulator can also have an impact if the particular legislation allows for a reduction in the penalty for early cooperation. Further, the ability to use administrative financial sanctions, as opposed to a criminal prosecution, may also be appropriate in scenarios where a good continuing relationship between the regulator and the regulated entity is desirable.

2. Potential weaknesses in administrative financial sanctioning regimes

3.16 There are some impediments to the effective use of administrative financial sanctions that have been addressed in the literature and in the submissions received by the Commission. Firstly, in order to act as an effective deterrent, administrative financial sanctions must be pitched at a sufficiently high level. This generates two potential problems. First, a large monetary sanction being imposed by a body other than a court arguably raises constitutional issues. However, the High Court decision in *Purcell v Central Bank of Ireland,*[9] discussed below, illustrated that, provided certain safeguards are in place, administrative financial sanctions are constitutionally permissible. The second issue is the fact that some legislatures, including the Oireachtas, have been reluctant to grant regulators powers to issue such sanctions. This has meant that, in certain instances, when regulators are given financial sanctioning powers, they are pitched so low as to render them ineffective. Therefore, it is important that, where administrative financial sanctioning powers are provided, they be set at a level that would allow a regulator to impose sanctions with sufficient deterrent effects, while remaining proportionate.

3.17 Another possible impediment to the efficiency of administrative financial sanctions is the requirement for a sanction to be confirmed by a court before it can take effect. This inability to directly impose administrative financial sanctions potentially hampers effectiveness, given the delays this involves. However, such judicial oversight is likely to be a requirement in order to safeguard administrative financial sanctioning regimes from constitutional challenge.

3.18 Administrative financial sanctions, as opposed to criminal sanctions, may not carry the associated reputational damage in the eyes of the public.[10] The imposition of a criminal conviction by a court is likely to have a greater associated stigma, which, in turn, results in such a response having a greater deterrent effect.[11] Reduced social stigma can pose a

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[9] [2016] IEHC 514.

[10] Macrory *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)), at paragraph 3.37.

[11] Such stigma may also be relevant for a subsidiary operating in this jurisdiction who may be required to report a criminal conviction to a parent company where an undertaking is part of a larger multinational conglomerate.

particular issue in situations in which the conduct that attracts the administrative financial sanction does not include any intention to cause harm, for example due to negligence.

3.19 A particular drawback to the use of administrative financial sanctions is the argument that they may simply become a cost of doing business for the regulated entity. Administrative financial sanctions could thus be viewed as a lenient alternative to criminal punishment, allowing corporate bodies to perform a cost-benefit analysis in making decisions whether to breach legislation. Therefore, to be effective, they need to be sufficiently high to deter non-compliance by signalling that the costs of infringement exceed those of compliance. This issue must be taken into consideration, if the relevant statute places a maximum on the level of sanction that can be imposed. However, sanctions must also act as a deterrent while being proportionate to the non-compliance to which they are applied. One approach to counteract the "cost of doing business" phenomenon is to combine administrative financial sanctions with other sanctions such as redress schemes that can form part of regulatory enforcement agreements.[12] However, a balance must be struck in setting a monetary sanction that constitutes a genuine deterrent, but which will allows the company to remain in business. This avoids so-called collateral damage caused to employees, suppliers and other connected entities.[13]

3. General principles of administrative financial sanctions

3.20 The Commission considers that, having regard to the discussion above, in order to be an effective regulatory power or tool, administrative financial sanctions should be based on a number of principles.[14] These are as follows:

> **1. Deter non-compliance**. The first goal of administrative financial sanctions, like any other regulatory power or tool, is to deter regulated entities from violating the law. An administrative financial sanction should aim to deter future non-compliance: the sanction should persuade a corporate body that breaks the law to take precautions to avoid future non-compliance (specific deterrence) and also, should dissuade others from violating the law (general deterrence). This is reflected, for example, in laws derived from EU secondary law, which often specify that sanctions should impose a sufficient "deterrent" effect.[15] In other words, the amount of the

[12] See Chapter 4.

[13] It is also consistent with sanctioning principles generally, that regard should be had to the overall proportionality of the administrative financial sanction imposed.

[14] These principles, albeit numbered differently, are set out in Macrory *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)) which formed the basis for the reform of financial services regulation in the UK in the Regulatory Enforcement and Sanctions Act 2008. It is notable that these principles reflect many of the underlying general principles in sentencing, which the Commission discussed in its *Report on Mandatory Sentences* (LRC 108-2013) at ch 1.

[15] For example, recital 71 to *Regulation (EU) No 596/2014 of the European Parliament and of the Council* (Market Abuse Regulation) states that fines ought to have a "deterrent effect".

financial sanction should be sufficiently high so as to outweigh any perceived benefit of non-compliance (so that there is no "cost benefit" from non-compliance).

2. Impose a proportionate sanction. The administrative sanction should be proportionate to the violation in question, and should therefore reflect a "gravity component" that reflects the nature of the contravention and the harm caused. The more serious the contravention, the higher the sanction, while a less serious contravention should attract a lower financial sanction.

3. Prevent financial benefit: "disgorgement". The administrative financial sanction should also eliminate any financial benefit arising from non-compliance. This is sometimes referred to as "disgorgement", or more simply, that "crime doesn't (or shouldn't) pay." This approach has formed the background to legislation in many jurisdictions providing for the confiscation of the proceeds of crime and to combat money laundering,[16] and it is notable that the Central Bank has a significant regulatory role in combating money laundering. It also reflects the long established legal principle that persons should not benefit from their wrongdoing.[17]

4. The sanction should be responsive to the regulated entity. The administrative financial sanction should be responsive in that it should be appropriate for the particular regulated entity, taking account, for example, of whether it is a large or small organisation. It should also be consistent with overall regulatory goals, so that a corporate body that self-reports wrongdoing it has uncovered or has a good compliance history should be treated less harshly than a corporate body whose wrongdoing was only uncovered after an investigation by the regulator.

R 3.01 The Commission recommends that, subject to the principles and procedural safeguards recommended below, the power to impose administrative financial sanctions is both valuable and necessary in ensuring that financial and economic regulators have the requisite powers to achieve their regulatory objectives.

3.21 The benefits to a regulator of having administrative financial sanctioning powers have been outlined above. They constitute a crucial regulatory tool and to omit such powers would constitute a highly detrimental gap in the enforcement powers of the regulators. Although concerns have been raised in Ireland as to their constitutionality, these concerns

[16] See, for example, Ryder, *Financial Crime in the 21st Century: Law and Policy* (Edward Elgar Publishing, 2011).

[17] This principle is sometimes described in the Latin phrase *nullus commodum capere potest de injuria sua propia*. The Commission discussed the principle in detail in its *Report on Prevention of Benefit from Homicide* (LRC 114-2015), at paragraphs 1.01ff. In Ireland, see generally the *Criminal Justice Act 1994* (which is anti-money laundering legislation) and the *Proceeds of Crime Act 1996*.

have been definitively addressed by the High Court (Hedigan J) in *Purcell v Central Bank of Ireland*,[18] discussed in Part B. In addition, they are consistent with the views expressed in *Fingleton v Central Bank.*[19] The Commission considers that putting certain features and safeguards in place addresses such concerns.

R 3.02 The Commission recommends that the financial and economic regulators encompassed by this Report be provided with the power to impose administrative financial sanctions.

3.22 As will be discussed below, there are numerous financial sanctioning regimes currently operating in Ireland. However, this Chapter will primarily focus on the administrative financial sanctions available to the Irish regulator for financial services, the Central Bank. This focus may be justified by the role played by inadequate use of financial regulation in the financial crisis of 2008 onwards. The administrative financial sanctions regime of the Central Bank has been in place for over a decade. The Central Bank has therefore had time to gain experience and revise its use and policies in relation to administrative financial sanctions. The powers it possesses and the procedures it operates in applying administrative financial sanctions have been upheld as constitutionally permissible by the High Court.[20] It therefore acts as a good model for the purposes of examining the operation of potential administrative financial sanctioning regimes that may be implemented and exposing any potential shortcomings or gaps in sanctioning powers or procedures. The administrative financial sanctioning regime of the Central Bank provides a suitable framework for the type of procedure by which administrative financial sanctions may be legally imposed by a public body.

C. Constitutional Permissibility of Administrative Financial Sanctions

1. Administrative financial sanctions are Not an Administration of Justice

3.23 There have been some questions as to whether it is constitutionally permissible, outside of the revenue context, for administrative financial sanctions to be imposed on undertakings or individuals.[21] This has been one of the main impediments to the expanded use of administrative financial sanctions in Ireland, as concerns about the constitutionality of these measures have inhibited the Oireachtas. As a result, the State has been the subject of criticism for being out of step with its European counterparts due to its failure

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[18] [2016] IEHC 514.

[19] [2016] IEHC 1.

[20] *Purcell v Central Bank of Ireland* [2016] IEHC 514*; Fingleton v Central Bank of Ireland* [2016] IEHC 1.

[21] McDowell, "Non-Criminal Penalties and Criminal Sanctions in Irish Regulatory Law" in Kilcommins and Kilkelly, *Regulatory Crime in Ireland* (First Law 2010).

to provide for administrative financial sanctions in its competition legislation[22] and electronic communications legislation.[23] Constitutional concerns also led the Oireachtas to provide for the confirmation of administrative financial sanctions by the High Court when the *Central Bank and Financial Services Authority of Ireland Act 2004* inserted the power to impose administrative financial sanctions into Part IIIC of the *Central Bank Act 1942* (the 1942 Act).[24] Similar misgivings led the Oireachtas to abort the inclusion of administrative financial sanctions measures in sea fisheries legislation in 2006[25] and competition legislation in 2011.[26]

3.24 These concerns have been addressed by the 2016 decision of the High Court (Hedigan J) in *Purcell v Central Bank of Ireland*.[27] The applicant challenged the jurisdiction of the Central Bank to hold an inquiry under its Administrative Sanctions Procedure (ASP inquiry).[28] It was argued by the applicant that the ASP inquiry engaged in the exercise of judicial power, contrary to Article 34 of the Constitution. In order to succeed in this argument, all 5 of the *indicia* of the administration of justice, as set out by the High Court in *McDonald v Bord na gCon,*[29] would have to have been satisfied. Under this test, the administration of justice may be taken to have the following characteristics or requirements:

1. a dispute or controversy as to the existence of legal rights or a violation of the law;
2. the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
3. the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;

[22] 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).

[23] 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 administrative financial sanctions measures until after 2008 drew criticism in the Nyberg Report, at paragraph 4.3.3.

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

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

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

[27] [2016] IEHC 514.

[28] The Central Bank's administrative sanctions procedure is the mechanism by which an administrative financial sanction may potentially be imposed.

[29] [1965] IR 217.

4. the enforcement of those rights or liabilities or the imposition of a penalty by the court by the executive power of the State which is called in to enforce its judgment; and

5. the making of an order by the Court which as a matter of history is an order characteristic of courts in this country.

3.25 In *Purcell,* the High Court (Hedigan J) examined each of these 5 criteria as applied to the administrative sanctions procedure of the Central Bank, and rejected the argument that the ASP inquiry involved the administration of justice. In fact, the Court concluded that the ASP inquiry met none of the criteria concerning the administration of justice.

3.26 Of particular relevance to administrative financial sanctions is the fourth criterion. When applying the test, the High Court drew attention to the fact that the imposition of any sanction by an Inquiry is not self-executing. Sanctions imposed are not enforceable as a judgment. Section 33AW(2) of the *Central Bank Act 1942* provides that any monetary penalty or costs order only takes effect when the decision is confirmed by an order of the court of competent jurisdiction.

3.27 *Purcell* also considered whether the potential financial sanction could be characterised as the imposition of a criminal penalty. In finding that it did not, the Court relied on the fact that Part IIIA of the 1942 Act provided separately for criminal offences. It noted that the role of a criminal trial is something completely distinct from financial regulation. The function of a criminal trial is solely to determine whether an accused is guilty or not guilty of a specified offence.

3.28 Finally, and in relation to Article 38, it was submitted by the applicant that Part IIIC of the 1942 Act goes beyond mere investigatory powers. The High Court rejected this, finding that the procedure was in fact merely an inquiry to determine whether contraventions of the legislation had occurred.

3.29 Although the *Purcell* decision refers specifically to the administrative financial sanctions regime of the Central Bank, the discussion can be applied to comparable powers already conferred on other regulators, as well as to powers that could be conferred on other regulators. It therefore provides a useful guidance as to the types of safeguards and features such regimes would require in order to comply with the relevant constitutional provisions. For this reason, Part D of this Chapter discusses the Central Bank's administrative sanctions procedure in detail.

3.30 *Purcell* focused on whether the ability of the Central Bank to exercise administrative financial sanctioning powers was appropriate in light of certain constitutional requirements as to the exercise of judicial-type powers. There is, however, a further constitutional aspect to the administrative financial sanctioning powers of the Central Bank. When a public body, such as the Central Bank or any other statutory regulator, is taking decisions with the potential to adversely affect private individuals or undertakings, it must provide fair procedures in any decision making process.[30] What constitutes fair procedures can include many things, such as the provision of an oral hearing or the right to legal representation. It depends on the particular circumstances, but it is generally the case that the more severe the potential consequences, the greater the level of fair procedures that must be provided.[31] For example, the imposition of a significant monetary sanction by a public body would require the provision of the highest level of fair procedures.

3.31 This aspect of the Central Bank's administrative sanctions procedure was discussed by the High Court (Noonan J) in *Fingleton v the Central Bank of Ireland*.[32] This case involved a judicial review of the Central Bank's powers to hold an ASP inquiry in relation to a former senior manager of a financial institution. The main argument in the challenge concerned was whether a person who was no longer employed by the relevant financial institution fell within the scope of the Central Bank's administrative sanctions procedure. However, one matter submitted by the applicant in the proceedings was that there was an inherent unfairness in the ASP inquiry process. The Court found that:

> "[t]he elaborate procedures provided for by the [*Central Bank Act 1942*] and the guidelines drawn up by the [Central Bank], coupled with an appeal to an independent Tribunal and a further appeal to the High Court, to my mind ensure that the applicant's right to a fair hearing is guaranteed."[33]

3.32 The Court was referring, in particular, to the fact that the regulated entity is provided with a hearing before any sanction under the 1942 Act can be imposed. At the hearing, the regulated entity is the given the opportunity to put forward a case on whether it had breached regulations and is generally provided with a high level of fair procedures. The regulated entity is also provided with opportunities to make representations during the Investigation stage, as contained in the Central Bank's guidelines and outlined in Section D below.

3.33 The procedures by which the Central Bank exercises its administrative financial sanctioning powers are therefore constitutionally permissible. Detail on these procedures will be outlined in Part D of the Chapter, as such procedures can form the basis of a framework by which other regulators could legally exercise administrative financial sanctioning powers.

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[30] This is regarded as implicit in Art. 40.3.1° of the Constitution.

[31] Hogan and Morgan, *Administrative Law in Ireland* 4th ed (Round Hall 2010).

[32] [2016] IEHC 1.

[33] *Ibid* at paragraph 148.

2. Regimes Currently in Operation in Ireland

3.34 Administrative financial sanctions are currently provided for in legislation concerning financial services, taxation, the regulation of property services, and broadcasting and energy regulation.

3.35 In Part D, the Central Bank's administrative sanctions procedure provided for under the *Central Bank Act 2004* is discussed, which gives administrative financial sanctioning powers in relation to the regulation of financial services by the Central Bank.

3.36 A number of other regulators possess the power to impose administrative financial sanctions. For example, the Revenue Commissioners can directly impose administrative financial sanctions under the *Taxes Consolidation Act 1987*. The sanction for fraudulently making incorrect tax returns, for example, is not criminal in nature; rather, it is an administrative financial sanction of twice the amount of the tax owed, with potential for a penalty payment of €315.[34] That penalty increases to between €1,500 and €3,000 for corporate entities. If this sum is not paid, recovery can be sought through civil proceedings in the High Court.

3.37 The Broadcasting Authority of Ireland can apply to the High Court to confirm the imposition of an administrative financial sanction of up to €250,000 on a broadcaster that has breached certain provisions of the *Broadcasting Act 2009*.[35]

3.38 The Property Services Regulatory Authority may impose, on completion of an investigation, a "major sanction" within the meaning of the *Property Services (Regulation) Act 2011*,[36] which may include a financial sanction of up to €250,000, which takes effect when confirmed by the High Court.[37]

3.39 The *Energy Act 2016* amends the *Electricity Regulation Act 1999* to provide for the introduction of a system of administrative financial sanctions in the market for energy provision, to be operated by Commission for Energy Regulation (CER). The 1999 Act now provides CER with the power to impose an administrative financial sanction of up to 10% of a regulated entity's annual turnover and a direction for payment to CER of a sum not exceeding €50,000. Many of these processes resemble those under the Central Bank's administrative sanctions procedure.

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[34] Section 1053 of the *Taxes Consolidation Act 1997*. See also Revenue Commissioners *Notes for Guidance – Taxes Consolidation Act 1997 – Finance Act 2017 Edition – Part 47* (2017).

[35] Section 54(5) of the *Broadcasting Act 2009*.

[36] Section 2 of the *Property Services (Regulation) Act 2011.*

[37] Sections 68 and 69 of the *Property Services (Regulation) Act 2011.*

D. Powers of the Central Bank of Ireland

1. Introduction

3.40 The Central Bank regulates all firms providing financial services in the State, notably banks and insurers. It utilises risk-based regulation[38] and has a number of regulatory tools to supervise and enforce a variety of regulatory rules, one of which is the power to impose administrative financial sanctions via its administrative sanctions procedure.

3.41 Administrative financial sanctioning powers were first introduced in 2004. This followed from the 1999 *Report of the Working Group on the Establishment of a Single Financial Regulatory Authority*, which recommended administrative financial sanctions as a suitably proportionate response to many breaches of financial services legislative requirements.[39] This was on the grounds 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.[40] As a response, in 2004 the Oireachtas inserted a new Part IIIC into the *Central Bank Act 1942,*[41] which includes administrative financial sanctioning powers.[42]

3.42 In 2013, the administrative financial sanctioning powers of the Central Bank were reviewed and augmented under the *Central Bank (Supervision and Enforcement) Act 2013.* The 2013 Act amended the *Central Bank Act 1942* and increased the maximum level of administrative financial sanctions available from €500,000 to €1 million for individuals and from €5 million to €10 million for corporate bodies. In the case of corporate bodies, it also provided the Central Bank with the option of imposing a sanction of up to 10% of turnover for the previous complete financial year for the regulated entity, if such a figure exceeded €10 million.[43]

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[38] The Central Bank utilises a risk based framework for regulated entities referred to as Probability Risk and Impact System (PRISM). See *https://www.centralbank.ie/regulation/how-we-regulate/supervision/prism*.

[39] Department of Finance, *Report of the Implementation Advisory Group on a Single Regulatory Authority for Financial Services* (1999), the "McDowell Group Report."

[40] *Ibid* at sections 7.5 and 7.6.

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

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

[43] Section 33AQ(4) of the *Central Bank Act 1942.*

3.43 The largest administrative financial sanction issued under Part IIIC of the 1942 Act was €3.5 million, which was paid by Ulster Bank Ltd for a failure of its IT systems in 2012.[44] In total, financial sanctions in the region of €49.7 million have been issued between 2004 and 2016.[45] All of these sanctions have come from settlement agreements,[46] and the Central Bank has yet to unilaterally impose sanctions under the Part IIIC process. This may be because, in each case, both the Central Bank and the regulated entity concluded that the efficiency of entering a settlement agreement represented the best outcome. An alternative explanation may relate to the perceived constitutional vulnerabilities of the administrative financial sanctions regime, as outlined above, though this has now been dealt with by the *Purcell* case.

2. Scope of persons covered

3.44 Administrative financial sanctions can be applied to both individuals and corporate entities by the Central Bank. The Central Bank, under section 33AO(1) of the 1942 Act, may hold an inquiry into the conduct of a regulated financial service provider. Under section 33AO(2), it may hold an inquiry into the conduct of a managerial agent in a regulated financial service provider.

3. Conduct Covered

3.45 A wide array of conduct carried out by a regulated entity is potentially subject to an administrative financial sanction, including activities such as aiding or attempting regulatory contraventions.[47] Such conduct is referred to as a "prescribed contravention". Prescribed contraventions involve breaches of various provisions or obligations under a number of designated enactments that fall under the administrative sanctions procedure.[48] There are also instances where administrative financial sanctions may be imposed for a breach of bilateral obligations; that is, obligations agreed between the Central Bank and the regulated entity.

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[44] Central Bank of Ireland, *Settlement Agreement between the Central Bank of Ireland and Ulster Bank Ireland Limited* (2012) 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.

[45] Derville Rowland (Director of Enforcement Central Bank of Ireland), Remarks as Law Reform Commission Conference, November 2016. Available at *https://www.centralbank.ie/news-media/press-releases/remarks-by-derville-rowland-director-of-enforcement-central-bank-of-ireland-at-law-reform-commission-conference-2016*.

[46] Discussed in Chapter 4.

[47] Section 33AN of the *Central Bank Act 1942*.

[48] The list of designated enactments and designated statutory instruments is located in Schedule 2 of the *Central Bank Act 1942*, as amended.

3.46 The Central Bank also possesses the power to impose administrative financial sanctions as a result of breaches of other statutory instruments that do not fall under its administrative sanctions procedure. Certain breaches of the *Prospectus (Directive 2003/71/EC) Regulations 2005*[49] and the *European Union (Market Abuse) Regulations 2016*[50] may result in administrative financial sanctions. These regulations set out the particular procedures by which the sanction may be imposed within the context of those regulations, which implemented, respectively, the *Directive 2003/71/EC of the European Parliament and the Council* and *Regulation (EU) No 596/2014 of the European Parliament and of the Council*.

4. Procedure Stage 1: Investigation

3.47 Where a concern arises that a prescribed contravention has been or is being committed, the Central Bank may initiate an investigation.[51] This is an information gathering exercise to determine whether there are reasonable grounds to proceed to the ASP inquiry stage, or whether some alternative action may be appropriate. The triggering of an investigation may come about as a result of the ordinary supervisory work of the Central Bank or alternatively at the request of the European Central Bank (ECB). During the investigation stage, the Central Bank will communicate with the entity on an ongoing basis via Investigation Letters.[52] This involves putting to the entity information or concerns that have emerged during the investigation and providing the entity with an opportunity to respond before any inquiry is initiated.

3.48 Investigations are carried out by the Central Bank's Enforcement Directorate.[53] This is a separate division from the Central Bank's Supervisory Division, although the enforcement branch liaises closely with the supervision branch and provides advice. The Enforcement Directorate is comprised of several multi-disciplinary teams and deals with the issues identified during the normal course of work undertaken by the Supervisory Division or as a result of an on-site inspection at a regulated entity or a themed inspection across a particular sector.[54]

5. Procedure Stage 2: Inquiry

3.49 The Central Bank, following an investigation, may decide to pursue other options aside from initiating an inquiry.[55] Should the Central Bank suspect on reasonable grounds that a regulated entity is committing or has committed a prescribed contravention, it will

[49] SI No 324 of 2005.

[50] SI No 349 of 2016.

[51] Central Bank of Ireland, *Outline of Administrative Sanctions Procedure* (2014), at paragraph 2.1.2.

[52] *Ibid* at paragraph 3.3.1.

[53] *Ibid* at paragraph 3.2.1.

[54] *Ibid* at paragraph 3.3.1.

[55] *Ibid* at paragraph 3.7.1. It may decide to take no further action; issue a supervisory warning; resolve the matter by taking supervisory action; or agree a settlement.

proceed to the ASP inquiry stage. The Central Bank's Enforcement Directorate will provide the following to the inquiry:[56]

1. an outline of the prescribed contraventions that the regulated entity is suspected of having committed, and the grounds upon which the suspicions are based;

2. an investigation report, which will detail the investigation carried out by Enforcement Directorate and contain a schedule of the categories of materials and information gathered during the investigation;

3. copies of documentation relied upon in preparing the investigation report; and

4. copies of any investigation letters issued to the regulated entity and any responses.

3.50 The purpose of the inquiry is to determine if a prescribed contravention is being or has been committed and to determine the appropriate sanctions. The ASP inquiry is composed of one or more persons, internal officers or employees of the Central Bank and/or external individuals.[57] The ASP inquiry may consider both written and oral submissions[58] in relation to the alleged contravention(s) and will make a determination as to:

1. whether the prescribed contravention(s) occurred; and

2. the appropriate sanction to be applied.

3.51 The procedure during the inquiry hearing will be kept as informal as possible, with as little technicality, and with as much expedition, as proper consideration of the matter will allow.[59] Given the consequences for the entity, the ASP inquiry will, at all times, observe the rules of procedural fairness, but is not bound by the formal rules of evidence.[60] The ASP inquiry may decide to hear oral evidence, depending on the particular circumstances of the case.[61] The ASP inquiry may request persons to appear before it to provide evidence and answer questions, and failure to cooperate with the ASP inquiry may constitute an offence.[62] The inquiry has the same powers with respect to the examination of witnesses (including witnesses who are outside the State) that a judge of the High Court has when

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[56] *Ibid* at paragraph 3.7.12

[57] Central Bank of Ireland, *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942* (2014), at paragraph 2.4.

[58] Section 33BA of the *Central Bank Act 1942*.

[59] Section 33AY(1) of the *Central Bank Act 1942.*

[60] Section 33AY(2) of the *Central Bank Act 1942*. On the application of the rules of evidence to non-court adjudicative bodies, see the Commission's Report: Law Reform Commission, *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016), Appendix B.

[61] Central Bank of Ireland, *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942* (2014) at paragraph 4.2.

[62] Section 33BA of the *Central Bank Act 1942*.

hearing civil proceedings.[63] The standard of proof involved is on the balance of probabilities.[64] Where the regulated entity has formally admitted a prescribed contravention(s) in open correspondence, but does not agree with the sanction proposed by the Central Bank, an ASP inquiry as to sanctions alone will be undertaken.[65]

6. Legal advice and costs

3.52 Although the procedure will be kept as informal as possible, the Central Bank and the regulated entity may each be assisted by a legal practitioner during the ASP inquiry.[66] Given the complex financial regulation involved and the potential consequences of an adverse finding, this is something that is likely to be necessary in most cases. The retention of counsel during an ASP inquiry will, of course, have cost implications, both for the Central Bank and for the regulated entity.

3.53 If, at the conclusion of the ASP inquiry, it is found that the regulated entity has contravened the prescribed rules, the Central Bank may issue a direction to pay to the Central Bank all, or a specified part, of the costs it incurred in holding the ASP inquiry and in investigating the matter to which the ASP inquiry relates.[67] The 1942 Act does not provide the Central Bank with a power to award costs to the regulated entity under any circumstances, even if it is found following the ASP inquiry that no prescribed contraventions were committed. The absence of such a power is surprising, given that such powers are available to the Irish Financial Services Appeals Tribunal (IFSAT). If an appeal takes place, IFSAT may award costs of the hearing to both parties, and may also award the costs of, and incidental to, the ASP inquiry stage.[68]

7. Sanction level and factors applied

3.54 Following the ASP inquiry, the Central Bank may decide to impose a financial sanction.[69] The Central Bank has discretion as to the amount imposed, but this may not exceed a statutory maximum or a proportion of the entity's turnover. Furthermore, there is an overriding requirement that any monetary sanction imposed will not be so high as to cause a corporate entity to cease business or cause an individual to be adjudicated

[63] Section 33BA(6) of the *Central Bank Act 1942*.

[64] Central Bank of Ireland, *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942* (2014) at paragraph 4.2.

[65] Section 33AR of the *Central Bank Act 1942*.

[66] Sections 33AY(3), and 33AY(4) of the *Central Bank Act 1942*.

[67] Section 33AQ(3)(f) of the *Central Bank Act 1942*.

[68] Section 57AH of the *Central Bank Act 1942*.

[69] Other enforcement options include the imposition of supervisory warnings which are non-statutory tools, the imposition of conditions on authorisation and the issuance of directions. Referral of suspected breaches to other agencies also forms part of the regulatory framework. Enforcement also works with supervisors and regulated entities to put in place redress schemes to redress customer loss, where appropriate.

bankrupt.[70] In determining the appropriate sanction amount, the Central Bank will have regard to all circumstances relevant to the case.[71] There are also certain specified factors to which it will have particular regard. The relevant maximum limits and considerations for sanction calculation are dependent on the particular legislation under which the conduct falls.

3.55 In the case of a corporate and unincorporated body, the Central Bank may impose a sanction not exceeding €10 million or 10% of the annual turnover of the regulated financial service provider in the last financial year may be imposed, whichever is greater. In the case of a natural person, an amount not exceeding €1 million may be levied.

3.56 The factors relevant to determining the appropriate sanction for prescribed contraventions under Part IIIC of the *Central Bank Act 1942* are set out in a Central Bank guidance document, *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942.* [72] Under these guidelines, the Central Bank's approach to enforcement is discussed. This document also outlines the mitigating and aggravating factors that the Central Bank will consider when determining the appropriate sanction level. The factors are placed under four different headings and can be summarised as follows:

8. The nature, seriousness and impact of the contravention

3.57 Under this heading, matters such as whether the contravention was deliberate, dishonest or reckless, the duration and frequency of the contravention, any harm caused to consumers and the quantum involved, are considered.

9. The conduct of the regulated entity after the contravention

3.58 Under this heading, account is taken of the level of general cooperation the entity has shown and how quickly, effectively and completely the regulated entity brought the contravention to the attention of the Central Bank as well as any remedial steps taken by the entity.

10. The previous record of the regulated entity

3.59 Under this heading, any previous enforcement actions and the follow through on commitments made by the entity (if any) on foot of such actions, are considered.

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[70] Section 33AS of the *Central Bank Act 1942*.

[71] Central Bank of Ireland, *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942* (2014) at paragraph 5.9.

[72] Central Bank of Ireland, *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942* (2014) at paragraph 5.9.

11. Other general considerations

3.60 These considerations include actions taken by the Central Bank in previous similar cases, the level of turnover of the regulated entity in its last complete financial year prior to the commission of the contravention and the prevalence of the contravention.

12. Sanction level and factors applied under European Union (Capital Requirements) Regulations 2014

3.61 For breaches of the *European Union (Capital Requirements) Regulations 2014*, the Central Bank, in the case of an incorporated or unincorporated body, may impose an administrative financial sanction of up to 10% of annual turnover[73] and up to twice the amount of the profits gained or losses avoided because of the breach where that can be determined.[74] In the case of a natural person, an administrative financial sanction of up to €5 million may be imposed.[75]

3.62 The 2014 Regulations specify that the following matters must be considered, where appropriate, when determining the appropriate sanction. These are:

(a) the gravity and the duration of the breach;

(b) the degree of responsibility of the natural or legal person responsible for the breach;

(c) the importance of profits gained or losses avoided, insofar as they can be determined, by the natural or legal person responsible for the breach;

(d) the losses for third parties, insofar as they can be determined, caused by the breach;

(e) the level of co-operation with the Central Bank of the natural or legal person responsible for the breach;

(f) previous breaches by the natural or legal person responsible for the breach;

(g) any potential systemic consequences of the breach.[76]

3.63 These criteria are derived from Article 70 of *Directive 2013/36/EU of the European Parliament and of the Council*, which was implemented by the 2014 Regulations. In its

[73] Regulation 55(1)(e) of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

[74] Regulation 55(1)(g) of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

[75] Regulation 55(1)(f) of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

[76] Regulation 58 of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

guidance document on Inquiries under the 1942 Act, the Central Bank states that it will also have regard to this set of criteria when determining appropriate sanctions for breaches under other designated enactments, where appropriate.

13. Appeal to Appeals Tribunal and High Court

3.64 If the regulated entity disagrees with the final decision of the ASP inquiry, it may appeal the decision to the Irish Financial Services Appeals Tribunal (IFSAT).[77] The appeal must be lodged within 28 days of notification of the decision, or within such time as agreed with the registrar or chairperson of the IFSAT.[78] The appeal is a full rehearing,[79] and IFSAT may affirm, vary, substitute or set aside the decision, or remit the matter back to the ASP inquiry for reconsideration, together with any recommendation or direction as to the matters to be reconsidered.[80]

3.65 The decision of IFSAT may be further appealed to the High Court.[81] This is also a full rehearing and the High Court may make such orders as it sees fit in light of its own decision, including, but not limited to, affirming or setting aside the decision of IFSAT, or remitting the matter to IFSAT with such directions as it sees fit.[82] The decision of the High Court is final, save that an appeal may be brought to the Court of Appeal on a point of law only, with the leave of either court.[83] IFSAT may, on application by the regulated entity, make an order staying the operation of the decision of the ASP inquiry pending the outcome of the appeal.[84]

14. Interaction with Central Bank’s Settlement Agreement Powers

3.66 In addition to using its supervisory powers to gather relevant data to make a determination as to whether a breach has occurred, the Central Bank’s other regulatory powers interact with its use of administrative financial sanctions. The most significant of these is the Central Bank’s settlement procedure. This is an example of a regulatory enforcement agreement as discussed further in Chapter 4. Indeed, as already noted, at the time of writing (September 2018), all administrative financial sanctions have been imposed as part of a settlement agreement.

3.67 The 1942 Act provides that if the Central Bank suspects on reasonable grounds that a regulated entity is committing or has committed a prescribed contravention, the Central

[77] Section 57L(1) of the *Central Bank Act 1942*.

[78] Section 57L(2)(b) of the *Central Bank Act 1942*.

[79] Sections 57V(3) of the *Central Bank Act 1942*.

[80] Section 57Z(2) of the *Central Bank Act 1942*.

[81] Section 57AK(1) of the *Central Bank Act 1942*.

[82] Section 57AL(3) of the *Central Bank Act 1942*.

[83] Section 57AL(3) of the *Central Bank Act 1942*.

[84] Section 57R(2) of the *Central Bank Act 1942*.

Bank may enter into an agreement with the regulated entity to resolve the matter.[85] This arrangement, referred to as a Settlement Agreement, must be recorded in writing and is binding on the Central Bank and the regulated entity.[86] The terms of the settlement agreement may contain any or all of the sanctions that are available following a full ASP inquiry and a public statement containing details of the settlement agreement will also be published.[87] The regulated entity is generally offered a discounted level of administrative financial sanction as part of the settlement agreement, where relevant.[88]

3.68 A settlement agreement may arise if the Central Bank considers that it is in the public interest for the administrative sanctions procedure case to settle.[89] It will seek to settle such cases as early as possible. However, the Central Bank must be satisfied that the basis for settlement is appropriate taking into account all relevant facts, including the determination of the appropriate sanction, whether all concerns have been addressed to the Central Bank's satisfaction, and any other relevant considerations. Such other considerations include whether the basis for the settlement is consistent with the general approach to regulation adopted by the Central Bank, whether the settlement is fair having regard to all the facts known, and whether it will contribute to the efficient, effective and economic use of resources.[90] The level of co-operation from the regulated entity with the Central Bank during an investigation will be relevant to the settlement. The opportunity to enter into a settlement agreement will not be available once an ASP inquiry has been completed.[91]

15. Link with criminal procedures

3.69 It is possible that conduct that potentially constitutes a prescribed contravention for the purposes of the administrative sanctions procedure and as such, may give rise to a settlement agreement, could also raise the suspicion that a criminal offence has been committed. In such circumstances, the Central Bank has discretion, like all prosecutors in Irish law, as to whether to initiate criminal prosecution or proceed through its administrative, civil procedures.[92] If the conduct potentially constitutes an indictable offence, the Central Bank must inform the Director of Public Prosecutions.

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[85] Section 33AV of the *Central Bank Act 1942*.

[86] Section 33AV(2) of the *Central Bank Act 1942*.

[87] Publication is not required by the 1942 Act but it is Central Bank policy to publish details of the agreements.

[88] Central Bank of Ireland, *Outline of Administrative Sanctions Procedure* (2014) at paragraph 4.4.

[89] *Ibid* at paragraph 4.2.1.

[90] Central Bank of Ireland, *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942* (2014) at paragraph 4.25.

[91] Section 33AV(3)(b) of the *Central Bank Act 1942*.

[92] Central Bank of Ireland *Outline of Administrative Sanctions Procedure* (2014) at paragraph 3.6.1.

3.70 No criminal prosecution may be brought if the contravention in question was already the subject of an ASP inquiry which led to the imposition of administrative financial sanctions.[93] Similarly, if a criminal prosecution has been brought in respect of an offence that also involves a contravention to which the administrative sanctions procedure applies, and a regulated entity is found either guilty or not guilty, then no administrative financial sanction may be imposed.[94]

R 3.03 The Commission recommends that, subject to the specific recommendations below, the statutory regime under which the Central Bank imposes administrative financial sanctions provides a suitable model for the financial and economic regulators encompassed by this Report.

E. Powers of the UK Financial Conduct Authority

3.71 This Part examines the Financial Conduct Authority (FCA), the key financial regulator in the United Kingdom. It is a conduct regulator for financial services firms and financial markets and is the prudential regulator for a number of those firms. The FCA is a useful comparator for a number of reasons. Similar to the Irish response following the Global Financial Crisis of 2008, financial regulation in the United Kingdom also underwent significant reforms. The Financial Services Authority (FSA) was disbanded in 2013 as a response to the fallout from regulatory failures in the financial sector, including State-backed bank bailouts.[95] Its functions were assigned to the FCA and a separate regulator, the Prudential Regulation Authority (PRA). The PRA is the prudential regulator of banks, building societies, credit unions, insurers and designated investment firms. The FCA was selected as a comparator for the Central Bank as it carries out a greater number of regulatory functions that are analogous to those of the Central Bank, for example, licencing of banks and the regulation of market abuse. It also imposes administrative financial sanctions through similar procedures and utilises a sophisticated methodology in order to arrive at an appropriate sanction level. As such, the FCA can provide some useful insights as to the use of administrative financial sanctioning powers in Ireland.

3.72 The *Financial Services and Markets Act 2000* sets out the structural and legal basis for financial regulation in the United Kingdom. The 2000 Act replaced the *Financial Services Act 1986*, which placed a good deal of reliance on self-regulation. Sections 3-6 of the 2000 Act set out the FCA's regulatory objectives, which include the reduction of financial crime and maintaining confidence in the markets. The 2000 Act established a civil law enforcement regime allowing for the imposition of administrative financial sanctions by the FCA, in the event of a person committing market abuse and other contraventions.

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[93] Section 33AT(1) of the *Central Bank Act 1942*.

[94] Section 33AT(2) of the *Central Bank Act 1942*.

[95] "UK financial regulation overhauled," BBC, 1 April 2013, available at *https://www.bbc.co.uk/news/business-21987829*.

3.73 As with the Central Bank, the FCA has published an *Enforcement Guide*, which contains a non-exhaustive list of criteria for the taking of enforcement proceedings.[96] It states that the FCA will engage in risk-based regulation, focusing on certain types of misconduct over others due to the limited resources at its disposal.[97] The Enforcement Guide acknowledges, however, that enforcement action is necessary in cases of particular significance to protect markets or consumers, financial crime, or in cases that the FCA considers is necessary to achieve effective deterrence.[98]

1. Scope

3.74 The 2000 Act applies to both incorporated and unincorporated bodies as well as individuals who engage in regulated or prohibited activities under the Act.[99] It may be appropriate in some cases for the FCA to take action against both the regulated entity and the individual.[100]

2. Conduct Covered

3.75 The FCA may impose financial sanctions against a person for breaches of conduct under a wide number of provisions of the 2000 Act. However, for present purposes, this Chapter will focus on 3 provisions that covering activities similar to those regulated by the Central Bank. First, the FCA may impose an administrative financial sanction on an "authorised person" who has contravened a requirement imposed upon them under the 2000 Act. Second, the FCA may impose an administrative financial sanction for actions carried out by an "approved person", that is a senior executive in a regulated entity. Third, the FCA may impose an administrative financial sanction on a person who has engaged in market abuse, or has required or encouraged another person to engage in market abuse.

3.76 Should the FCA wish to impose an administrative financial sanction in response to authorised and approved person conduct or market abuse, it must follow a standardised notice procedure prescribed by the 2000 Act. Section 395(1) of that Act requires that the FCA determine its own procedures in relation to the giving of the various statutory notices. It must also publish its policy on enforcement and discipline,[101] which it has done through its *Enforcement Guide*. This document outlines the FCA's policies and procedures in the exercise of its enforcement powers. The *Decision Procedure and Penalties Manual* sets out the steps the FCA takes in reaching enforcement decisions.

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[96] Financial Conduct Authority, *Enforcement Guide* (2014), at paragraph 2.10.

[97] Financial Conduct Authority, *Enforcement Guide* (2014), at paragraph 2.9.

[98] Financial Conduct Authority, *Enforcement Guide* (2014), at paragraph 2.2.4.

[99] The term "person" is used as a catch-all term for such entities under the *Interpretation Act 1978*.

[100] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013), at paragraph 6.2.5.

[101] Section 206 (in respect of authorised persons) and Section 66 (in respect of approved persons) of the *Financial Service and Markets Act 2000*.

3. Procedure Stage 1: statutory notices and determination

3.77 The process leading to a potential sanction is initiated by the FCA issuing a warning notice to the person[102] stating, amongst others matters, the action the FSA proposes to take, the reasons for that action and the amount of any proposed financial sanction.[103] The notice must also specify a reasonable period, not less than 28 days, within which the regulated entity may make responses to the concerns of the FCA. This is the equivalent to the investigation stage under the Central Bank's administrative sanctions procedure.

3.78 The second phase involves the issuing of a decision notice by the FCA. This notice essentially sets out the determination of the FCA and the enforcement action it will take as a result of the breach. This enforcement action will take effect unless the matter is referred to the Upper Tribunal (Tax and Chancery Chamber). The notice must state what action the FCA has decided to take, the quantum of the administrative financial sanction, the reasons on which the decision was based and it must inform the regulated entity of its right to refer the matter to the Upper Tribunal.[104] The FCA may not take action specified in a decision notice until the period for referral to the Upper Tribunal has expired or until the hearing and any appeal have taken place.

3.79 If the matter is not referred to the tribunal, the FCA must issue a final notice.[105] It must also publish information about the matter and, at a minimum, the publication must include information about the terms of any statement that is to be made and the details of the manner and date on which the statement will be published and in regard to a financial sanction, the amount, manner and period for payment, as well as how it will be recovered if not so paid. The issuing of the notice has the effect of formally concluding the FCA's enforcement action.

3.80 As with many organisations, it can be important for information barriers to be erected between certain departments within a regulator in order to prevent the exchange of information that could lead to potential conflicts of interest arising. These are sometimes referred to as "Chinese walls". The 2000 Act has placed this requirement on a statutory footing in the case of those involved in supervisory and enforcement functions in the FCA.[106] A decision to issue a notice as described in the above paragraphs must be taken by someone other than a person involved in gathering the information on which that decision was based.

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[102] Section 126(1) (in the case of market abuse), section 207 (in the case of an Authorised Person) and sections 67(1)-(3) (in the case of an Approved Person) of the *Financial Service and Markets Act 2000*.

[103] Section 387 of the *Financial Service and Markets Act 2000*.

[104] Section 388 of the *Financial Service and Markets Act 2000*.

[105] Section 390 of the *Financial Service and Markets Act 2000*.

[106] Section 395(2) of the *Financial Service and Markets Act 2000*.

4. Procedure stage 2: referral to Upper Tribunal

3.81 If the regulated entity does not accept the decision notice, the matter is referred to the Upper Tribunal (Tax and Chancery Chamber). The Upper Tribunal is an independent tribunal created by the *Tribunals Courts and Enforcement Act 2007*. The membership of the Upper Tribunal is composed of judges and experts in the particular field. Its role is to conduct fresh hearings on the matters referred to it based on the available evidence. At the Upper Tribunal, the burden of proof rests with the regulator. The Upper Tribunal has discretion as to the matters on which it will require evidence, the nature of the evidence to be given, and whether such evidence ought to be given orally or in writing. It may summon witnesses and order persons to answer questions and produce documents specified in the summons.[107] Tribunal hearings are held in public, although all or part may be held in private at the discretion of the Upper Tribunal.[108] While the Upper Tribunal hears appeals from certain decisions, it does not carry out this function in relation to the imposition of administrative financial sanctions by the FCA. The Upper Tribunal stage is the equivalent to an ASP inquiry held by the Central Bank. The 2000 Act provides for a situation where a regulated entity may forego a hearing if it accepts the sanction. The Irish *Central Bank Act 1942* provides for a somewhat comparable procedure where the contravention is not contested,[109] but in practice, if a regulated entity intended to accept the imposition of an administrative financial sanction, it would likely enter a settlement agreement.

3.82 Appeals against decisions of the Upper Tribunal can be made to the Court of Appeal (in England, Wales and Northern Ireland) or the Court of Session (in Scotland).[110] Section 13 of the *Tribunals Courts and Enforcement Act 2007* sets out the basis and hierarchy on which appeals may be made. Appeals may only be made on a point of law, and require the permission of the Upper Tribunal, Court of Appeal or Court of Session before they can proceed.

5. Legal advice and costs

3.83 During the legislative process in which the *Financial Services and Markets Bill*, which was to become the 2000 Act, was being scrutinised, a concern was raised as to whether the administrative financial sanctions regime would be in violation of Article 6 of the ECHR. This concern arose because the UK parliament had received legal advice that the administrative financial sanctions regime possessed certain features of criminal law. If this were the case then such a regime would need criminal law protections, including the

[107] Rule 16 of *The Tribunal Procedure (Upper Tribunal) Rules 2008* (SI No 2698 of 2008).

[108] *Ibid* at rule 37(1).

[109] If the regulated entity accepts that a prescribed contravention took place, under section 33AR of *the Central Bank Act* 1942, an Inquiry may take place to determine the level of sanction alone.

[110] The procedure for appeals is governed by part 7 of *The Tribunal Procedure (Upper Tribunal) Rules 2008* (SI No 2698 of 2008).

provision of legal assistance in cases where it was considered to be in the interests of justice.[111]

3.84 Section 134 of the 2000 Act provides the FCA with the power to put in place a legal assistance scheme. Such a scheme was established under the *Financial Services and Markets Tribunal (Legal Assistance Scheme- Costs) Regulations 2001*[112] and *Financial Services and Markets Tribunal (Legal Assistance) Regulations 2001*.[113] The *Financial Services and Markets Tribunal (Legal Assistance Scheme- Costs) Regulations* concern matters such as the method of calculation of assistance and the provision of the payments, while the *Financial Services and Markets Tribunal (Legal Assistance) Regulations* sets out matters such as arrangements for applying for legal assistance, eligibility, and assessment criteria.

3.85 The Upper Tribunal may provide costs for all, or part of, the overall anticipated legal fees involved in the hearing. The scheme sets out relevant factors to be taken into account in making a determination as to whether to provide a costs order. Matters to be considered include whether the case appears to involve substantial, novel or complex issues of law or fact, whether the case is exceptional compared with the generality of such cases, and the number and level of advocates instructed on behalf of the regulator.[114]

3.86 The Upper Tribunal is required to provide legal costs to a person if they are satisfied that the person's financial resources are such that they would require such assistance, and if it is in the interests of justice to make such an order.[115] The regulations also allow the Upper Tribunal to take into account the financial resources of the persons supporting the regulated entity participating in the hearing. The scheme puts in place financial assistance for meeting the legal costs that the regulated entity would be likely to incur in relation to the proceedings before the Upper Tribunal. Under rule 13(1)(a) of the *Financial Services and Markets Tribunal (Legal Assistance) Regulations 2001*, legal assistance would also include preparatory work outside of the actual hearing at the Upper Tribunal. However, rule 2 of the same regulations defines "legal assistance" as being in connection with proceedings before the Upper Tribunal and includes advice, assistance and representation for the purpose of those proceedings. It would therefore appear that the regulated entity

[111] "The Convention requires legal assistance to be made available where that is necessary in the interests of justice. I think what that suggests is clearly one has to look at the means of the person, the individual or the company, against whom market abuse fining proceedings are being brought. One also has to look at the complexity of the case and whether or not it is actually reasonable to expect the individual concerned to put his own case or whether legal representation is going to be required in order for that person to have a fair hearing." Evidence of Ms Patricia Hewitt, *Joint Committee on Financial Services and Markets*, Wednesday 19 May 1999.

[112] SI No 3633 of 2001.

[113] SI No 3632 of 2001.

[114] *Ibid* at rule 37(2).

[115] *Ibid* at rule 8.

is not entitled to costs for legal work employed in instances in which a regulatory breach is suspected, but the matter does not reach tribunal stage.

3.87 Generally, at the Upper Tribunal, outside of the legal assistance context, each party is responsible for their own costs. However, under rules 10(3)(d) and (e) of the *Tribunal Procedure (Upper Tribunal) Rules 2008*, if a party has "acted unreasonably in bringing, defending or conducting the proceedings…or the decision in respect of which the reference was made was unreasonable" then the Upper Tribunal may order that they pay the costs of the other side.

6. Sanction level and factors applied

3.88 The legislative framework for the FCA's administrative financial sanctions regime differs significantly from the Central Bank's, in that, under the 2000 Act, the FCA has absolute discretion as to the amount of administrative financial sanctions to be imposed. That is, there are no maximum limits; the FCA may impose a financial sanction of such amount as it "considers appropriate" for relevant contraventions.[116] It is likely that such a wide discretion would be difficult to reconcile with the relevant provisions of the Constitution, and the decision of the High Court in *Purcell v Central Bank,*[117] discussed above.

3.89 The purpose and calculation of administrative financial sanctions is set out in the FCA's *Decisions and Penalties Procedure Manual*. The FCA states that its sanction-setting regime is based on the principles of disgorgement, punishment and deterrence.[118] The actual sanction amount will be made up of 2 elements: disgorgement of the benefit received as a result of the breach and a financial sanction reflecting the seriousness of the breach.[119] The FCA employs a 5-step framework to determine the level of seriousness of the breach. The framework sets out detailed factors to be taken into account under each step of the determination. The framework is used for both corporate entities and individuals, with slightly different factors being employed where relevant. The steps will also be slightly different where the conduct concerned involves market abuse.[120]

3.90 In all cases, the FCA will assess the seriousness of the breach on a scale from Level 1 to Level 5. The levels are relevant to the proportion of revenue (for a corporate body) or income (for an individual) to determine the seriousness of the breach. The 5-step framework, including a brief outline of the factors, can be summarised as follows when being applied to corporate entities (outside of a market abuse context):

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[116] Section 66(3)(a) of the *Financial Service and Markets Act 2000*, for example.

[117] [2016] IEHC 514.

[118] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 6.5.2.

[119] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 6.5.3

[120] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 6.5.3(2)

Step 1: the removal of any financial benefit derived directly from the breach.

1. Where it is practicable to quantify, the FCA will seek to deprive a regulated entity of the financial benefit derived directly from the breach. A voluntary or mandatory redress programme to compensate those who have suffered loss as a result of the breach can be taken into consideration and, in such cases, the final sanction might not include a disgorgement element, or the disgorgement element might be reduced.[121]

Step 2: the determination of a figure that reflects the seriousness of the breach

1. The revenue generated by an activity may be, though not always, indicative of the harm the relevant breach may cause and thus sanctions can be based on a percentage of that revenue;

2. Revenue generated will also be a relevant consideration in determining the level of sanction required to act as a credible deterrent;

3. During this step, the levels relating to a percentage of a regulated entity's revenue income are employed. There are five levels between 0% and 20%, with each level corresponding to a 5% increase, and with Level 5 being 20%. The seriousness of the breach is assessed by factors, including the impact of the breach and whether it was deliberate or reckless. The FCA's *Decisions and Procedures Manual* sets out in more detail the numerous factors used in determining whether the breach was reckless or deliberate.[122]

Step 3: an adjustment made to the Step 2 figure, to take account of any aggravating and mitigating circumstances

1. This reduction is not applied against any disgorgement;

2. Factors include the level of cooperation shown and the regulated entity's previous record, including cooperation with other domestic and international regulatory authorities;

3. Another relevant factor is whether the FCA publicly called for an improvement in standards in relation to the behaviour constituting the breach or similar behaviour before or during the occurrence of the breach.[123]

Step 4: an upwards adjustment made to the amount arrived at after Steps 2 and 3, where appropriate, to ensure that the sanction has an appropriate deterrent effect

1. Circumstances include where the FCA considers it is likely that similar breaches will be committed by the regulated entity, or by other regulated entities in the future, in the

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[121] *Ibid* at paragraph 6.5A.1.

[122] *Ibid* at paragraph 6.5A.2.

[123] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013), at paragraph 6.5A.3.

absence of such an increase to the sanction or where the FCA considers that the likelihood of the detection of such a breach is low.[124]

Step 5: Settlement

1. The FCA and the regulated entity on whom a sanction is to be imposed may seek to agree the amount of any sanction and other terms. In recognition of the benefits of such agreements, the manual provides that the amount of the financial sanction which might otherwise have been payable will be reduced to reflect the stage at which the FCA and the entity concerned reached an agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.[125]

3.91 The lists of factors and circumstances set out in the FCA's manual are not exhaustive.[126] The FCA also notes that any sanction must be proportionate to the breach. It may therefore decrease the level of the sanction arrived at after applying Step 2 of the framework, if it considers that the sanction is disproportionately high for the breach concerned.[127]

3.92 It should be noted that the Upper Tribunal is not bound to assess administrative financial sanctions by following the FCA's published policy, but will pay it due regard when carrying out its overriding objective of doing justice between the parties, taking into account all of the circumstances of the case.[128]

7. Public statement

3.93 The FCA will consider the circumstances of each case but it will usually issue public statements along with its various statutory notices: warning notices, decision notices and final notices. The FCA states that the settlement of proceedings will not normally eliminate the need to issue the statutory notices. The settlement of proceedings will, therefore, usually be accompanied by a public statement.

3.94 The procedure for the release of public statements relating to statutory notices varies depending on the statutory notice. As discussed above, warning notices are issued at the start of an enforcement process where the FCA considers that a financial sanction, which may ultimately be settled by agreement, is appropriate. The FCA may publish information relating to warning notices after consultation with the entity to whom the notice is given. The decision on whether to publish information relating to the warning notice and, if so, what information to publish will be taken by the Regulatory Decisions Committee (the RDC). The procedure for this decision is set out in the *Decision Procedure and Penalties*

[124] *Ibid* at paragraph 6.5A.4.

[125] *Ibid* at paragraph 6.5A.5.

[126] *Ibid* at paragraph 6.5.3.

[127] *Ibid* at paragraph 6.5.3(3)

[128] *Tariq Carrimjee v FCA* [2015] UKUT 0079.

Manual. The RDC will first settle the wording of the public statement and arrange for it to be given to the person or persons to whom the warning notice was sent. The recipient will have 14 days to respond to this statement, although they may apply for an extension of time within which to respond. If there is no response, the FCA will proceed with the publication of the statement. If there is a response, the RDC will consider whether it is appropriate, with regard to all of the circumstances, to publish a statement, in light of the issues raised in the response. The RDC will notify the regulated entity of the outcome of the decision whether or not to publish a statement.

3.95 The statement will typically be published on the FCA website. The statement will often contain a brief summary of the facts so that the other regulated entities may understand the circumstances that gave rise to the warning notice. The regulated entity or individual concerned may also consider it appropriate to identify the regulated entity or individual in the statement. The FCA will not normally publish the nature of the proposed sanction at this point in the process. The statement will also make it clear that the warning notice is not a final decision of the FCA, that the recipient has the right to make representations to the FCA and that any subsequent decision notice is subject to a reference to the Upper Tribunal.

3.96 Section 391(4) of the 2000 Act provides that the FCA must publish such information about the decision notice or final notice as it considers appropriate. As with warning notices, the FCA will usually consider the publication of a statement relating to decision notices and statutory notices appropriate. This statement will usually be published on the FCA's website, along with a press release. The FCA will also notify the regulated entity or individual concerned if it intends to publish a decision notice. The FCA states that it will not publish; however, any information that, in the opinion of the FCA, would be unfair to the person who is subject of the enforcement action, detrimental to consumers or would jeopardise the stability of the financial system. The FCA is also committed to periodically reviewing the publications on its website to assess whether they continue to be appropriate. Section 391(7) provides that the FCA may publish information in such a manner as it considers appropriate.

3.97 In its enforcement guide, the FCA notes some of the benefits associated with the publication of statements along with statutory notices. The publication of statements accompanying statutory notices ensures the transparency of the FCAs decision making. Publication also provides information to the public and maximises the deterrent effect of the enforcement action by ensuring that others are aware that breaches of regulations result in sanctions.

8. Interaction with other FCA's settlement scheme

3.98 The FCA, like the Central Bank, also operates a settlement scheme and a person subject to an enforcement action may agree to a sanction or other outcome rather than contest formal action by the FCA at the Upper Tribunal. The procedure of the scheme is set out in the FCA *Decisions and Procedure Manual*.[129] In appropriate cases, the FCA will negotiate with the person concerned to agree, in principle, the amount of the sanction.[130]

3.99 Settlement discussions may take place at any time during the enforcement process if both parties agree to this. This might be before the FCA issues a warning notice, before a decision notice, or even after referral of the matter to the Upper Tribunal. However, the FCA states that it would not normally agree to detailed settlement discussions until it has a sufficient understanding of the nature and gravity of the suspected misconduct to make a reasonable assessment of the appropriate outcome. Settlement after a decision notice will be rare.[131]

3.100 In return for engaging in early settlement, the regulated entity will receive a discount of up to 30% of any sanction that would otherwise have been imposed. However, this discounted level will not apply to disgorgement of any financial benefit derived directly from the breach.[132]

9. Link with criminal procedures

3.101 The FCA also has powers under sections 401 and 402 of the 2000 Act to prosecute a range of criminal offences. The FCA states that it will pursue criminal prosecution where to do so would be appropriate and will apply the basic principles set out in the Code for Crown Prosecutors.[133] Additionally, in cases where market abuse may have been involved, the decision as to whether to prosecute may involve consideration of some of the factors set out in a guidance document. These include factors such as the effect of the misconduct on the market, the extent of any profits accrued or loss avoided as a result of the misconduct and whether there are grounds for believing that the misconduct is likely to be continued or repeated.

3.102 The FCA has a policy of not imposing a sanction on a person who has been prosecuted or convicted for market misconduct in a criminal prosecution arising from substantially the same allegations. Similarly, it has a policy not to commence a prosecution for market misconduct where the FCA has brought or is seeking to bring disciplinary proceedings for market abuse arising from substantially the same allegations.[134]

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[129] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 5.1.

[130] *Ibid* at paragraph 6.7.2.

[131] *Ibid* at paragraph 5.1.3.

[132] *Ibid* at paragraph 6.5.3.

[133] Financial Conduct Authority, *Enforcement Guide* (2014) at paragraph 12.1.2.

[134] Financial Conduct Authority, *Enforcement Guide* (2014) at paragraph 12.3.4.

F. Other Administrative Tribunals in Ireland

3.103 There are a number of professional disciplinary tribunals in Ireland, which may impose regulatory sanctions on professionals within their purview. Professional disciplinary sanctions, such as striking someone from a register, may be considered quite different in principle to imposing administrative financial sanctions. However, the procedures of the regulatory bodies imposing the sanctions can be usefully compared.

3.104 Two examples of such tribunals include the Solicitors Disciplinary Tribunal and the Medical Council's Fitness to Practise Committee.

1. The Solicitor's Disciplinary Tribunal

3.105 Although the Law Society is the regulatory body for solicitors, the most serious disciplinary matters are heard by an independent body, the Solicitors Disciplinary Tribunal (SDT). The President of the High Court is responsible for the appointment of members and the body is made up of a combination of practicing solicitors and laypersons.[135] The SDT is made up of no more than 20 members who are practising solicitors and no more than 10 lay persons. The body has gender quotas and members are appointed in consultation with the Law Society.

3.106 A SDT hearing involves two phases, a preliminary investigation stage and the inquiry stage.[136] The preliminary investigation is carried out by the SDT itself and not a separate committee. The purpose of this initial stage is to determine whether legitimate concern of misconduct exists against the solicitor concerned. If it is so determined that an inquiry is necessary, both the applicant Law Society and respondent solicitor furnish the SDT with affidavits, and any documents exhibited thereto.

3.107 The SDT inquiry proceeds first upon application and affidavits furnished by the applicant Law Society and responding affidavits of the respondent solicitor. Both sides may summon witnesses to give evidence to the inquiry.[137] The SDT, for the purposes of the hearing, has the same powers, rights and privileges as vested in the High Court in respect of enforcing attendance of witnesses, examination of witnesses under oath or otherwise and compelling the production of documents and discovery under oath of documents. Should the SDT make a finding of misconduct, it may decide to impose one or more sanctions. It cannot impose the most serious sanctions itself, including striking off or suspension. Such sanctions can only be imposed by the President of the High Court following a report from the SDT.

3.108 A respondent solicitor may appeal to the High Court against a finding of misconduct on his or her part by the SDT. The Court determines this appeal when it considers the report of

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[135] Rule 3(a) of the *Solicitors Disciplinary Tribunal Rules 2017*.

[136] See part II of the *Solicitors Disciplinary Tribunal Rules 2017*.

[137] See generally, Mills and others, *Disciplinary Procedures in the Statutory Professions* (Bloomsbury Professional 2011) at 352 to 365.

the SDT. The Court, on appeal, may rescind or vary the order in whole or in part. It is also open for certain interested parties to appeal to the High Court in response to the sanction selected by the SDT. The Law Society or the respondent solicitor may appeal an order made by the High Court to the Court of Appeal and the appeal is not confined to a point of law.[138]

2. The Medical Council's Fitness to Practise Committee

3.109 The Medical Council's disciplinary functions involve two relevant internal committees: the Preliminary Proceedings Committee (PPC) and the Fitness to Practise Committee (FTPC). The FTPC, the relevant adjudicatory body, is a committee that the Medical Council is required to establish under the *Medical Practitioners Act 2007* and currently consists of 46 persons.[139] It is made up of both members of the Medical Council and external expert individuals. For hearings it usually sits in a panel of 3 members and in each panel, at least one person must be a Medical Council member. The panel must be composed of one medical practitioner and 2 persons who are not medical practitioners. The Chairperson of the panel must be a member of the Medical Council.[140]

3.110 The PPC conducts the initial consideration of the complaints received by the Medical Council. It investigates the complaint and determines whether further action needs to be taken. If it determines that there is a case to answer on the face of the matter, the PPC refers the complaint to the FTPC. Once the matter is referred to the FTPC, it must hold an inquiry. Unlike the SDT, these committees are part of the Medical Council.

3.111 Under the Medical Council's procedure, the usual arrangement at the FTPC inquiry is that the CEO of the Medical Council presents the evidence in support of the allegations of misconduct.[141] Any evidence, which is given under oath, is subject to cross-examination and the medical doctor may call evidence in defence and reply. Evidence may be given orally or on affidavit or by other means permitted by the rules of the FTPC. The FTPC has the same powers, rights and privileges as the High Court in terms of enforcing attendance and examining witnesses on oath and compelling the production of documents. Witnesses before the FTPC also possess the same immunities and privileges as a witness before the High Court. Following the conclusion of the inquiry, the FTPC must make a report to the Medical Council on its findings, which must specify the nature of the complaint triggering the inquiry, the evidence presented to the FTPC, and the FTPC's findings as to whether any allegation was true. The FTPC is not expressly required by the *Medical Practitioners Act*

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[138] *Law Society of Ireland v Carroll* [2009] IESC 41.

[139] See: https://www.medicalcouncil.ie/About-Us/Medical-Council-Committees/Fitness-to-Practise-Committee.html.

[140] Medical Council, *Procedures in respect of Part 8 of the Medical Practitioners Act 2007 (as amended)* (2012).

[141] See generally, Mills and others, *Disciplinary Procedures in the Statutory Professions* (Bloomsbury Professional 2011) at 322 to 327.

2007 to make a recommendation to the Medical Council as to the appropriate sanction. However, it may include in the report other matters that it deems to be appropriate. Once submitted, the Medical Council then considers the report and imposes the sanction it deems appropriate. Should it decide to impose certain serious sanctions, such as a fine or striking off, the sanction will not take effect until it is confirmed by the High Court.

3.112 A medical practitioner may appeal the Medical Council's notification of the sanction to the High Court. The appeal relates to the decision of the Medical Council to impose a sanction. The High Court may consider any evidence adduced or arguments made to it, whether that evidence or argument was made to the FTPC or not. The High Court has jurisdiction to make any order and may give the Medical Council any direction it deems appropriate (for example, as to how the costs of the appeal are to borne).

G. Conclusions and Recommendations

1. The administrative financial sanctions regime of the Central Bank

(a) Whether the upper limit of administrative financial sanctions available to the Central Bank need to be increased

3.113 For the majority of designated enactments that fall under the Central Bank's administrative sanctions procedure, the maximum administrative financial sanction is €10 million in the case of a legal person, or €1 million in the case of a natural person.[142] In the case of corporate bodies, the Central Bank also has the option to impose a sanction of up to 10% of the turnover for the previous complete financial year of the regulated entity if such a figure exceeds €10 million.

3.114 For breaches of the *European Union (Capital Requirements) Regulations 2014*,[143] which is a designated enactment for the purposes of the administrative sanctions procedure, the Central Bank may, in the case of a legal person, impose an administrative financial sanction of up to 10% of annual turnover,[144] and up to twice the amount of the profits gained, or losses avoided, because of the breach, where the latter can be determined.[145] In the case of a natural person, an administrative financial sanction of up to €5 million may be imposed.[146]

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[142] 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.*

[143] SI No 158 of 2014.

[144] Regulation 55(1)(e) of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

[145] Regulation 55(1)(g) of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

[146] Regulation 55(1)(f) of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

3.115 The Central Bank also has administrative financial sanctioning powers under the *European Union (Market Abuse) Regulations 2016*[147] and the *Prospectus (Directive 2003/71/EC) Regulations 2005*.[148] These sanctions do not fall under the Central Bank's administrative sanctions procedure[149] but these regulations have specified procedures by which such sanctions can be imposed. In the case of the *Prospectus Regulations 2005*, the maximum limit of the sanction is €2.5 million.[150] The 2005 Regulations do not distinguish between legal and natural persons.[151]

3.116 Under the *Market Abuse Regulations 2016*, in the case of certain conduct, the maximum limit is €15 million or 15% of annual turnover in the case of a legal person and €5 million in the case of a natural person. These limitations are mandated by the *EU Market Abuse Regulations 2014*.[152] The conduct sanctionable by these higher upper limits levels concern insider dealing[153] and market manipulation.[154] These upper limits are higher than those seen in other EU financial regulation and this may be explained by the type of conduct involved. Insider dealing and market manipulation both constitute conduct that necessarily entails a high level of deliberate action and moral culpability when committed by a regulated entity.[155] The higher limits may, however, also reflect a general upward trend in upper sanction limit over time.

3.117 The *2014 EU Markets in Financial Instruments Directive* ("MiFID II"), which took effect in Ireland on 3 January 2018,[156] is also worth considering. Article 70(7) of the Directive sets out the lowest amount of upper limit a Member State may opt for when empowering competent authorities to impose an administrative financial sanctions regime for breaches of its provisions. In the case of both legal and natural persons, this "minimum" limit is €5 million. Article 70 also includes a disgorgement-related sanction of twice the amount of the benefit derived from the infringement, where that benefit can be determined. In addition, there is power to impose a financial sanction on a legal person of up to 10% of

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[147] Regulation 41(1)(k) of the *European Union (Market Abuse) Regulations 2016* (SI No 349 of 2016).

[148] Regulation 99(c) of the *Prospectus (Directive 2003/71/EC) Regulations 2005* (SI No 324 of 2005).

[149] Section 33AN(1) of the *Central Bank Act 1942*.

[150] Regulation 99(c) of the *Prospectus (Directive 2003/71/EC) Regulations 2005* (SI No 324 of 2005).

[151] Regulation 92 of the *Prospectus (Directive 2003/71/EC) Regulations 2005* (SI No 324 of 2005).

[152] Article 30(2) of *Regulation (EU) No 596/2014 of the European Parliament and of the Council*.

[153] *Ibid* at art 14.

[154] *Ibid* at art 15.

[155] One example of market abuse is the practice of "trashing and cashing". This involves circulating false or misleading information about a company and profiting from the short selling of that company's shares. This occurred to of Halifax Bank of Scotland shares in 2008 through the circulation of an email which spread a rumour that a newspaper would be writing an expose on the bank that would raise the spectre of a run on the bank. As a result, the bank's share value dropped by 19% on that day alone. See Daily Telegraph "Hunt for £100m rogue trader after attack on HBOS share price" 19 March, 2008.

[156] Regulation 1(2) of the *European Union (Markets in Financial Instruments) Regulations 2017* (SI No 375 of 2017).

total annual turnover. This level is capped at 10% and therefore is not subject to any Member State discretion.

3.118 In a 2016 consultation paper on MiFID II, the Minister for Finance expressed a preference to opt for a maximum limit of €10 million in respect of legal persons.[157] This was based on the potentially serious consequences of the breach of MiFID II and in order to align it with the maximum level operation under the Central Bank's administrative sanctions procedure. The consultation document also noted that the Minister was "strongly" minded not to increase the €5 million maximum fine for natural persons or to increase the disgorgement amount.

3.119 The Commission considers that there is no justification for an increase in the upper limits in place under Part IIIC of the 1942 Act. There is no available evidence to indicate that the current statutory limits inhibit the Central Bank in seeking to impose proportionate sanctions with sufficient deterrent effects. To date, the largest administrative financial sanction issued under Part IIIC of the 1942 Act has been €3.5 million, which was paid by Ulster Bank Ltd for a failure of its IT systems in 2012.[158] However, it should be noted that his was the maximum sanction available at the time, with a 30% discount.

3.120 Further, the Central Bank has the option to issue a sanction of up to 10% of the annual turnover of the entity. For many of the entities regulated by the Central Bank, this level would far exceed €10 million. This therefore allows the imposition of a sanction that is both of a sufficient level to have a deterrent effect as well as being proportionate and responsive to the size, in financial terms, of the regulated entity.

R 3.04 The Commission recommends that the maximum statutory limits of administrative financial sanctions that may be imposed by the Central Bank under Part IIIC of the *Central Bank Act 1942*, as amended, are appropriate, which are, in most cases:

(1) for corporate bodies: €10 million or 10% of annual turnover, or;

(2) for natural persons: €1 million.

(b) The removal of economic benefit from regulatory breaches

3.121 As outlined in the discussion of the principles relating to administrative financial sanctions in Part A, an administrative financial sanction should seek to remove any economic benefit from the regulatory breach. This is also known as "disgorgement." It should be made clear that the removal of economic benefit ought to be in addition to any administrative financial sanction imposed. The purpose of disgorgement is to put the regulated entity in

[157] Department of Finance, *MiFID 2 Public Consultation Paper* (2016).

[158] Irish Nationwide Building Society and Quinn Insurance had larger sanctions imposed, but these were never collected as both entities were in administration by the time they were subject to the Administrative Sanctions Procedure.

the position in which it would have been had it not committed the breach. An administrative financial sanction, as a proportionate and deterrent response to the breach, should be viewed as being separate to the disgorgement.

3.122 The Central Bank already takes account of the economic benefits gained as a result of a breach when calculating the appropriate level of sanction. In its guidance document on its administrative sanctions procedure, under the heading of 'The Nature, Seriousness and Impact of the Contravention', a relevant factor in the calculation of the sanction is "the amount of any benefit gained or loss avoided due to the contravention."[159]

3.123 The FCA, where it is practicable to quantify, will seek to remove any financial benefit derived directly from the breach as an automatic first step in its administrative financial sanction procedure.[160] In addition, should the regulated entity enter a settlement agreement with the FCA, any settlement discount does not apply to the disgorgement of any benefit calculated at the beginning of the process.[161] The FCA, as can be seen from the discussion in Part D, places a strong emphasis in its administrative financial sanctioning policy on the removal of the economic benefit arising from breaches of that policy.

3.124 While the Central Bank already possesses the ability to include a disgorging figure in any administrative financial sanction, the Commission considers that it should be provided with the express power in legislation to remove the economic benefit arising from the breach. This power should be in addition to, and separate from, any sanction imposed as a result of the breach and should not be included in any upper statutory limitations. Disgorgement is a vehicle for preventing unjust enrichment and can offer significant deterrent value by reducing the likelihood that wrongdoers can consider administrative financial sanctions to be merely a business cost.[162] Providing a separate power to remove economic benefit, in addition to ensuring such a figure does not form part of the sanction, would also reflect the commitment of the Oireachtas in ensuring that regulated entities do not benefit from wrongdoing.

R 3.05 The Commission recommends that the Central Bank, and comparable financial and economic regulators, be empowered to remove any economic benefit derived from a regulatory breach.

(c) Multiple of economic benefit sanctions

3.125 Another method of determining a sanction level that is proportionate to the harm caused, with a sufficient deterrent effect, is to impose a sanction that is a multiple of the economic

[159] Central Bank of Ireland, *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942* (2014).

[160] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 6.5A.1.

[161] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 6.5A.5.

[162] Australian Securities and Investments Commission, *Penalties for corporate wrongdoing* (2014) at paragraph 66.

benefit derived from the breach. This figure, while based on a disgorgement amount, should be considered as part of the sanction amount.

3.126 The Central Bank may impose a sanction that is up to twice the amount of the profits gained or losses avoided because of the breach, where this can be determined, for certain breaches of the *European Union (Capital Requirements) Regulations 2014.*[163] This is in addition to an administrative financial sanction that is subject to the €10 million limitation. Section 119 of *European Union (Markets in Financial Instruments) Regulations 2017*,[164] which implements MiFID II, also includes this sanctioning power.

3.127 The Commission considers that the Central Bank should be given the power to impose multiples of benefit sanctions for all conduct under the administrative sanctions procedure. In order to remain consistent with existing and future applicable EU law, the multiple should be twice the amount of economic benefit. This amount should be in addition to any sanction imposed based on other calculating factors.

R 3.06 The Commission recommends that the Central Bank, and comparable financial regulators, be provided with the power to impose an administrative financial sanction up to a maximum of twice the amount of economic benefit gained from the breach.

(d) Costs recovery at the ASP inquiry

3.128 A regulated entity subject to the administrative sanctions procedure may be represented by legal counsel during the ASP inquiry stage[165] and will be allowed to submit oral legal submissions during the hearing.[166] As outlined above, the 1942 Act does not provide a power to award costs to the regulated entity for the legal representation availed of at the ASP inquiry. There is no obligation to provide any form of financial assistance for legal costs arising from representation before a tribunal.[167] The Supreme Court, in *Magee v Farrell*,[168] held that any constitutional right to state funded legal aid is restricted to criminal matters.

3.129 Although there is no automatic right to costs before the tribunal, it is of course open for such powers to be provided by legislation. The Commission considers that, given the potentially serious financial and reputational consequences on the imposition of an administrative financial sanction by the ASP inquiry, the regulated entity ought to be provided with the best possible opportunity to present their case. A regulated entity or

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[163] Regulation 55(1)(g) of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

[164] SI No 375 of 2017.

[165] Sections 33AY(3), (4) of the *Central Bank Act 1942*.

[166] Section 33BA of the *Central Bank Act 1942*.

[167] Hogan and Morgan, *Administrative Law in Ireland* 4th ed (Round Hall 2010) at paragraph 14.79.

[168] [2009] IESC 60, [2009] 2 ILRM 453, at 459-460.

individual should not be dissuaded from exercising their right to legal representation at the ASP inquiry. The Commission therefore considers that the entity ought to have the opportunity to recover costs where appropriate, such as instances in which no regulatory breach is found to have occurred.

3.130 The ASP inquiry's lack of powers to award costs is also unusual in light of the power of the appeals body, the Irish Financial Services Appeals Tribunal, to award costs of the hearing to both parties, and the power to award the costs, and incidental costs, at the ASP inquiry stage.[169] However, this could arguably incentivise the taking of appeals solely to recover legal costs. The absence of a power to award costs is also unusual given the level of attention the issue brought for equivalent matters in the UK, as outlined in Part E above.

3.131 The Commission considers that the Central Bank should be provided with the power to award costs for legal representation at the ASP inquiry. The detail on matters such as the calculation of costs, the legal and preparatory work to be covered and the instances where costs will be awarded should be provided for in regulations.

R 3.07 The Commission recommends that the Central Bank, and comparable financial regulators, should be empowered to put in place a legal costs assistance scheme, the details of which should be set out in regulations.

(e) The prevention of conflicts of interest within the Central Bank.

3.132 The procedures by which the Central Bank imposes administrative financial sanctions are robust from a fairness standpoint, as stated by the High Court in *Fingleton v Central Bank of Ireland*.[170] One matter, however, that could be improved upon is formalising the separation of the Central Bank's supervision and enforcement activities. Such a separation is necessary to ensure the avoidance of conflicts of interest and to provide enhanced objectivity in decisions to pursue enforcement action. In fact, the Central Bank has already put this separation in place.[171] As outlined above, the UK *Financial Services and Markets Act 2000* specifically requires such a separation by necessitating that any enforcement decision be taken by a person other than the person involved in the supervisory activities on which that decision was based.[172] The Commission considers that placing such a requirement on a statutory footing in this jurisdiction would remove any potential weaknesses in the procedures provided for by the administrative sanctions procedure.

[169] Section 57AH of the *Central Bank Act 1942*.

[170] [2016] IEHC 1.

[171] Central Bank of Ireland, *Outline of Administrative Sanctions Procedure* (2014), at paragraph 3.2.1.

[172] Section 395(2) of the *Financial Services and Markets Act 2000.*

R 3.08 The Commission recommends that there should be a statutory requirement for information exchange barriers to be erected between those involved in supervisory and enforcement activities in the Central Bank, and comparable financial regulators.

2. Conclusions on the provision of an administrative financial sanctions regime in the standardised approach to regulatory powers

(a) The imposition of the administrative financial sanction following a hearing

3.133 When a public body is taking decisions with the potential to adversely affect private individuals or undertakings, it must provide fair procedures in any decision making process. What constitutes fair procedures can include many things, such as the provision of an oral hearing or the right to legal representation. It depends on the particular circumstances, but it is generally the case that the more severe the potential consequences, the greater the level of fair procedures that must be provided.[173] The imposition of a significant monetary sanction by a public body would require the provision of the highest level fair procedures.

3.134 The UK *Regulatory Enforcement and Sanctions Act 2008*, which puts in place a standard financial sanctioning regime for regulators in the United Kingdom, provides for a common power to impose administrative financial sanctions.[174] However, the 2008 Act does not expressly require the provision of an oral hearing before the sanction can be imposed. The 2008 Act requires that the regulated entity be provided with the opportunity to make written representations to the regulator before any civil financial sanction is enforced. However, the 2008 Act also requires that any decision to impose a sanction be subject to an appeals process. The form and detail of the appeal is left to regulation specific to the particular regulator under the 2008 Act.[175] The *Macrory Report*,[176] whose recommendations formed the basis for the 2008 Act, discussed such appeals as being an opportunity for the regulated entity to dispute either the imposition or the level of administrative financial sanction to a regulatory tribunal. The Report recommended that such a tribunal take the form of an oral hearing.[177] It would seem in practice that in instances where the regulated entity does not accept that a breach occurred and the subsequent imposition of an administrative financial sanction, the appeal under this regime functions in a similar manner to an oral hearing.

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[173] Hogan and Morgan, *Administrative Law in Ireland* 4th ed (Round Hall 2010).

[174] Section 42 of the *Regulatory Enforcement and Sanctions Act 2008*.

[175] Section 54 of the *Regulatory Enforcement and Sanctions Act 2008*

[176] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)).

[177] *Ibid* at paragraph 3.65.

3.135 The Commission considers that a formalised oral hearing should be provided to a regulated entity before any administrative financial sanction may be imposed.

(b) An Adversarial Process is Preferable to Inquisitorial Process

3.136 In general terms, and for the reasons outlined above, the Commission has already recommended that the administrative sanctions procedure in Part IIIC of the 1942 Act is a suitable model for the regime being proposed for the regulators encompassed in this Report. The Commission, having analysed a specific aspect of the model in Part IIIC of the 1942 Act, which involves what appears to be a 2-step process and inquisitorial approach, has concluded that this element is not generally a suitable or applicable model and that single-step, adversarial model is preferable.

3.137 The model in the 1942 Act involves, in the Commission's view, an unnecessary and time-consuming 2-stage process when a single adversarial process would be more efficient, and indeed, more consistent with the regulatory context in which it arises. Under the 1942 Act, the supervisory staff of the Central Bank will, from time to time as part of routine supervision, come across material in, for example, a bank or insurance undertaking, that may require further investigation, including a formal inquiry under Part IIIC of the 1942 Act.

3.138 If a formal inquiry under Part IIIC of the 1942 Act is to proceed, the 1942 Act envisages that, in effect, the process begin again from scratch because the investigation unit of the Central Bank does not play any further formal part in the process. Instead, Part IIIC of the 1942 Act provides for the appointment of an external panel of persons, who, in effect, "step into the shoes" of the Central Bank and who then begin the ASP inquiry process afresh, including gathering information afresh that has already been gathered by the internal investigation unit of the Central Bank. The Commission considers that, while this inquisitorial process has the attraction that it allows a fresh start to the process and is entirely defensible on procedural fairness grounds, a more straightforward model, based on an adversarial approach, would equally meet standards of fair procedures, but with the added benefit of using regulatory resources more efficiently.

3.139 The inquisitorial model in the 1942 Act is also very much in the minority (and possibly unique) in current comparable legislation in Ireland. The vast majority of comparable models, such as those used in professional disciplinary bodies, including for solicitors and medical practitioners, discussed above, involve an "in-house". The "in-house" is an internal, investigatory unit that presents its case on an adversarial basis to an adjudicative panel, made up partly or wholly of externally sourced persons, and in which the party being investigated is also represented. These hearings are analogous to the potential imposition of an administrative financial sanction by a financial and economic regulator, as they concern regulatory responses towards the top end of the enforcement pyramid[178] in

[178] See Chapter 1.

the context of those particular regulatory regimes.[179] In the Commission's view, such a model fully complies with requirements of fair procedures, as well as being more efficient.

3.140 In addition, the Commission considers that an adversarial model rather than an inquisitorial model is preferable from the perspective of good regulatory practice. An adversarial model allows the relevant regulator, in a single process, to develop and advance the case for the imposition of, for example, an administrative financial sanction while at the same time, providing the regulated entity with sufficient fair procedures.

R 3.09 The Commission recommends that the hearing by which an administrative financial sanction may potentially be imposed, referred to as the "Adjudicative Panel Process", should be based on an adversarial model, comparable to the approach used in disciplinary bodies for the legal and medical professions. This approach involves an internal investigatory unit presenting its case on an adversarial basis to an externally sourced adjudicative panel, and in which the party being investigated is also represented.

(c) Composition of the Adjudicative Panel

3.141 The Commission considers that the adjudicative panel should be part of the regulator. This allows the adjudicative panel to exercise the sanctioning powers possessed by the regulator.[180] This would also allow the adjudicative panel to use the back-office facilities of the regulator and thus save on expense.

3.142 The Commission considers that, similar to the Fitness to Practice Committee of the Medical Council, discussed above, regulators should be required to establish an "Adjudicative Panel Committee". From this committee, a panel of 3 will be established to sit as the adjudicative panel. The adjudicative panel must be chaired by a legally qualified person of 10 years (a solicitor, barrister or retired judge) and the other 2 members should be "suitably qualified" in disciplines that are relevant to the matter in dispute (accountant, tax qualified, communications/engineering qualified etc.).[181] Unlike the Fitness to Practice Committee, none of the members of the Adjudicative Panel Committee will be staff of the regulator; all must be external. This is to ensure the strongest possible protection against bias, in accordance with fair procedures.

3.143 In a small jurisdiction such as Ireland, it may be likely that conflicts of interests will arise between those considered to be suitable to be placed on the panel for the adjudicative panel hearing and the regulated entities. It is for this reason that an Adjudicative Panel

[179] Normally the revocation of a licence to practice the profession or imposing a financial sanction.

[180] Either existing or those to be provided for in the proposed standardised approach to the drafting and construction of regulatory powers.

[181] The meaning of suitably qualified within the context of the particular regulator can be set out in subsequent regulations. Membership of the relevant professional bodies, number of years in practice and field of expertise are criteria normally used when seeking expert for similar roles.

Committee system would be desirable, in order to provide the regulator with the scope to empanel individuals who would not be perceived to have some interest in the matter before the adjudicative panel. This is a necessary step to guarantee the impartial consideration of the matters before the adjudicative panel and avoid any claims of objective bias.[182]

R 3.10 The Commission recommends that the externally-sourced adjudicative panel should, as is the case with disciplinary bodies for the legal and medical professions, be an internal entity within the regulators.

R 3.11 The Commission recommends that each financial or economic regulator encompassed by this Report be empowered to establish a committee to be referred to as the "Adjudicative Panel Committee" with the following elements:

(1) the membership of the Adjudicative Panel Committee should be persons external to the regulator;

(2) the membership of the Adjudicative Panel Committee should be in a ratio of 2:1 between "suitably qualified" individuals and legally qualified persons, each of more than 10 years standing; and,

(3) the membership of the Adjudicative Panel Committee should contain a sufficient number of persons to avoid conflicts of interest in the make-up of a specific 3 person Committee.

(d) Stage one: leading to Adjudicative Panel Process

3.144 The Commission considers that in the model being proposed here it would not be appropriate for the body investigating and the body adjudicating to be the same body for the reasons outlined above. The enforcement or investigatory division of the regulator would be involved in the process leading to the imposition of an administrative financial sanction. This team would prepare the case to be put to the adjudicative panel based on material derived from its own investigation, once a decision to initiate enforcement proceedings has been made, based on the evidence. This investigatory division of the regulator may have obtained such information from a supervisory or day-to-day regulatory inspection or visit, or possibly by way of a complaint from the public.

(e) Stage two: the hearing before the Adjudicative Panel

3.145 *Fingleton v Central Bank of Ireland*[183] demonstrates that the procedures as prescribed by Part III of the 1942 Act provide a regulated entity with a fair hearing, The Commission therefore considers that the adjudicative panel procedures be based on those in the 1942

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[182] See *Radio Limerick One Ltd v IRTC* [1997] IESC 3, [1997] 2 ILRM 1.

[183] [2016] IEHC 1.

Act. The Commission considers that the proposed adjudicative panel hearing should take place on the following basis and with the following characteristics. Both parties may be legally represented, and if the respondent chooses to be legally represented, a legal aid scheme will be available. The hearing, as stated above, will be an adversarial hearing, to which the constitutional right to fair procedures applies, though not necessarily with all the strict rules of evidence.[184] The applicable standard of proof will be the balance of probabilities, with the burden of proof resting on the regulator. Evidence may be given orally or on affidavit or by other means permitted by the rules to be set out in regulations. Any evidence, which is given under oath, is subject to cross-examination. The adjudicative panel will have the same powers, rights, and privileges as the High Court in terms of enforcing attendance and examining witnesses on oath and compelling the production of documents. Witnesses before the adjudicative panel will also possess the same immunities and privileges as a witness before the High Court.

R 3.12 The Commission recommends that before holding a hearing of the Adjudicative Panel Committee, the Regulator must give notice in writing of the proposed hearing to the regulated entity. The notice should specify the grounds on which the Regulator's suspicions of a regulatory breach are based, specify a date, time and place at which the Regulator will hold the hearing, and invite the regulated entity to attend or to make written submissions about the matter to which the hearing relates.

R 3.13 The Commission recommends that the Adjudicative Panel Committee hearing should be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow.

R 3.14 The Commission recommends that at the Adjudicative Panel Committee hearing, the rules of procedural fairness should be followed, but it should not be bound by all the rules of evidence.

R 3.15 The Commission recommends that the standard of proof at the Adjudicative Panel Committee should be the balance of probabilities.

R 3.16 The Commission recommends that the person presiding at the Adjudicative Panel Committee hearing should have the power to require a witness at the hearing to answer a question put to the witness, and to require a person appearing at the hearing to produce specified documents.

R 3.17 The Commission recommends that the person presiding at an Adjudicative Panel Committee hearing should have the power to allow a witness at the hearing to give evidence by tendering a written statement, which, if the person presiding so requires, must be verified by oath or affirmation.

[184] See *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016), Appendix B.

R 3.18 The Commission recommends that the Adjudicative Panel Committee have the same powers of a judge of the High Court when hearing civil proceedings as to the examination of witnesses, including witnesses who are outside the State.

R 3.19 The Commission recommends that a person who is summoned to appear before an Adjudicative Panel Committee hearing should be entitled to the same rights and privileges as a witness appearing in civil proceedings before the High Court.

R 3.20 The Commission recommends that a person who obstructs an Adjudicative Panel Committee in the exercise of its hearing powers without reasonable excuse, or who fails to comply with a requirement or request made by the Adjudicative Panel Committee, or who in purported compliance with such a requirement or request, gives information that the person knows to be false or misleading, or who refuses to comply with a summons to attend before, or to be examined on oath or affirmation by, the Adjudicative Panel Committee, commits an offence.

(f) High Court Confirms or Refuses to Confirm Adjudicative Panel's Recommendation

3.146 Following the hearing, the adjudicative panel must make a finding of some kind as to whether the regulatory breach transpired and, where relevant, the sanction(s) it considers appropriate. However, the adjudicative panel's finding as to the appropriate sanction will not take effect unless it is confirmed by the High Court. This is to remain compliant with the High Court decision of *Purcell v Central Bank of Ireland.*[185] In that case, the Court held that the administrative sanctions procedure of the Central Bank did not constitute an administration of justice and demonstrated the types of safeguards which would need to be in place in the common administrative financial sanctioning regime in order to protect it from successful constitutional challenge.

3.147 A characteristic of an administration of justice relevant for present purposes, as set out in *McDonald v Bord na gCon,*[186] is "the enforcement of … rights or liabilities or the imposition of a penalty by the court by the executive power of the State which is called in to enforce its judgment." Applying this aspect of the *indicia* to the Central Bank's administrative sanctions procedure, the High Court in *Purcell* held:

> "The imposition of any penalty by the inquiry is not self-executing. Sanctions imposed are not enforceable as a judgment… any monetary penalty or costs order only takes effect at the time when the decision is confirmed by an order of the court of competent jurisdiction."[187]

3.148 Therefore, any administrative financial sanction imposed by the Adjudicative Panel Committee would need to be confirmed by the High Court before it may take effect. This

[185] [2016] IEHC 514.

[186] [1965] IR 217.

[187] This is provided for under section 33AW(2) of the *Central Bank Act 1942*.

requirement will, of course, add a delay to the exercise by a regulator of its powers. The requirement of confirmation of a sanction by a court is not something that is required either for the FCA, or under the administrative financial sanctions regime provided for in the *Regulatory Enforcement and Sanctions Act 2008*. However, such a safeguard is a constitutional necessity in this jurisdiction and is a feature of sanctioning powers in other regulatory fields, such as the disciplinary procedures of solicitors and medical practitioners.

3.149 For constitutional reasons, outlined above, the decision of the adjudicative panel will need to be confirmed by the High Court. That case does not outline the exact role of the High Court, but the Commission considers that the following model, based on the High Court confirmation of SDT sanctions, is appropriate.

R 3.21 The Commission recommends that following the hearing, the Adjudicative Panel Committee must make a report to the High Court, which must address, insofar as they are applicable and appropriate, the following matters:

(1) the alleged regulatory breaches which required the hearing before the Adjudicative Panel Committee and the Adjudicative Panel Committee's findings in relation to each of those findings;

(2) a note on the evidence given to the Adjudicative Panel Committee;

(3) the Adjudicative Panel Committee's recommendation as to the appropriate sanction;

(4) any other matters which the Adjudicative Panel Committee may think fit to report.

R 3.22 The Commission also recommends that both parties may submit written submissions and affidavits to the High Court.

R 3.23 The Commission recommends that the role of the High Court, based on the report, submissions and affidavits presented to it, is either to give judicial approval to the Adjudicative Panel Committee's decision or to refuse such approval. The Commission therefore recommends that the High Court may either (a) approve the Adjudicative Panel Committee's decision, in which case the matter has come to an end, subject to appeal, or (b) not approve the Adjudicative Panel Committee's decision, in which case the High Court remits the matter to the Adjudicative Panel Committee, and this may include remittal subject to directions on, for example, substantive points or procedural points.

(g) Appeal from the High Court

3.150 A second constitutional safeguard is the provision of an appeal of the decision to impose the administrative financial sanction. As the Supreme Court held in *McDonald v Bord na* *gCon,*[188] a characteristic of an administration of justice is "the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties." In the *Purcell* case, the High Court (Hedigan J) found that in relation to the administrative sanctions procedure that "[t]here is no final determination by the proposed inquiry. It is in fact the first step in the process. The second is an appeal to the Appeals Tribunal and the third is an appeal to the High Court."[189] The Oireachtas commonly provides for a statutory right of appeal from certain decisions of adjudicative bodies, including for the disciplinary procedures of solicitors and medical practitioners.

3.151 The Commission considers that either party should be allowed to appeal the High Court decision to the Court of Appeal, but only on a point of law of general public importance, or where the interest of justice so require. This is in line with the constitutionally enshrined standard for granting leave to appeal decisions of the Court of Appeal to the Supreme Court.[190] This is in order to mitigate the phenomenon of regulatory gaming by reducing the opportunity for well-resourced regulated entities to take appeals as a delaying or frustrating tactic. The Commission notes that in the wake of the establishment of the Court of Appeal in 2014, it is not common for provision to be made for appeals from the High Court to the Supreme Court.[191]

R 3.24 The Commission recommends that provision be made for the appeal of decisions of the High Court to the Court of Appeal, provided the Court of Appeal is satisfied that:

(1) the decision involves a matter of general public importance; or,

(2) in the interest of justice, it is necessary that there be an appeal to the Court of Appeal

(h) Legal representation and costs at the hearing

3.152 Another aspect of fair procedures is legal representation before the hearing. The regulated entity must be allowed to put forward its best possible case and, particularly where there is an oral hearing, this may necessitate the availability of legal assistance.[192] The Supreme Court decision of *O'Brien v Personal Injuries Board*[193] suggests that legislation need only be concerned with a person's right to legal representation before an administrative body in situations where the right to make the best possible case is being

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[188] [1965] IR 217.

[189] [2016] IEHC 514, at paragraph 8.7.

[190] Article 34.5.3° of the Constitution.

[191] Article 34.4.3° of the Constitution provides that legislation may be enacted to the effect that a decision of the Court of Appeal shall be final and conclusive. Article 34.5.3° of the Constitution provides that legislation may preclude further appeal to the Supreme Court (except where a constitutional issue arises).

[192] Hogan and Morgan, *Administrative Law in Ireland* 4th ed (Round Hall 2010), at paragraph 14.66.

[193] [2009] 3 IR 243.

restricted.[194] Sections 33AY(2) and 33AY(3) of the 1942 Act expressly provide for both the Central Bank and the regulated entity to be provided with the assistance of a legal practitioner at the ASP inquiry.

R 3.25 The Commission recommends that the Regulator, the Adjudicative Panel Committee and the regulated entity may be assisted by a legal practitioner at the hearing, the details of which should be set out in regulations.

3.153 Representation by a legal practitioner at the hearing will have cost implications for the regulated entity. Given the possible financial and reputational consequences of the imposition of an administrative financial sanction, it is to be expected that the entity concerned will seek to put forward the best possible case at a hearing if it does not accept that a regulatory breach occurred. To be able to effectively prepare and present a case at a hearing will be potentially expensive. However, a regulated entity wishing to contest the imposition of an administrative financial sanction must not be dissuaded from representing itself fully at a hearing due to concerns over legal costs.

3.154 The Commission considers that it is important that the regulator be provided with the power to award costs to the regulated entity in certain circumstances, for example if following a hearing no regulatory breach is found to have occurred. The *Financial Services and Markets Act 2000* in the UK empowers the FCA to make regulations concerning the awarding of costs.[195]

R 3.26 The Commission recommends that there should be an express power to award costs in connection with investigations and hearings by the Adjudicative Panel Committee, the details of which may be set out in regulations.

(i) Publicity for the imposition of an administrative financial sanction

3.155 There are numerous advantages to publicising the terms of an administrative financial sanction. Many of these advantages would equally apply to the publication of the terms of a regulatory enforcement agreement made between the regulator and regulated entity in settlement of administrative financial sanctions proceedings. Regulatory enforcement agreements are discussed in Chapter 4 of this Report. The publication of information regarding the imposition of administrative financial sanctions is a common feature in the legislative framework of such regimes.[196]

3.156 One advantage of making public disclosure of the terms of an administrative financial sanction is the educational effect it has on regulated entities. Regulated entities can learn

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[194] *O'Brien v Personal Injuries Board* [2008] IESC 71, [2009] 3 IR 243, at paragraphs 44, 58-60, 66 (Denham J).

[195] Section 134 of the *Financial Services and Markets Act 2000.*

[196] For example, section 65 of the *Regulatory Enforcement and Sanctions Act 2008* and section 33BC of the *Central Bank Act 1942.*

from the prescribed contraventions committed by others in the market and improve their own compliance accordingly. In addition to the publication of the imposition of the sanction, the regulator's public statements can detail the nature of the breach and the steps that are taken to remedy it. This provides a clear picture of how other regulated entities could comply with the same obligations. Although there may be a perception that contraventions are the result of insufficient incentives to comply or opportunism, the Commission considers that, at least some regulatory breaches are a result of inadvertence, or even incompetence.[197] However, this may be less likely where the regulated entity is a large, sophisticated entity with a vast amount of resources. On the other hand, financial regulation, for example, is notoriously complex and compliance may not be straightforward. Educating regulated entities on effective methods of ensuring compliance by disclosing the details of breaches can assist regulators in achieving their objectives. However, this compliance-based approach should also be combined with a more specific deterrence-based approach to disincentivise those who contravene regulatory requirements out of opportunism rather than inadvertence.

3.157 Another compliance-based aspect of this publication is the norm-setting effect that it can have. This is particularly true where the sanction includes an element of culpability for a breach, for example, an admission of wrongdoing by the regulated entity or a censure by the regulator. It has long been recognised that the dissemination of rules and their enforcement can result in the creation of moral standards as to what is acceptable behaviour.[198] This helps provide a moral force to regulatory enforcement, which may encourage compliance.

3.158 Where there is an administrative financial sanction (or, indeed, a regulatory enforcement agreement), the regulated entity responsible for the prescribed contravention is specifically deterred from engaging in that conduct in the future. The financial cost of the administrative financial sanction or regulatory enforcement agreement impresses upon the entity that breaches will result in sanctions, which shall, in turn, incentivise future compliance. However, if this sanction were not disclosed, the deterrent effect would potentially be limited to the entity subject to the sanction. Publication of the terms of the sanction can enhance the deterrent effect, by providing for a more general deterrent to other regulated entities in the industry. In addition, publication also creates a stronger deterrent to the regulated entity guilty of a prescribed contravention because of the reputational damage and potential stigma associated with regulatory breaches.

3.159 The effectiveness of the deterrent aspect of "naming and shaming" is contingent on an implicit financial cost to the regulated entity that is subject to the adverse publicity. Literature on reputational sanctions suggests that the "reputational capital" of companies

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[197] For example the breaches of the European Market Infrastructure Regulations (EMIR), for which Merril Lynch International reached an accepted responsibility, was arguably a result of inadvertence. *https://www.fca.org.uk/publication/final-notices/merrill-lynch-international-2017.pdf*.

[198] See for example Hodges, *Law and Corporate Behaviour* (Hart Publishing 2014) at 52.

is often a valuable asset, which companies are incentivised to maintain. Macrory observes that "the consequences of damaging a firm's reputation can potentially exceed the effect of a maximum fine that a court could impose."[199] Reputations are valuable because they assure customers and business partners of the reliability and trustworthiness of the firm, allowing it to obtain business or sell more products or services. However, in many industries, reputation does not greatly influence profitability, for example where legal remedies such as breach of contract are an effective method of ensuring compliance with obligations.[200] Similarly, customers may not rely on the reputation of the firm in order to determine whether to do business with them. [201]

3.160 In addition to the uncertainty over the value firms place on their reputations, where firms do value their reputation, there is also uncertainty about the effect of the public statement by the regulator on reputation of the firm.[202] One commentator states that there are two reasons why parties value their reputation; the first is self-interest, the second is moral obligation. A firm or individual may cultivate a reputation for trustworthiness or reliability because it is in the interests of the business, but also because it is also the honourable and decent thing to do. The regulator must be able to affect a regulated entity's profitability or sense of moral uprightness in order to incentivise compliance with "name and shame approaches." If there is no stigma that may affect either of these mechanisms, then the regulator's condemnation or disapproval will not have the desired deterrent effect. If there is no consensus on whether certain regulatory breaches indicate dishonesty or untrustworthiness, then the negative publicity will do little to affect the incentives of the firm that is in breach. In some cases, consumers or business partners will not view the negative publicity unfavourably, and therefore the publicity will do little to disincentivise the regulated entity or others in the industry.

3.161 Whether or not public condemnation will act as an effective deterrent depends on the circumstances of the breach and the industry itself.[203] The Commission nonetheless considers that the negative publicity associated with publication of the details of a regulatory breach will often be a useful addition to a regulator's enforcement tools.

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[199] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)), para 4.65. Van Erp, "Reputational Sanctions in Private and Public Regulation" (2008) 1 *Erasmus Law Review* 145, at 146 also states that reputation is a powerful social control device.

[200] Van Erp, "Reputational Sanctions in Private and Public Regulation" (2008) 1 *Erasmus Law Review* 145, at 154.

[201] *Ibid*.

[202] Van Erp, "Reputational Sanctions in Private and Public Regulation" (2008) 1 *Erasmus Law Review* 145, at 158 argues that reputational mechanisms can be an effective method of social control in the presence of 4 specific factors. First, the industry in question must rely on reputation of reliability or trustworthiness as a means of obtaining business or preventing disputes. Second, information regarding reputations must be freely exchanged between market participants.

[203] Arguably, the Central Bank's public statement in relation to Ulster Bank's customers losing service for 28 days would negatively impact the reputation whereas others contraventions which are viewed as "more technical," such as the Merril Lynch example, discussed above, would not be.

3.162 A key feature of the public disclosure approach is that it has both the deterrent and educational effects discussed above. It is a useful enforcement strategy to combine the educational, compliance-based approach with deterrence against breach. These two effects are complementary; the deterrence-based approach influences the regulated entity's incentives, whereas the compliance-based approach influences their capacity to comply.

3.163 The use of public statements accompanying regulatory enforcement agreements can also lend transparency to the use of this enforcement tool.[204] It is important that a regulator exercise its power in a transparent manner when acting in pursuit of the public interest.

3.164 Publication of all of the details of an administrative financial sanction or regulatory enforcement agreement may not be warranted in every situation. However, in certain circumstances it may be counterproductive to the regulator's overall enforcement strategy. For example, it may prejudice a criminal prosecution of a related matter to identify the regulated entity. Similarly, there may be parties who are innocent of any regulatory breaches who may not wish to remain anonymous, for example, victims of regulatory breaches. Finally, it may not serve any useful regulatory purpose to disclose certain confidential business practices, but it may be very damaging to a company if sensitive commercial information is made public.

3.165 The Commission considers that details relating to the imposition of an administrative financial sanction on a regulated entity should be published by the Regulator. Publication of such information serves two purposes. It provides transparency by ensuring the regulator is exercising its powers appropriately and it signals to the other entities in the regulatory field the consequences of non-compliance, which acts as a general deterrent. The reputational damage that an entity may suffer as a result of the negative publicity such a publication would generate also potentially acts as a specific deterrent.

R 3.27 The Commission recommends that, in the interests of transparency and accountability, where an administrative financial sanction is imposed, the Regulator must publish details on the sanction in such form and manner as is appropriate, including on the Regulator's website.

R 3.28 The Commission recommends that the following terms should be included in the public statement outlining the sanction imposed:

(1) the name of the regulated entity or individual on whom a sanction has been imposed;

[204] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)) at paragraph 5.5. See also chapter 5 generally.

(2) the nature of the breach in respect of which the sanction has been imposed and the specific provision which the regulated entity or individual has contravened;

(3) details of the sanction imposed, including the sanction amount and the criteria relevant to the figure arrived at; and,

(4) the grounds on which the finding of a contravention is based.

3.166 The Commission considers that it will usually be beneficial to disclose as much information as possible about the imposition of an administrative financial sanction. Information should only be omitted to the extent necessary to address the injustice that might arise from the publication of sensitive corporate data. For example, any prejudice arising from to the confidential legitimate commercial interest could be safeguarded by redacting any reference to the specific confidential commercial practices. Other details, such as the level of sanction, for example, would still be retained in the public statement.

R 3.29 The Commission recommends that, where it is necessary to exclude any information in the public statement, this should be done to the minimum extent possible to prevent any unfair prejudice from arising.

3.167 The Commission does not consider it necessary to set out an exhaustive list of circumstances that justify the omission of any of the above terms. The Commission considers that the regulator will often be best placed to assess these matters. However, the Commission considers that the following are likely to be grounds for omission: to prevent prejudice arising for separate criminal proceedings, to protect the legitimate commercial interest of a company or individual, to prevent prejudice or unfairness arising for innocent consumers or other third parties, and to prevent instability in the financial system.

R 3.30 The Commission recommends that where any of the elements of the administrative financial sanction have initially been omitted from the public statement, and where subsequent publication would no longer unfairly prejudice the regulated entity, individual or other third party, a supplementary public statement shall be published, including the previously omitted elements.

3. Determining the appropriate level of administrative financial sanction

(a) Statutory guidance on the factors to be used

3.168 In the interest of transparency and legal certainty, regulators should develop and set out the various factors that should be considered when calculating the level of administrative financial sanction to be imposed in response to a regulatory breach. The ability of a regulator to point to a specified process and the criteria used in determining the level of the sanction means that the decision and figure arrived are less likely to be arbitrary. The community of regulated entities also needs to be confident that an administrative financial sanctioning regime is not being used inappropriately or irresponsibly by the regulator. Furthermore, the particular factors utilised can ensure that the administrative financial sanctions are proportionate and act as a sufficient deterrent.

3.169 The regulator will be well placed to determine the appropriate administrative financial sanction level given its expertise of the market and supervisory role, as will the Adjudicative Panel Committee, by extension, However, it may be necessary for the Oireachtas to have a role in providing guidance as to the type of considerations relevant to the calculation of the sanction level. The exact factors relevant to calculating an appropriate administrative financial sanction level are likely to require the regulator to use its expertise of the regulatory field, the regulated entity and to have regard to the particular circumstances of the case. If the Oireachtas were to allow all regulators as a matter of course to formulate their own criteria without providing any guidance as to the types of matters that should be considered, this may constitute an overly broad delegation of parliamentary power and thus violate Article 15.2.1° of the Constitution, which vests the sole law-making powers for the State in the Oireachtas.

3.170 This issue arises in numerous social and economic areas in which specialist rules are required. The balance that has been struck by the courts between the needs of a modern state in regulating complex or specialist situations and of ensuring that laws are solely made by the democratically elected parliament requires the use of what is called the 'principles and policies' test. This test was outlined by the Supreme Court in *Cityview Press Ltd v An Comhairle Oiliúna*.[205] Essentially the test is that primary legislation should set out the key principles and policies in order to guide the exercise of powers by, for example, a regulator.

3.171 The Commission considers that setting out factors in legislation to which the Adjudicative Panel Committee must have regard when calculating the sanction level, where appropriate, while allowing the Committee to take account of all the circumstances of the particular case at hand, would strike an appropriate balance. The provision should be phrased in such a way as to make it clear that the list of factors is non-exhaustive. The determination of the appropriate sanction level will be dependent on the circumstances in each particular case. A guidance document on enforcement policy published by the regulator could, for example, elaborate on the matters as provided for in the legislation, develop further considerations or perhaps signal to regulated entities that certain factors will be given more weight than others in sanction calculation.

(b) Standard set of factors to be utilised

3.172 At EU level, a number of Directives and Regulations have established administrative financial sanctioning regimes for breaches of certain regulatory provisions. The Directives and Regulations also set out matters to be considered when determining the appropriate sanction level. The factors to be considered, though expressed in slightly different terminologies, are largely analogous. For example, article 31(1) of *Regulation (EU) No*

[205] [1980] IR 381.

596/2014 of the European Parliament and of the Council (the Market Abuse Regulation) states:

> "Member States shall ensure that when determining the type and level of administrative sanctions, competent authorities take into account all relevant circumstances, including, where appropriate:
>
> (a) the gravity and duration of the infringement;
>
> (b) the degree of responsibility of the person responsible for the infringement;
>
> (c) the financial strength of the person responsible for the infringement, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;
>
> (d) the importance of the profits gained or losses avoided by the person responsible for the infringement, insofar as they can be determined;
>
> (e) the level of cooperation of the person responsible for the infringement with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;
>
> (f) previous infringements by the person responsible for the infringement; and
>
> (g) measures taken by the person responsible for the infringement to prevent its repetition."[206]

3.173 Article 70 of *Directive 2013/36/EU of the European Parliament and of the Council* (Capital Requirements Directive) contains almost identical matters to be considered as relevant circumstances for the level of administrative financial sanction.[207] It does contain an additional requirement to consider "any potential systemic consequences of the breach". This is something that is not germane to market abuse related breaches.

3.174 These factors also appear in administrative financial sanctions regimes outside of the context of financial and economic regulation. For example, Article 83(2) of the *Regulation (EU) 2016/679 of The European Parliament and of the Council* (the General Data Protection Regulation) states:

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[206] This Regulation was given effect in Ireland by the *European Union (Market Abuse) Regulations 2016* (SI No 349 of 2016).

[207] This Directive was given effect in Ireland by the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

> "…[w]hen deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to the following:
>
> > the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;
> >
> > the intentional or negligent character of the infringement;
> >
> > any action taken by the controller or processor to mitigate the damage suffered by data subjects;
> >
> > the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;
> >
> > any relevant previous infringements by the controller or processor;
> >
> > the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
> >
> > the categories of personal data affected by the infringement;
> >
> > the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;
> >
> > where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;
> >
> > adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and
> >
> > any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement."

3.175 Again, with the exception of certain considerations particular to data protection, a core set of factors can be observed. A similar set of factors also are set out in Part 3 of the *Energy Act 2016* which puts in place an administrative financial sanctioning regime which can be made available to the Commission for Energy Regulation. Additionally, a list of mitigating and aggravating factors for sanction calculation, suggested in *the Macrory Report*, are consistent with those under the EU regimes discussed above.[208]

3.176 The Commission considers that the core factors contained in these regulations and directives should form the basis for the type of matters to which the Adjudicativee Panel Committee must have regard to when imposing an administrative financial sanction under the proposed unified approach to the drafting and construction of regulatory powers. They are factors that have been developed, debated and approved of at EU level and their use in the proposed standardised approach to regulatory powers would demonstrate that a consistent approach is being taken when introducing new regulations. The Commission considers that these mitigating and aggravating circumstances comply with the principles of the use of administrative financial sanctions outlined in Part A. Considerations such as the gravity and duration of the breach, and losses caused to third parties, ensure that the sanction issued is likely to be proportional to the severity of the breach. The consideration of the financial strength of the regulated entity would ensure that the sanction could be set at a level that would have a deterrent effect and not simply be a cost of doing business. Consideration of previous breaches and steps taken to mitigate the damage caused provides scope for responsiveness to the regulated entity.

R 3.31 The Commission recommends that in determining the appropriate level of administrative financial sanction, the Adjudicative Panel Committee should be required to take into account all relevant circumstances, including, where appropriate:

(1) the gravity and the duration of the breach;

(2) the degree of responsibility of the natural or legal person responsible for the breach;

(3) the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;

(4) the importance of profits gained, or losses avoided, by the natural or legal person responsible for the breach, insofar as they can be determined;

(5) the losses for third parties caused by the breach, insofar as they can be determined;

[208] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)), at Box. 3.2. The *Regulatory Enforcement and Sanctions Act 2008* does not itself provide a list of factors. However, section 63(4) of the Act requires that where a regulator has been granted administrative financial sanctions, it must publish a guidance document stating “the matters likely to be taken into account by the regulator in determining the amount of the penalty”.

(6) the level of cooperation of the natural or legal person responsible for the breach with the competent authority;

(7) previous breaches by the natural or legal person responsible for the breach; and

(8) any action taken to mitigate the damage caused by the breach.

(c) Preventing economic benefit from the breach

3.177 As discussed above, in relation to the Central Bank, the Commission considers that the power to remove economic benefit from a regulatory breach has a number of benefits. Such benefits would equally apply in the context of the other financial and economic regulators encompassed by this Report. As noted, certain financial regulators in Ireland and the United Kingdom use disgorgement, as provided for in their relevant guidance documents. However, the Commission considers that the other regulators being considered should be provided with the express power to remove the economic benefit from regulatory breaches by its regulated entities. Expressly providing a disgorgement power, in addition to and separate from an administrative financial sanction, means that the disgorgement figure is not subject to any upper limit applicable to the sanction amount.

R 3.32 The Commission recommends that the financial and economic regulators encompassed by this Report be provided with the express power to remove economic benefit derived from a regulatory breach.

(d) Putting an upper monetary limit of administrative financial sanction

3.178 Upper limits on monetary sanctions may be justified for two reasons. The first justification is that unlimited sanctioning powers may be constitutionally disproportionate. The second justification is that extremely significant sanctions can result in negative "spill-overs" to innocent third parties.

3.179 In the United Kingdom, section 42(3) of the *Regulatory Enforcement and Sanctions Act 2008*, provides a regulator with absolute discretion as to the amount of administrative financial sanction it can impose. The *Macrory Report* opposed the use of upper limits of administrative financial sanctions in order to ensure that regulators have the flexibility and ability of capturing the financial benefit that businesses may have acquired through a regulatory breach.[209] However the provision of an express power to remove the economic benefit from the breach, as discussed in the previous section, addresses such concerns.

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[209] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)) at paragraph 3.40

3.180 To provide a Regulator with discretion to impose an administrative financial sanction of any amount, without an upper monetary limit, may be unconstitutional. Article 37 of the Constitution permits the exercise of "limited" functions and powers of a judicial nature in matters other than criminal matters. In *Re the Solicitors Act 1954*[210] the Supreme Court examined a power of the Law Society to deregister a solicitor through its disciplinary committee. In finding that its powers under the Act constituted an administration of justice, the Court examined the parameters of power exercisable under Article 37 of the Constitution and stated that:

> "[t]he test as to whether a power is or is not 'limited' in the opinion of the Court, lies in the effect of the assigned power when exercised. If the exercise of the assigned 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.'"

3.181 The power to impose a monetary sanction without an upper ceiling may be too far-reaching to be considered as "limited." However, under the proposed regime, any sanction decision would need to be confirmed by the High Court before taking effect. Judgments made subsequent to *Re the Solicitors Act 1954* have tended to confine this decision to its own facts or have refused to apply it by analogy.[211] In *M v Medical Council*[212] the High Court analysed the disciplinary procedures of the Medical Council. Finlay P found the powers to be "limited" in nature because, in particular, an order of the High Court was required before they could take effect.

3.182 In addition to being a constitutional requirement, that regard should be had to the overall proportionality of the administrative financial sanction imposed is also consistent with sanctioning principles generally. An upper monetary limit could prevent disproportionate sanctions from being imposed, which may result in spill-overs to innocent third parties.

3.183 The literature concerning criminal sentencing underlines the importance of proportionality, along with consistency, as a sentencing principle.[213] The Commission has previously noted that proportionality is an important component of treating individuals justly.[214] The Supreme Court has recognised that criminal sentences must be proportionate to the severity of the offence and also the circumstances of the offender.[215] Although distinct concepts, criminal sentencing can be usefully compared to regulatory

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[210] [1960] IR 239.

[211] Hogan and Whyte, *J M Kelly: The Irish Constitution* 4th ed (Bloomsbury Professional 2003) at paragraph 6.4.96.

[212] [1984] IR 485.

[213] O'Malley *Sentencing Law and* Practice 3rd ed (Round Hall 2016) at paragraph 19- 26; *The People (DPP) v M* [1994] 3 IR 306.

[214] Law Reform Commission, *Report on Mandatory Sentences* (LRC 108-2013).

[215] *The People (DPP) v M* [1994] 3 IR 306.

enforcement, given that some of the aims and effects of each can overlap. Deterrence, retribution and reparation are aims of both criminal sentencing and regulatory enforcement. In a regulatory context therefore, proportionality means that the sanction must be proportionate to the gravity of the breach and the particular circumstances of the regulated entity or the individual breaching the regulations.[216]

3.184 O'Malley notes that a difficulty with imposing fines on corporate offenders is the "spill-over" that this can have on other persons who were not responsible for the breach. There may be wide-ranging and unpredictable consequential results from a financial sanction, and these results may become more severe and widespread with a more severe financial sanction. For example: innocent employees, creditors, trading partners and customers may be negatively impacted by a large fine. This is particularly the case where the sanction is so large as to threaten the financial viability of the firm or jeopardise the solvency of an individual. O'Malley suggests that capping fines at a specified percentage of annual turnover could address proportionality concerns.

3.185 Proportionality in the context of hardship to the offender or others becomes relevant at the third stage of sentencing,[217] when court must consider the aggravating or mitigating factors in the imposition of the sentence. The Court of Appeal has considered the impact of the circumstances of corporate offenders in the context of criminal sentencing. In *DPP v Kilsaran Concrete Ltd*,[218] the Court of Appeal held that, the financial hardship imposed on the respondent could be a relevant factor in mitigating the severity of the fine in the interests of proportionality. In assessing the proportionality of the sentence, the Court considered the gravity of the offence and the resources of the firm. The Court concluded that, because the offending conduct was particularly severe, and the firm had adequate resources to meet a fine, no mitigation was appropriate. The Court acknowledged that a substantial fine would cause the company hardship; however, it noted that a certain level of hardship would be required for there to be meaningful deterrence, both general and specific. The Court noted that there was no suggestion that a very large fine would threaten the viability of the company. In light of these, and other, considerations, the Court held that the sentencing judge had been unduly lenient in imposing a fine of €125,000 and, in resentencing the respondent, instead imposed a fine of €1,000,000.

3.186 In *DPP v Kilsaran Concrete Ltd*, the Court of Appeal referred to the earlier Court of Appeal decision in *DPP v Roadteam Logistic Solutions*,[219] concerning proportionality in sentencing.

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[216] See also, Law Reform Commission, *Issues Paper on Suspended Sentences* (IP 12-2017) at paragraph 1.19.

[217] The Commission has previously noted the 3 inter-related stages in sentencing, set out by Egan J in the Supreme Court case of *The People (DPP) v M* [1994] 3 IR 306. These stages are (i) identifying the range of particular penalties (ii) locating the particular case on that range (iii) Applying the factors which mitigate or aggravate the sentence.

[218] [2017] IECA 112.

[219] [2016] IECA 38.

In *Roadteam,* the Court of Appeal had regard to the "overspill factor,"[220] that is, the possible adverse consequence to innocent third parties, which is relevant to the proportionality of the sentence. The sentencing judge had directed that the €1,000,000 fine was to be paid over 3 years, so as to protect innocent employees from this overspill factor. The Court, as a result of this and other factors, upheld the fine of €1,000,000 imposed by the sentencing judge as proportionate.

3.187 In the UK, similar considerations have been taken account of in criminal sentencing for the offence of failure to prevent bribery. In *SFO v XYZ Ltd,*[221] the Crown Court held that "the interests of justice did not require XYZ to be pursued into insolvency." This is because of the impact that a large fine would have on the employees and customers. In order for the sentence to be proportionate, the Court had regard to the defendant's means. As part of a deferred prosecution agreement,[222] the Court imposed a fine of £325,000 instead of the £8,200,000 which would have been the sum had the defendant the means to pay it. Such a sum would have been unrealistic however as it would likely have resulted in the insolvency of the defendant, with the full amount unlikely to be recovered. The Court also ordered the disgorgement of a sum of over £6,200,000 from the defendant, which is separate from the fine.

3.188 The later case of *SFO v Rolls-Royce*[223] concerned bribery and corruption on a global scale. The Crown Court considered what impact the imposition of criminal sanctions would have on the defendant company. Because the defendant was a large global company, the impact of a criminal conviction would have significant adverse consequences for the defendant in light of the mandatory or discretionary debarment from public sector procurement in a number of countries. The fallout from such a prosecution, therefore, would have a significant impact on the finances of the defendant and, as a result, a number of other parties such as employees, customers and the UK defence industry, which relied on the defendant to supply some services. The Court held that it was in the interests of justice, having regard to the circumstances of the defendant, that the offending conduct should be dealt with by way of DPA. This is because a conviction would be disproportionate in its effect, having regard to the "spill-over" on other innocent parties, among other reasons. Under the terms of the agreement, the defendant paid in excess of £650,000,000 in fines and costs. The Court held that this level of sanction was severe enough that it would have a real impact on the financial circumstances of the defendant, without being so severe as to cause the firm to be wound up, which the court held would be inappropriate in the circumstances.

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[220] *Ibid* at paragraph 33.

[221] Crown Court 11th July 2016.

[222] Deferred Prosecution Agreements (DPAs) are discussed in greater detail in Chapter 5

[223] [2017] Lloyd's Rep FC 249.

3.189 Because proportionality is also an important principle of regulatory sanctioning, it should also be taken into account in the sanctioning process. The effect on third parties is, therefore, relevant in a similar manner as it is in a criminal context. Administrative financial sanctions could potentially be significant, and comparable in magnitude, to fines in criminal sentencing. Employees and other innocent third parties should, therefore, be afforded similar protection from the spillover from regulatory sanctions as applies in criminal sanctions. This should be taken into account in conjunction with the enforcement aims, such as deterrence, to ensure that these aims are achieved in a proportionate manner. There should, therefore, be restrictions on the value of administrative sanctions to prevent excessive fines from causing spillover onto other innocent parties.

(e) The monetary amount of the maximum limit

3.190 One challenge posed by placing an upper limit on the level of administrative financial sanction is the "cost of doing business" phenomenon. This involves a regulated entity treating a financial sanction as an additional tax upon its activities as opposed to a punishment or deterrent. An entity considering an activity that, if detected, may result in an administrative financial sanction may ask itself "does the benefit of the conduct outweigh the costs of the conduct"? In essence, this means that any administrative financial sanction imposed must have a sufficient deterrent effect to be considered effective.

3.191 Deterrence can be described as the avoidance of a given action through fear of the perceived consequences.[224] It can be thought of in terms of the following equation: [225]

S x P > B

S = severity of sanction

P = probability of detection and punishment

B = benefit to the wrongdoer of the wrongdoing

3.192 In order for a sanction to have a deterrent effect, S x P must be greater than B. There are two types of deterrent effect: special deterrence in relation to the entity itself and its future conduct, and general deterrence for other regulated entities in the market and how the sanction affects their future behaviour.[226] Ideally, any penalty imposed by the regulator would produce both types of effect. In order for this to happen, the 'S' component of the equation must be of a sufficiently high level. However, a statutory

[224] Freiberg, *The Tools of Regulation* (Federation Press 2010) at 210.

[225] *Ibid*.

[226] Von Hirsch et al*, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research,* (Hart Publishing 1999).

upper limit, coupled with the requirement of proportionality, places a ceiling on the degree of punishment.[227]

3.193 A balance must be struck therefore as to the need for a sanction that is sufficiently severe while at the same time remaining within constitutionally permissible boundaries. It is difficult to anticipate where exactly these boundaries lie. Judicial decisions have not provided any guidance on this issue. Cases involving the imposition of administrative financial sanctions by public bodies have tended to focus on the legality of the powers of the public body to impose a civil sanction and have not specifically considered in detail the level of the sanction to be imposed.

3.194 What is clear is that, should a regulator be provided with administrative financial sanctioning powers, sanctions are liable to become part of the arithmetic in making compliance decisions and thus lose all deterrent effect if they are set at too low an amount. It is difficult to be prescriptive as to the right balance as motivations and economic climates can change rapidly. It is hard for regulators and enforcement agencies to keep up with the changes and decide what the "right" punishment is for the misconduct of corporate or senior management.

3.195 It is not the role of the Commission to make recommendations as to how this balance ought to be struck in practice. It is for the regulators to utilise their particular expertise of the regulated markets and to exercise their powers under legislation. As discussed above, the Commission considers that a ceiling should be placed on the monetary amount of sanction a regulator can impose for constitutional reasons. The Oireachtas in the *Central Bank (Supervision and Enforcement) Act 2013* raised the upper monetary limits available to the Central Bank to €10 million in the case of a legal person or €1 million in the case of natural persons. In addition, as mentioned above, Section 33AS of the 1942 Act contains the overriding requirement that the Central Bank may not impose a monetary sanction that is likely to cause the regulated entity to cease business or the individual to declare bankruptcy.

3.196 The Commission therefore considers that administrative financial sanctions under the unified approach to the drafting and conclusion of regulatory powers proposed by the Commission should be aligned with those that the Oireachtas has made available to the Central Bank and as such should not exceed €10 million in the case of a legal person or €1 million in the case of natural person. This represents the maximum possible figure and it should not be taken as an amount that is imposed as a matter of course. This maximum limit is available in order to allow a regulator to address the worst possible misconduct, representing egregious examples at the highest end of the spectrum of the categories of wrongdoing for which an administrative financial sanction can be imposed. The figures specified would provide the particular regulator with the necessary ability and tools to punish such extraordinary conduct, while remaining within constitutionally acceptable

[227] Freiberg, *The Tools of Regulation* (Federation Press 2010).

boundaries. The figure is also separate from the removal of economic benefit from the breach and any sanction that is a multiple of the disgorgement amount.

3.197 Another limitation that may be placed on the amount of administrative financial sanction is to link the sanction to the turnover or income of the regulated entity. The cap is normally in the amount of 10%.[228] This figure may exceed the €10 million limit depending on the particular regulated entity under consideration. The Commission considers that such a power would be held constitutional as it is by its very nature proportionate to the means of the entity and the potential consequences for the entity are therefore limited.

3.198 The Commission considers that a regulator be provided with the option to select a sanction that is up to 10% of the annual turnover or income of the regulated entity should this figure exceed the monetary upper limit for legal and natural persons. This allows for situations where, due to the financial power of the regulated entity, the monetary limits set out above would not constitute a sanction of sufficient deterrence. Providing the regulator with the option to select an amount linked to turnover or income would allow a regulator to respond to conduct by entities in an effective and proportionate manner.

R 3.33 The Commission recommends that the standardised regulatory powers template should involve, in the case of an administrative financial sanction as applied to a legal person, an upper limit of €10 million or 10% of annual turnover, whichever figure is the greater.

R 3.34 The Commission recommends that the standardised regulatory powers template should involve, in the case of an administrative financial sanction as applied to a natural person, an upper limit of €1 million or 10% of annual income, whichever figure is the greater.

3.199 In addition to these upper limitations, in the interests of overall proportionality and the prevention of negative “spill-overs” for innocent third parties the Commission considers that the proposed regulatory powers approach should be subject to the overriding requirement of not jeopardising the continued viability of the entity that is the subject of the sanction. The Commission considers this requirement is appropriate to preserve the “limited” nature of administrative financial sanctions.

R 3.35 The Commission recommends that the standardised regulatory powers template should involve, in the case of an administrative financial sanction as applied to a legal person, an overriding requirement that the level of the sanction should not be so high that it would be likely to cause the regulated entity to cease business.

R 3.36 The Commission recommends that the standardised regulatory powers template should involve, in the case of an Administrative Financial Sanction as applied to a natural

[228] For example, section 33AQ(4)(a)(ii) of the *Central Bank Act 1942*.

person, an overriding requirement that the level of the sanction should not be so high that it would be likely to cause the person to be adjudicated bankrupt.

(f) Guidance and enforcement policy

3.200 Both the Central Bank and the FCA publish various guidance documents setting out detail on enforcement policies and use of administrative financial sanctions. Further, under section 63 of the Regulatory Enforcement and Sanctions Act 2008, a regulator conferred with administrative financial sanctioning powers under the Act must publish a guidance document. The document must set out matters such as policy as to its use of sanctions, the circumstances in which the sanction is likely to be imposed and the matters likely to be taken into account by the regulator in determining the amount of the sanction.

3.201 The Commission considers that the publication of such documents has a number of advantages. For example, they provide the regulator with the opportunity to set out the approach it will take in relation to discretionary matters. One example of this is to provide extra detail on the various factors that will be taken into consideration when arriving at an appropriate administrative financial sanction or the exact methodology it will employ when calculating the level of sanction. The FCA, for example, through its decisions and enforcement procedures manual, sets out a sophisticated five-stage process in determining appropriate sanction level. It also employs a number of novel and, in the opinion of the Commission, sensible considerations in setting the appropriate level. These include taking breaches by the same entity of regulations in other jurisdictions and the fact as to whether the FCA had called for an improvement in a particular compliance issue recently, prior to the breach, into consideration.

3.202 The Commission considers that the entities regulated by the regulators encompassed by this Report would benefit from the provision of similar guidance. The regulators would also have the opportunity to develop and set out in a guidance document further bespoke sanction calculation factors and methodologies permissible within the legislative framework. Such guidance documents also have the advantage of improving transparency and legal certainty in relation to a regulatory regime. They aide regulated entities in achieving compliance by setting out the approach a regulator will take in certain circumstances. Guidance documents will also allow a regulator to be responsive by signalling the outcomes should the entity engage in certain conduct to a regulated entity in advance. The publication of enforcement policy facilitates communication between the regulator and its regulated entities and can provide clarity and nuance as to enforcement policies.

R 3.37 The Commission recommends that each regulator should be required to publish guidance on enforcement policy and its use of administrative financial sanctions.

CHAPTER 4

REGULATORY ENFORCEMENT AGREEMENTS

A. Introduction

4.01 A regulatory enforcement agreement[1] (REA) is the agreed imposition of an administrative financial sanction (AFS) between the regulator, and a regulated entity in respect of a prescribed contravention, in settlement. This in imposed in preference to the more formal administrative financial sanctions proceedings. Under a regulatory enforcement agreement, when a regulator suspects that a contravention of the regulations has taken place, that regulator may enter into negotiations with the regulated entity or individual concerned, instead of bringing formal enforcement procedures. This would be with a view to ultimately settling the proceedings, usually with the imposition of a financial sanction, among other sanctions.

4.02 As discussed in the previous chapter, administrative financial sanctions are an important part of the "regulatory toolkit" that enables regulators to ensure compliance with regulations. A regulator's authority to enter into regulatory enforcement agreements can complement other enforcement powers, such as the power to impose administrative financial sanctions. Entering into regulatory enforcement agreements can ensure the achievement of a regulator's compliance and deterrent objectives, without the resource demands of a potentially long and costly administrative inquiry. The Central Bank provides an example of this method in its settlement of its administrative sanctions procedure. In practice, all of the Central Bank's enforcement actions have been settled, so any discussion of administrative financial sanctions would be incomplete without also considering the possibility of regulatory enforcement agreements.

4.03 Arguably, there are a number of advantages to the use of regulatory enforcement agreements. As well as the resource saving advantages, regulatory enforcement agreements provide regulators with a degree of flexibility to deal with regulated entities. In addition, these can fill a much-needed gap in the "enforcement pyramid"[2] for some

[1] "Regulatory enforcement agreement" is not a term of art, but a phrase that the Law Reform Commission has employed to refer to the specific type of agreement between regulator and regulated entity. The Commission considered the previously used term in the Issues Paper, Negotiated Compliance Agreements did not capture the true nature of the agreements that were ultimately being considered.

[2] See generally, Ayers and Braithwaite, *Responsive Regulation* (OUP 1992). See also Baldwin and Cave, *Understanding Regulation* 2nd ed (OUP 2012) at 259 to 280.

regulators. For example, administrative financial sanctions themselves are a less severe method of enforcement than criminal prosecution. Regulatory enforcement agreements, in turn, may be seen as an even less adversarial, and more collaborative, method of enforcement. Regulatory enforcement agreements provide the opportunity for a more compliance-based approach that is agreed between the regulator and the regulated entity as a solution to the breach that has occurred.

B. Examples of Regulators' Powers to Settle Enforcement Actions

4.04 As noted, the Central Bank's settlement of its administrative sanctions procedure is an example of a regulatory enforcement agreement in Ireland. Section 33AV of the *Central Bank Act 1942* 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. This settlement process is discussed in detail below.

4.05 Section 14B of the *Competition Act 2002* has some similarities to the Central Bank's settlement procedure.[3] Under section 14B, the Competition and Consumer Protection Commission (CCPC) and the Commission for Communications Regulation (ComReg) have a statutory power to negotiate agreements with regulated entities that are suspected of breaching competition law.[4] When the regulator suspects that an undertaking has breached the *Competition Act 2002*, it can enter into an agreement whereby the regulated entity, 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 2002 Act, thus avoiding the significant cost and deployment of resources involved in enforcement through court action. If the regulated entity 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 regulated entity 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 gave rise to it.

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[3] Unlike the Central Bank's settlement procedure, however, this settlement procedure is not backed up by significant financial sanctioning powers.

[4] The "Competent authority" is either Comreg or CCPC (Previously this was the Competition Authority).

C. The Nature of Regulatory Enforcement Agreements

1. Regulatory enforcement agreements as an Enforcement Tool

4.06 In a superficial sense, regulatory enforcement agreements may resemble "out of court settlements" of civil proceedings. However, there are some significant differences. Private parties to ordinary civil proceedings may decide to settle for less than the value that they place on their claim, in recognition of the disadvantages of going to court. These disadvantages may include the risk that they may be unsuccessful in court, the inconvenience or expense of additional court proceedings, the time delay or even the emotional distress and animosity that can be associated with some cases. Some of these considerations may even be relevant to emanations of the state settling civil claims, for example, a local authority settling a claim in negligence.

4.07 Administrative financial sanctions, however, are different in character to ordinary civil proceedings.[5] The key difference is that there is an enforcement element. While private parties to civil litigation need only be concerned with their own interest, in the sphere of regulatory enforcement there is also the public interest to consider. The regulator usually derives its authority from the promotion of the public interest, for example, the functioning of markets, or the fair treatment of individuals. There is a public interest to the maintenance of regulatory standards by regulated entities. Therefore, regulators must ensure that any settlement of proceedings is consistent with their enforcement objectives in order to strike a balance between practical solutions that are cost effective and resisting an overly lenient approach. Any settlement will potentially affect a regulator's ability to ensure compliance, by affecting the regulated entities incentives or ability to comply. If, for example, the sanction resulting from a regulatory enforcement agreement is significantly more lenient than that which would be imposed otherwise, this might undermine the regulator's ability to ensure compliance with other enforcement tools in the future. Regulated entities may be less likely to adhere to regulatory standards if they believe that they can agree a lenient settlement with the regulator.

4.08 Regulatory enforcement agreements should not, therefore, be seen as a tactical compromise by the regulator, but, rather, a parallel enforcement tool. The calculation of the financial sanction should closely resemble the level that would be achieved if it were imposed by an ASP inquiry. The principal reason for this is that the enforcement considerations that underlie both regulatory enforcement agreements and administrative financial sanctions are the same. The only difference between the two is that regulatory enforcement agreements offer a specific discount in recognition of the regulated entity's early compliance and settlement. This discount can be justified, not on the basis that it is a

[5] Financial Conduct Authority, *Enforcement Guide* (2014) at paragraph 5.3.

tactical settlement, but that it ensures the achievement of the regulators objectives in a timely and cost-effective manner that encourages co-operation by the regulated entity. It must be acknowledged that administrative financial sanctions and regulatory enforcement agreements are both flexible enforcement tools that may depend on the circumstances of the offender and the regulator's approach to enforcement. Although both administrative financial sanctions and regulatory enforcement agreements are flexible and responsive to the circumstances of each case, the exercise of this discretion and flexibility should be consistent across both of these tools. No two cases will be identical but the regulators should apply consistent principles across cases. This ensures that, for regulatory enforcement agreements, no additional leniency is granted over and above the discount in recognition of the early settlement.

4.09 The Central Bank, acknowledging the public interest element of regulatory enforcement agreements, states that it will only enter into a settlement agreement where it accords with its objectives.[6] Consistent with this approach, the sanctions imposed as a result of a settlement will also be based on the same criteria as the sanctions imposed as a result of the ASP inquiry.[7]

2. Regulatory Enforcement Agreements as Part of the "Enforcement Pyramid"

4.10 Regulatory enforcement agreements are one of many tools that a regulator might employ, in order to achieve its objectives. Regulatory enforcement agreements can be seen as part of the array of tools available to the regulator. The complementary manner in which the regulator uses these tools is known as the "Enforcement Pyramid." As discussed further below, different sanctions will be appropriate in different scenarios.

4.11 Regulatory enforcement agreements, as a tool, exist in the intermediate level of the enforcement pyramid. They will usually be suitable in many of the same situations as administrative financial sanctions.

4.12 Less severe sanctions are appropriate where the breach is minor, or where it has caused very little harm. In such circumstances, it may be appropriate for the regulator to educate or persuade the regulated entity of the correct course of action. For example, warnings or reprimands may be appropriate where the breach is minor, where it is the first occurrence, or where there is no harm resulting from the breach. In such circumstances, a more conciliatory approach by the regulator may be appropriate

4.13 More severe sanctions, such as licence revocation or criminal enforcement are also an effective part of the "regulatory toolkit". However, these tools should not be overused. While it is important to impose criminal sanctions in appropriate cases of significant or

[6] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014) paragraph 4.6.2.

[7] *Ibid* at paragraph 4.1.2. See also *Central Bank Act 1942*, section 33AV(2) of the *Central Bank Act 1942*.

morally culpable breaches, they have the disadvantage of being costly to implement and uncertain in their outcome. In addition, such significant tools may have negative spillovers to innocent customers, for example the removal of a service previously available. The onerous burden of proof on the prosecution, which is necessary to protect the accused from the severe consequences of a finding of guilt against them, makes it less likely that a prosecution will be successful, which can dilute the deterrent effect. Similarly, criminal prosecutions, although often effective deterrents, may not address the underlying causes of non-compliance, which can be remedied by more co-operative action on the part of the regulator. Additionally, the conduct that might give rise to regulatory enforcement agreements, for example technical breaches of anti-money laundering regulations, will often not be significant enough to justify criminal prosecution in every instance.

4.14 Just as it is essential that the regulator has tools at the lower end of the enforcement pyramid, to use as appropriate, it is also important that regulators have intermediate to high level tools, such as administrative financial sanctions and regulatory enforcement agreements. These tools are a key part of the enforcement pyramid, without which contraventions that occur at the intermediate level would either be over- or under-deterred.

4.15 As noted in Chapter 1, it is important that a regulator is able to move up and down the "enforcement pyramid" in a manner that is responsive to the particular entity. Such intermediate level tools can combine the advantages of both lenient and severe sanctions. Such tools can combine the compliance and educational effects of less severe sanctions, with the deterrent effects of more severe ones.

3. The Constitutionality of Regulatory Enforcement Agreements

4.16 As discussed in the previous chapter, administrative financial sanctioning powers do not appear to present any constitutional problems, in accordance with the decision in *Purcell v Central Bank of Ireland*.[8] In *Purcell,* the High Court (Hedigan J) held that the Central Bank's ASP inquiry procedure did not infringe Articles 34 or 38 of the Constitution, given that it did not amount to the administration of justice, or the imposition of a criminal penalty.

4.17 In light of this decision, it is unlikely that there would be any constitutional prohibition on regulators entering into regulatory enforcement agreements in respect of administrative sanctions procedures that are, themselves, constitutional. The settlement powers of the Central Bank in respect of its administrative sanctions procedures, which are discussed above, are an example of such a regulatory enforcement agreement power.

4.18 Regulatory enforcement agreements are likely to be constitutionally permissible for two reasons. First, they are voluntary. There is no obligation on a regulated entity to enter into a regulatory enforcement agreement or to agree to its terms. As the agreement would be

[8] [2016] IEHC 514.

voluntary, the constitutional rights of the regulated entity would not be engaged and, if the terms of the proposed agreement were in some way oppressive or disproportionate, the entity could refuse the offer of settlement. The settlement procedure has the same important objectives of achieving effective regulation of financial markets, but without any element of coercion that might give rise to comparisons with criminal enforcement. The burden of the Central Bank's administrative sanctions procedure is proportionate[9] to the important objectives of enquiring into the nature of the banking crisis and ensuring effective financial regulation. It follows, therefore, that a less oppressive measure, in pursuit of the same objectives, also meets the constitutional standard of proportionality.

4.19 The second argument in favour of the constitutionality of settlement agreements is that regulatory enforcement agreements will always be made in respect of a more formal administrative financial sanctions procedure. The constitutional safeguards provided for in that procedure should provide the regulated entity with adequate protection, such as the requirement of confirmation in the High Court. Again, the Central Bank's administrative sanctions procedure is an example of this. A regulated entity could always elect to go through the full ASP inquiry. Of course, this argument would only apply where the administrative sanctions procedure itself provided adequate constitutional protections, such as those recommended by the Commission in the previous chapter.

D. The Central Bank and Regulatory Enforcement Agreements

4.20 As noted in the previous chapter, the Central Bank employs its "settlement procedure" in order to settle proceedings under its administrative sanctions procedure. This is an example of what the Commission refers to as a "regulatory enforcement agreement" in this chapter.

1. Scope, Procedure and Level of Sanction

(a) Scope

4.21 The settlement proceeding applies in respect of the administrative sanctions procedure. The scope of the procedure is therefore the same as it is for administrative financial sanctions.

(b) Procedure

4.22 Section 33AV of the *Central Bank Act 1942* empowers the Central Bank to enter into an agreement with a regulated entity to resolve a suspected prescribed contravention. The

[9] *Ibid* at paragraphs 8.10 and 8.11.

Central Bank refers to such an agreement as a “Settlement Agreement” in its document outlining the administrative sanctions procedure.[10]

4.23 As discussed in Chapter 3, if the Central Bank is concerned that a breach of regulations has been, or is being committed, the Central Bank will begin an investigation under the administrative sanctions procedure.[11] The purpose of the investigation is to determine whether a prescribed contravention has occurred. The Central Bank will commence an investigation in order to gather information to enable it to determine whether there are reasonable grounds to suspect that a prescribed contravention has been, or is, occurring. The investigation will proceed to an ASP inquiry if the Central Bank suspects, on reasonable grounds, that a prescribed contravention has been, or is, being committed and the matter has not been concluded through any other means, for example, by way of settlement. Although not set out in the 1942 Act, the Central Bank’s outline of its administrative sanctions procedure states that its criminal prosecution will not be available in respect of acts by the regulated entity that have been the subject of an ASP inquiry that resulted in financial sanctions.[12]

4.24 After the commencement of the investigation, the Central Bank may write to the regulated entity offering the possibility of a settlement. This “settlement letter” is issued on a “without prejudice” basis, meaning that the Central Bank may still use its other enforcement tools and that the settlement is not binding on the parties until it is signed by both of them. The settlement procedure is at the discretion of the Central Bank; the Central Bank is not obliged to engage in the procedure or to reach a settlement once the procedure has been commenced. It is the stated policy of the Central Bank not to issue the settlement letter until it has assessed all of the information regarding the nature and gravity of the prescribed contravention. This policy allows the Central Bank to assess the appropriateness of a settlement and ensures that any agreed settlement is proportional to the severity of the prescribed contravention. The Central Bank may engage the settlement procedure at any time up until the ASP inquiry makes a finding.[13] However, it is the policy of the Central Bank policy that generally a settlement will not be considered once the Notice of Inquiry has been issued.[14]

4.25 Where a regulated entity is amenable to entering into a settlement agreement and is forthright in its responses to the investigations of the Central Bank, the Central Bank may schedule a settlement meeting if it is satisfied that a settlement is appropriate. In advance of the meeting, the Central Bank will notify the regulated entity of what it considers to be

[10] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014) paragraph 4.1.1.

[11] *Ibid* at paragraph 5.2.1.

[12] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014) paragraph 3.6.2.

[13] Section 33AV(3)(b) of the *Central Bank Act 1942* provides that a settlement agreement may not be entered into by the Central Bank after the completion of the ASP inquiry.

[14] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014) paragraph 4.2.5.

an appropriate sanction, again on a "without prejudice" basis.[15] The Central Bank states in its outline of the procedures that it anticipates that only one meeting should be conducted. The meeting is also "without prejudice" to the regulated entity, meaning that the Central Bank cannot take advantage of the disclosures made by the regulated entity or individual in the course of negotiation. The outline also states that this ensures that the regulated entity can openly discuss the case, in order to reach a settlement agreement.[16]

4.26 The 1942 Act requires that the agreement be in writing. The 1942 Act also provides that the agreement is binding on the Central Bank and the regulated entity. The Central Bank's outline of the administrative sanctions procedure states that the details of the settlement agreement will be published in a statement, and that the Central Bank expects that the regulated entity will admit the breach.[17] The outline also states that the Central Bank must be satisfied that it is an appropriate case to settle when taking account of all of the relevant facts, including the appropriate sanction.[18] The terms of the settlement agreement may be of a similar kind to those sanctions that the Central Bank may impose at the conclusion of the ASP inquiry, where the Central Bank has found that the regulated entity has committed a prescribed contravention.[19] These potential sanctions are set out in section 33AQ(3) of the 1942 Act and include such sanctions as: a reprimand, a financial penalty or a direction to repay money paid by customers. However, the Central Bank does state that it may be necessary on occasion to depart from the procedure outlined in its literature.

4.27 Although the sanctions agreed in the settlement agreement will closely track those that would be imposed after an ASP inquiry, a regulated entity may benefit from the early discount settlement scheme. This scheme allows the Central Bank to apply a discount of up to 30% from the sanction that the regulated entity might otherwise expect. In order to incentivise earlier settlement, the maximum percentage discount that the Central Bank may grant depends on the stage in the investigation at which the settlement is reached. The Central Bank will specify a period in the settlement letter, which it refers to as stage 1, during which a maximum discount of 30% is possible. The regulated entity must agree to the settlement procedure within this timeframe in order to be eligible for the full discount. During stage 2, after the specified period but before the notice of Inquiry is issued, the regulated entity will still be eligible for a lower maximum percentage discount of 10%. If the settlement is agreed after this point, but before the conclusion of the ASP inquiry, then no discount can apply and the sanction will take account of the costs

[15] *Ibid* at paragraph 4.2.6.

[16] *Ibid*.

[17] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014) at paragraph 4.2.3.

[18] *Ibid* at paragraph 4.2.1.

[19] Section 33AV(2) of the *Central Bank Act 1942* provides that the settlement agreement may include terms under which the regulated entity "accepts the imposition of sanctions of the kind referred to in section 33AQ." Section 33AQ of the *Central Bank Act 1942* sets out the sanctions that may be imposed by the Central Bank at the conclusion of the ASP inquiry.

incurred by the Central Bank. If a settlement agreement is reached, any discount will be detailed in the accompanying statement.

4.28 Although, as noted above, the settlement procedure is governed by section 33AV, section 33AR provides for a similar parallel enforcement mechanism. Under section 33AR there are two possible enforcement options if the breach is acknowledged by the regulated entity. In such circumstances, the Central Bank may (a) hold an inquiry to determine the sanction only or (b), where the regulated entity consents, the Central Bank may impose a sanction under its powers under section 33AQ. This second option is similar to the settlement procedure, although, with one difference.

4.29 Section 33BC of the 1942 Act provides that the Central Bank shall publish the details of prescribed contraventions that are discovered as a result of an inquiry under section 33AQ. In addition, section 33BC provides for the publication of the details of any sanctions imposed by the Central Bank under section 33AR, either as a result of a determination of an ASP inquiry or on the consent of the regulated entity.[20] Section 33BC specifies that the Central Bank must only publish those particulars that "it thinks appropriate.[21]" Section 33BC(4) further specifies that the Central Bank must not disclose certain confidential information if such publication of particulars would unfairly prejudice a person's reputation. Section 33BC does not apply to settlements under 33AV, and there is therefore no statutory obligation on the Central Bank to publish particulars of such settlements.

4.30 As noted above, it is the policy of the Central Bank to publish the particulars of settlements under section 33BC, and it usually does so.

4.31 The settlement agreement will usually include a financial sanction.[22] The complete list of possible elements of the settlement are as follows:

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[20] Section 33BC(2) of the *Central Bank Act 1942*.

[21] *Ibid.*

[22] Except where to do so would cause bankruptcy.

a) admissions by reference to the prescribed contraventions;

b) a statement that the prescribed contraventions have ceased or are being addressed;

c) a statement from the regulated entity that it has disclosed all relevant information in its possession;

d) appropriate sanctions;

e) any discount for early settlement;

f) a detailed public statement; and

g) other relevant terms.

4.32 Where a regulated entity fails to comply with a settlement agreement, the Central Bank may apply to the High Court to enforce the terms of the agreement.[23] Under such an application, if the High Court is satisfied that the regulated entity has failed to comply with any of the terms of the agreement, the High Court may make an order directing the regulated entity to comply with the relevant term or terms. Where the enforcement concerns the payment of the financial element of the sanction, this may be enforced by way of summary judgment, which has the advantage of being cheaper and less time consuming than a full High Court hearing.[24]

4.33 The settlement agreement will form part of the regulated entity's compliance record, and the Central Bank may refer to the settlement agreement in future enforcement actions against the entity.[25]

(c) Level of sanction

4.34 The level of financial sanction imposed by the Central Bank as a result of the settlement is related to the level of sanction that would be imposed as a result of the ASP inquiry.

4.35 In the previous chapter, the level of sanction that can result from the ASP inquiry is discussed. As noted, the Central Bank has discretion over the sanction that results from the ASP inquiry. A number of options can result from the ASP inquiry; the sanction may be: a caution or reprimand, a financial sanction, suspension or revocation of licence. The Central Bank has flexibility regarding the sanction that may be applied; however, it stipulates the sanctioning factors that it will have regard to. These factors are: the nature, seriousness and impact of the contravention, the regulated entity's conduct after the

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[23] Section 33AV of the *Central Bank Act 1942*.

[24] Section 33AV(4) of the *Central Bank Act 1942*.

[25] See Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014), paragraphs 4.8.1 to 4.8.4.

contravention, the previous record of the regulated entity, and other general considerations.

4.36 The sanction is limited by factors such as: the statutory maximum, the company's turnover and whether the sanction is likely to cause a company to go out of business or make an individual bankrupt.[26] The Central Bank, in deciding the level of the sanction will have regard to all the circumstances of the case, including some certain specific factors. The maximum limits and level of sanction depend on the conduct giving rise to the breach and the legislation under which it falls. As noted in the previous chapter, the Central Bank may impose a sanction as a result of the *Central Bank Act 1942,* as amended, or the domestic legislation implementing EU Capital Requirements.[27]

4.37 The sanction imposed as a result of settlement is determined in the same manner as the sanction would have been determined had the Central Bank proceeded to full ASP inquiry, with the exception that a discount of up to 30% may apply in respect of a settlement. As noted, the level of discount depends on the stage at which the settlement is reached. For settlements during stage 1, the time period specified by the Central Bank in the Settlement Letter, the maximum discount is 30%. During stage 2, after the end of Stage 1 but before the Notice of Inquiry is issued, the maximum discount is 10%. While both the sanction that results from the ASP inquiry and the sanction that results from settlement are flexible with regard to the nature and level of sanction imposed, with the exception of the discount rate, this flexibility is largely governed by the same factors discussed above.

4.38 In some cases, the settlement agreement will contain some element of compensation or redress to victims of the breach.[28] Previous examples have included: the payment of financial compensation, provision of appeals process or other restorative measures. However, the compensation procedure is not mentioned in the 1942 Act. Nor is the compensation procedure set out in detail in the Central Bank's outline of its administrative sanctions procedure. However, the outline does mention that the list of possible sanctions is non-exhaustive in terms of settlements. The outline also states that compensation is a relevant consideration for the Central Bank for the purposes of determining the sanction.[29]

2. Central Bank policy regarding settlement agreements

4.39 The Central Bank sets out the policy basis for its use of the settlement procedure in its outline of its administrative sanctions procedure. The Central Bank acknowledges the

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26 Section 33AS of the *Central Bank Act 1942*.

27 *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

28 See, for example the Central Bank of Ireland, *Settlement Agreement between the Central Bank of Ireland and Springboard Mortgages Limited trading as Springboard Mortgages* (2016) discussed below.

29 Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014) paragraph 6.3.1.

public interest in settling proceedings against regulated entities as early as possible, provided the Central Bank is satisfied that it is an appropriate case in which to do so.

4.40 The Central Bank identifies two advantages of the settlement procedure. The first advantage is that settlement allows the Central Bank and the regulated entity to swiftly resolve the contravention.[30] Early settlement is an efficient use of the Central Bank's resources because it can achieve its enforcement objectives in a way that is less costly or time-consuming than the ASP inquiry for both parties. This advantage relies on the credible threat of an ASP inquiry with a reasonable prospect of ultimately imposing sanctions with financial incentives to encourage early settlement. These financial incentives must be significant enough to allow for early settlement, but not so significant as to compromise the Central Bank's regulatory enforcement objectives.

4.41 The Central Bank also observes that there are several advantages of accompanying the settlement agreement with a public statement. The public statement informs the market of the nature of the breach and the sanction imposed. This enhances the deterrent and compliance effects of the sanction by making others aware of the severity of the sanction and the required steps to be taken to ensure compliance. Underlining the importance of the public statement, the Central Bank also acknowledges the benefit of publication as an "important tool in promoting the transparency of the Central Bank's decision-making process."[31]

4.42 It is part of the Central Bank's enforcement policy to encourage co-operation with its investigations. In determining the level of sanction as a result of either the settlement or the ASP inquiry, the Central Bank will have regard to the level of co-operation by the regulated entity or individual concerned.[32] In addition, the level of co-operation by the regulated entity is also relevant to the Central Bank's decision as to whether to offer the regulated entity the settlement procedure, and, accordingly, any discount for early settlement.[33]

3. Examples of Settlement Agreements

(a) The settlement agreement between The Central Bank and Ulster Bank

4.43 The settlement agreement between the Central Bank and Ulster Bank in 2014, is an example of the settlement agreements discussed above.[34] The terms of the agreement were published by the Central Bank. Ulster Bank was reprimanded in relation to both IT

[30] *Ibid* at paragraph 4.2.2.

[31] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014) paragraph 4.7.1.

[32] *Ibid* at paragraph 6.3.1.

[33] *Ibid* at paragraph 4.2.1.

[34] Central Bank of Ireland, *Settlement Agreement between the Central Bank of Ireland and Ulster Bank Ireland Limited* (2014).

and governance failings that resulted in approximately 600,000 customers being deprived of essential banking services for 28 days.[35] Ulster Bank accepted the findings of the Central Bank and agreed to pay €3,500,000 in settlement of administrative financial sanctions proceedings. This was the maximum fine that was available at the time, taking account of the €5,000,000 upper limit that was in place[36] and the 30% discount for early settlement. In calculating the appropriate sanction, the Central Bank considered: both the seriousness of the breach and the length of time over which the breaches occurred. These factors were weighed against the mitigating factors such as the fact that Ulster Bank co-operated and settled at an early stage and took steps to remedy the breaches. In addition to the fine and reprimand, a redress scheme was also agreed between the Central Bank and Ulster Bank whereby Ulster bank paid a total of approximately €59,000,000 to affected customers in compensation for the inconvenience caused.

(b) The settlement agreement between the Central Bank and Springboard Mortgages

4.44 The settlement agreement reached between the Central Bank and Springboard Mortgages in 2016 is another example of a settlement of the Central Bank's administrative sanctions procedure.[37] Springboard Mortgages agreed to pay €4,500,000 in respect of breaches of its obligations to tracker mortgage customers under the Consumer Protection Codes 2006 and 2012.[38] The Central Bank also issued a public statement reprimanding Springboard Mortgages for the contraventions, which Springboard admitted had occurred. In addition to the fine and reprimand, the Central Bank also required Springboard to undertake a comprehensive redress and compensation scheme. The total value of compensation provided to 222 customers was approximately €5,800,000.

[35] See Hancock, "Ulster Bank fined €3.5m by Central Bank over IT failure" *The Irish Times*, 12 November 2014.

[36] Section 33AQ(4) of *the Central Bank Act 1942* previously provided that the maximum sanction against a regulated entity (as opposed to an individual) could be €5,000,000. This was amended by section 68(b) the *Central Bank (Supervision and Enforcement) Act 2013*, increasing the maximum sanction to €10,000,000 or 10% of the annual turnover of the regulated entity, whoever is the greater. This change came into operation on the 1st of August 2013, in accordance with the *Central Bank (Supervision and Enforcement) Act 2013 (Commencement) Order 2013* (SI No 287 of 2013).

[37] Central Bank of Ireland, *Settlement Agreement between the Central Bank of Ireland and Springboard Mortgages Limited trading as Springboard Mortgages* (2016).

[38] Springboard was in breach of Chapter 1, General Principle 2 of the *Consumer Protection Code 2006*, and Chapter 2, General Principle 2.2 of the *Consumer Protection Code 2012* that is the requirement to "Act with due skill, care and diligence in the best interests of its customers". Springboard Mortgages was also in breach of Chapter 1, General Principle 4 of the 2006 Code and Chapter 2, General Principle 2.4 of the 2012 Code, that is, the requirement to "have and/or effectively employ adequate and/or appropriate resources and procedures and systems and control checks to ensure compliance."

4.45 This breach was an example of the wider "tracker mortgage scandal" that has been widely reported.[39] Springboard Mortgages had failed to apply the correct rate of interest to the mortgage accounts of 222 customers. As a result, these customers paid higher interest rates than they were required to by the initial agreement. The average amount of overcharging was in excess of €19,000, with some accounts overcharged as much as €68,000. As well as the direct cost of the higher interest rate, some of the customers suffered significant losses as a direct consequence of this over charging, for example, some customers went into mortgage arrears. Such a consequence could be seriously detrimental to the customers, resulting in a poor credit rating or the loss of their home.

4.46 Under the redress and compensation scheme agreed between the Central Bank and Springboard Mortgages, Springboard compensated affected customers to the value of €5,800,000 in respect of these breaches. Unlike the fine of €4,500,000, the redress and compensation reflects the damage done to customers as a result of the breach and was therefore, not subject to the 30% discount for early settlement. This redress scheme had a number of elements:

1. Each customer's account was restored to the correct tracker interest rates;
2. Each customer's account balance was restored to the correct amount, taking account of the interest rates that the customers should have been charged;
3. Some customers were awarded additional compensation payments to reflect the detriment suffered as a result of the overpayment;
4. Customers were given additional payments to pay for professional advice about the level of compensation offered;
5. An independent appeals process was established;
6. Redress and compensation payments were made immediately, whether or not the customer decided to appeal; and,
7. Springboard agreed not to invoke any statutory limitation period in respect of any complaint.

4.47 The Central Bank's director of enforcement stated that the settlement "served as a clear and timely warning to all regulated firms of their obligations to customers"[40]

[39] A number of other regulated entities were also responsible for such breaches. Up to 15,000 people received the wrong interest rates on their loans. Between 2015 and 2017 banks paid out a total of over €120,000,000 in compensation to consumers. See for example Hancock, "Banks pay out €120m over tracker mortgage scandal" *The Irish Times*, 4 April 2017. A number of other regulated entities were also responsible for such breaches.

[40] Central Bank of Ireland, *Settlement Agreement between the Central Bank of Ireland and Springboard Mortgages Limited trading as Springboard Mortgages* (2016), page 2.

4.48 As noted above, the settlement with Springboard was part of the wider "tracker mortgage scandal". Permanent TSB (PTSB) implemented a substantial redress and compensation regime in respect of its own customers for such breaches. As a result of these revelations in relation to Springboard and PTSB, the Central Bank undertook a "tracker mortgage examination", which began in October 2015.[41] The Central Bank discovered that these practices were widespread among virtually every financial institution in the country. A practice had developed among banks around 2010 whereby they were seeking ways to attract new mortgage customers. Tracker mortgages were attractive to customers, but ultimately very costly to the banks and they wished to transfer customers to higher interest rates. Via bi-lateral meetings with the financial institutions affected, the Central Bank, during its examination, instructed them to examine their mortgage portfolios and take such necessary redress they considered appropriate.

4.49 By October 2017, under its self-imposed redress scheme, PTSB had paid out a total of €43,000,000 in redress and compensation, on its own behalf and on behalf of its former subsidiary Springboard Mortgages. However, other banks had not been as quick to identify affected accounts and implement redress and compensation schemes. By October 2017, some banks were still identifying affected accounts, stating that it would take yet more time to resolve the problems.

4.50 In October 2017, questions were raised in the Irish media about the adequacy of some banks' response to the tracker mortgage issue. The Taoiseach, speaking in Dáil Éireann, stated that the banks' response to the scandal was inadequate. The Irish Times reported that just 25% of impacted customers had received redress and compensation. The governor of the Central Bank, speaking to an Oireachtas Committee, described the Central Bank's investigation as: "the largest, most complex and significant conduct review" the regulator has undertaken under its consumer protection remit. The Irish Times also reported May 2018, that the Central Bank initiated formal proceedings under its ASP inquiry powers against six banks.[42] By this time, over 37,000 customers had been identified as affected by the scandal, with an overall cost of redress and compensation approaching €1,000,000,000. The Director of Enforcement of the Central Bank also stated that they had begun communications with an Garda Síochana, although no formal criminal proceedings have been initiated as of the time of writing (September 2018).

4.51 The tracker mortgage scandal illustrates how administrative financial sanctions and regulatory enforcement agreements can be effective at securing compliance with regulations, and providing redress for consumers. Even the credible threat of such a sanction can encourage compliance by the regulated entities. The tracker mortgage example also acts as a reminder that sanctioning tools such as administrative financial sanctions and regulatory enforcement agreements exist within a broader framework of

[41] *Ibid* at 3.

[42] Hancock, "Tracker mortgage scandal has cost banks almost €1bn" *The Irish Times*, 11 May 2018.

the “enforcement pyramid.” Where tools such as regulatory enforcement agreements are not effective, the regulator may wish to impose more onerous sanctions.

(c) Conclusions and Recommendations about the Central Banks Settlement Procedure

4.52 In the previous chapter, the Commission recommended that, in general, the Central Bank’s ASP inquiry procedure was fit for purpose, subject to some recommended changes to the procedure surrounding inquiries. Similarly, the Commission considers that the ability to enter into regulatory enforcement agreements, which the Central Bank calls its settlement procedure, is a worthwhile power for it to have in its regulatory toolkit, which complements and strengthens its administrative financial sanctioning powers.

R 4.01 The Commission recommends that, subject to the below recommendations and the recommendations in the previous chapter, the powers and procedures by which the Central Bank reaches settlement agreement with regulated entities and individuals are fit for purpose and do not require reform.

E. The UK Financial Regulator and Regulatory Enforcement Agreements

1. Introduction and Scope

4.53 As discussed in the previous chapter, the Financial Conduct Authority (FCA) is a financial regulator in the United Kingdom. It is a conduct regulator for financial services firms and financial markets, and the prudential regulator for a number of those firms. As noted, it is a useful comparator for the purposes of administrative financial sanctions because of its comparable scope and purpose to those of the Central Bank. Similarly, the FCA may enter into settlement agreements that resemble the Irish Central Bank’s settlement procedures.

2. Procedure

(a) Administrative financial sanctions

4.54 The FCA sets out its administrative financial sanctions procedure in its Enforcement Guide. The FCA’s procedure, as set out in this guide, is discussed extensively in the previous chapter.[43] The FCA’s procedure is governed by the *Financial Services and Markets Act 2000*.

4.55 The 2000 Act applies to both individuals and firms (both incorporated and unincorporated) for certain prescribed contraventions regarding breaches of conduct. The contraventions covered include: a breach of conduct by an “approved person”, market abuse by an individual, and a contravention of the 2000 Act by a firm. The 2000 Act sets

[43] Financial Conduct Authority, *Enforcement Guide* (2014).

out the procedure that the FCA must follow in order to impose an administrative financial sanction. At the first stage of the process of imposing administrative financial sanctions, the FCA will issue a "warning notice" to the regulated entity or relevant person, where it considers that an enforcement action such as an administrative financial sanction is appropriate. Where the warning notice relates to the imposition of an administrative financial sanction it will set out the amount of the sanction. The warning notice will also specify that the recipient has 14 days within which to make representations to the FCA.

4.56 In the next stage of the enforcement process the FCA will issue a "decision notice." Alternatively, if no enforcement action is to be pursued, a "discontinuation notice" will be served. The decision notice sets out the enforcement action that the FCA will take, the amount of the sanction and the reasons from the decisions. The FCA will also inform the recipient of their right to refer the matter to the Upper Tribunal. The decision notice does not have to be on the same terms as the warning notice. Section 387 of the 2000 Act requires the FCA to decide, within a reasonable period, whether to issue a decision notice.

4.57 If the matter is not referred to the Upper Tribunal, the FCA will issue a "final notice," formally concluding the matter. The FCA must publish such information about the final notice as it considers appropriate. This publication usually involves a press release on the FCA website including a comment from a senior staff member of the FCA with the final notice included.

4.58 The matter will be referred to the Upper Tribunal (Tax and Chancery Chamber) if the decision notice is not accepted by the regulated entity. The Upper Tribunal is an independent tribunal created by the *Tribunals Courts and Enforcement Act 2007.* The Upper Tribunal is composed of judges and experts in a particular field. In cases concerning administrative financial sanctions, the Upper Tribunal will make the determination regarding the appropriate sanction, if any. Such a decision can be appealed to the Court of Appeal in England and Wales or to the Court of Session in Scotland.

(b) Settlement Procedure

4.59 The possibility of settlement represents a less formal method of resolving the alleged contravention.[44] A regulated entity subject to an enforcement action by the FCA may agree to a financial sanction instead of contesting the administrative financial sanctions procedure described above. Alternatively, the regulated entity may enter into a "focused resolution agreement" to partly contest the proposed action.[45] Another option available to the regulated entity is to agree to the FCA issuing the enforcement notices in an expedited manner and proceeding to the Upper Tribunal to fully contest the decision of the FCA.[46]

[44] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 5 sets out the FCAs settlement procedure.

[45] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 5.1.8.AG

[46] *Ibid* at paragraph 5.1.1.G.1A

4.60 Settlement may take place at any time during the process.[47] It may take place any time before the warning notice is issued up until the point where the Upper Tribunal has reached its determination. The issuing of a warning notice will often prompt "without prejudice" discussions between the regulator and the regulated entity. Often the warning notice will be accompanied by a letter inviting the regulated entity to enter into settlement discussions, and indicating the scale of the discount to any financial penalty that would be applied. The FCA states that, in general, early settlements are better because it minimises costs. However, the FCA will only engage in settlement discussions once it has a sufficient understanding of the nature of the breach. Actions are rarely settled after the decision notice has been issued.

4.61 Parties to the settlement process will often agree that neither party will subsequently seek to rely on admissions or concessions in the more formal ASP inquiry procedure. The decision on settlement will be taken by "settlement decision makers"[48] within the FCA. It had previously been the case that the Regulatory Decisions Committee (RDC) would make this determination; however, this gave rise to concerns that the RDC might find it difficult to later ignore concessions or admissions offered by parties to the discussions. This could dissuade parties from fully engaging with the process if they were concerned that there could be disadvantages to full disclosure. Despite the "without prejudice" nature of the settlement discussions, the FCA can still use information gleaned from settlement discussion to direct their continuing investigations, if any. Additionally, the RDC may be informed that negotiations are taking place, where relevant. For example, if there is an application to extend the period within which representations may be made.

4.62 Where a settlement agreement is entered into by the regulated entity, the FCA will still issue the warning notice and the decision notice.

(c) Sanction level and factors applied

4.63 The sanction agreed on settlement is calculated in fundamentally the same way as the sanction imposed as a result of the formal enforcement process (the ASP inquiry). The calculation of the administrative financial sanction imposed by the FCA is discussed in greater detail in the previous chapter. The principles governing the settlement will, therefore, be the same principles that govern the formal sanctioning process. These principles are disgorgement, punishment and deterrence. As a result, the two mechanisms

[47] Also, as noted above, if the decision notice is not contested by the regulated entity, the FCA will proceed straight to the final notice. This is similar but distinct from settlement and represents more of a non-opposition to the formal enforcement process, rather than a settlement of proceedings.

[48] The settlement decision makers are two senior FCA staff, one of whom will be of at least director of division level (which may include an acting director) and the other of whom will be of at least head of department level. At least one of the Settlement Decision Makers will not be from the Enforcement and Financial Crime Division. The other settlement decision maker will usually be, but need not be, from the Enforcement and Financial Crime Division. A settlement decision maker will not have been directly involved in establishing the evidence on which the decision is based.

of enforcement should reach the same figure, with the exception that a discount of up to 30% will be applied in recognition of the early settlement.

4.64 As noted in the previous section, the FCA employs a 5-step framework to determine the seriousness of the breach. Steps 1 to 4 reflect the ordinary calculation of the formal enforcement of sanctions, whereas step 5 only applies to settled proceedings. Step 1 involves the removal of any financial benefit derived from the breach, that is, disgorgement. In step 2, the FCA determines a figure that represents the seriousness of the breach. The seriousness of the breach is related to the revenue generated and the harm caused by the breach; however, this should not be confused with disgorgement under step 1. Under step 3, the step 2 figure is adjusted to take account of any aggravating or mitigating circumstances, such as the level of cooperation. Under step 4, the figure is adjusted upwards order to ensure that the sanction sufficiently deters the regulated entity and others.

4.65 Under step 5, the discount for settlement is applied. This discount is intended to encourage regulated entities to settle proceedings. The amount that would otherwise have been payable, under steps 1 to 4, is reduced to reflect the stage at which the firm reached the agreement. The settlement does not apply to the disgorgement under step 1; arguably, the entity should not be able to gain any advantage from the breach, even if they admit the breach and reach a settlement.

4.66 The amount by which the penalty is reduced will depend on whether the settlement agreement is a settlement agreement proper or a "focused resolution agreement."[49] For settlement agreements other than focused resolution agreements, there will be a 30% reduction in penalty if the agreement is reached within the time period set out by the FCA in their communication to the regulated entity. The FCA's Decision Procedure and Penalties Manual states that the FCA must first have a sufficient understanding of the facts of the case in order to know whether a settlement is warranted, and that the notice period must be "reasonable."[50] There will be no reduction in the sanction if an agreement is not reached within the reasonable period communicated by the FCA to the regulated entity.

4.67 Where the settlement agreement is a focused resolution agreement, the level of discount depends on the nature of the agreement between the FCA and the regulated entity. As with all other settlement agreements described in the previous paragraph, there will be no discount where an agreement cannot be reached within the reasonable period communicated by the FCA to the regulated entity. Where an agreement can be reached, there are three possible discount levels. Where an agreement is reached on all relevant facts, including whether these facts constitute a breach or breaches, the discount for settlement will be 30%. Where an agreement is reached on all relevant facts only, without

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[49] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 5.1.1.

[50] *Ibid* at paragraph 6.7.3(1).

an agreement on whether those facts give rise to breaches, the discount will be between 15% and 30%. Where the agreement does not fall within either of the previous two scenarios, then the discount will be between 0% and 30%. Where the applicable discount falls within a range the settlement decision makers will determine the range. Where the focused resolution is followed by a full settlement agreement before the prescribed time, the discount will be governed by the discount applicable to full settlement agreements.

(d) Public statement

4.68 The FCA will consider the circumstances of each case but it will usually issue public statements along with its various statutory notices: warning notices, decision notices and final notices. The FCA states that the settlement of proceedings will not normally eliminate the need to issue the statutory notices.[51] The settlement of proceedings will, therefore, usually be accompanied by a public statement.

4.69 The procedure for the release of public statements relating to statutory notices varies depending on the statutory notice. As discussed above, warning notices are issued at the start of an enforcement process where the FCA considers that a financial sanction, which may ultimately be settled by agreement, is appropriate. The FCA may publish information relating to warning notices after having consulted the entity to which the notice is given. The decision on whether to publish information relating to the warning notice and, if so, what information to publish, will be taken by the RDC. The procedure for this decision is set out in the Decision Procedure and Penalties Manual. The RDC will first settle the wording of the public statement and arrange for it to be given to the person or persons to whom the warning notice was sent. The recipient will have 14 days to respond to this statement; however, they may apply for an extension of time within which to respond. If there is no response, the FCA will proceed with publication of the statement. If there is a response, the RDC will consider whether it is appropriate, considering all of the circumstances and issues raised in the response, to publish a statement. The RDC will notify the regulated entity of the outcome of the decision whether or not to publish a statement.

4.70 The statement will typically be published on the FCA website. The statement will often contain a brief summary of the facts so that the other regulated entities may understand the circumstances that gave rise to the warning notice.[52] The FCA may also consider it appropriate to identify the firm or individual in the statement. The FCA will not normally publish the nature of the proposed sanction at this point in the process. The statement will also make it clear that the warning notice is not a final decision of the FCA, the recipient has the right to make representations to the FCA and that any subsequent decision notice is subject to a reference to the Upper Tribunal.

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[51] *Ibid* at paragraph 5.1.1.

[52] Financial Conduct Authority, *Enforcement Guide* (2014) at paragraph 6.7G.

4.71 Section 391(4) of the 2000 Act provides that the FCA must publish such information about the decision notice or final notice, as it considers appropriate. As with warning notices, the FCA will usually consider the publication of a statement relating to decision notices and final notices appropriate. This statement will usually be published on the FCA's website, along with a press release. The FCA will also notify the firm or individual concerned if it intends to publish a decision notice. However, the FCA states that it will not publish any information that, in the opinion of the FCA, would be unfair to the person who is subject to the enforcement action, would be detrimental to consumers or that would jeopardise the stability of the financial system. The FCA is also committed to periodically reviewing the publications on its website to assess whether they continue to be appropriate. Section 391(7) of the 2000 Act provides that the FCA may publish information in such a manner as it considers appropriate.

4.72 In its enforcement guide, The FCA notes some of the benefits associated with the publication of statements along with statutory notices.[53] The publication of statements accompanying statutory notices ensures the transparency of the FCAs decision making. Publication also provides information to the public and maximises the deterrent effect of the enforcement action by ensuring that others are aware that breaches of regulations result in sanctions.

(e) FCA settlement with Merril Lynch

4.73 The Settlement between the FCA and Merril Lynch International (MLI) in October 2017 is an example of a settlement, by the FCA, of enforcement proceedings.[54] The FCA published the details of its final notice in relation to the settlement with MLI for failure to report details of derivatives trades as required by the European Market Infrastructure Regulations (EMIR)[55] and for breaches of the FCAs "principles for business." The proceedings were settled by MLI during stage 1 of the FCA's settlement procedures, and MLI were, therefore, eligible for the maximum discount of 30%. The financial sanction imposed on MLI as a result of settlement was £34,524,000.

4.74 MLI had failed to report around 68.5 million derivatives transactions that were required to be reported under Article 9 of the EMIR. MLI had also contravened the FCAs "principles for businesses," by failing to place adequate oversight, or supply adequate resources to their

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[53] Financial Conduct Authority, *Enforcement Guide* (2014) at paragraph 6.10.

[54] Financial Conduct Authority, *Final Notice to Merril Lynch International* (2017) *https://www.fca.org.uk/publication/final-notices/merrill-lynch-international-2017.pdf*.

[55] *Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC Derivatives, Central Counterparties and Trade Repositories* (EMIR) imposes requirements to reduce risks associated with the derivatives market. In Ireland the Central Bank is the National Competent Authority for EMIR, as designated by the *European Union (European Markets Infrastructure) Regulations 2014* (SI No 443 of 2014).

reporting on the trading of derivatives. The FCA issued a detailed public statement outlining the nature of the breach and method of calculation of the sanction.

4.75 No financial benefit was derived from the breach by MLI and therefore the disgorgement amount calculated under step 1 was £0. The breaches involved millions of discrete failures to report and took place over a protracted period of time. Additionally, the breaches did not cause loss to customers or affect market confidence; therefore, the figure calculated as part of step 2 was £30,835,000. It was an aggravating factor that MLI had been responsible for similar breaches previously. However, the self-reporting, co-operation and initial remedial steps taken by MLI were mitigating factors. The resultant sum, having factored in the aggravating and mitigating factors was £49,320,000, under step 3. Under step 4, the FCA considered that the figure constituted a sufficient deterrent to others, so the penalty was not increased. Under step 5, the figure was reduced by 30% in recognition of the settlement, resulting in the final figure of £34,524,000.

(f) Settlement policy

4.76 The FCA identifies some advantages to its ability to settle proceedings in its Enforcement Guide.[56] The Enforcement Guide notes that settlement is an efficient use of resources as it can achieve the same outcomes as administrative sanctions, but at a lower cost. In addition to reducing costs, enforcement actions are initiated sooner where there is an early settlement. Where there is an early settlement, consumers, or other third parties, may receive compensation earlier than they would otherwise.

4.77 The FCA endeavours to reach settlement agreements as early as possible. One of the advantages of the early settlement of proceedings is that resources are saved by avoiding the expense of the formal enforcement process. A very early settlement will therefore maximise these advantages because this will save the FCA from utilising their more severe enforcement resources. The FCA states, however, that they will only engage with the enforcement settlement process once they have compiled sufficient information to determine whether a settlement is appropriate, having regard to their statutory objectives.[57]

4.78 The FCA states that settlement is a regulatory decision and, as such, it is not the same as the tactical settlement of ordinary civil proceedings. The FCA must have regard to its statutory objectives when considering the decision. The FCA emphasises the importance of sending clear and consistent messages to the regulated entities. The FCA will, therefore, only settle in appropriate cases. Accordingly, the Enforcement Guide states that there is no distinction between "action taken following agreement with the subject of enforcement action and action resisted by the firm before the RDC".[58] In order to ensure

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[56] Financial Conduct Authority, *Enforcement Guide* (2014).

[57] *Ibid* at paragraph 5.3.

[58] *Ibid* at paragraph 5.2.

consistency between the Enforcement and Financial Crime Division and the RDC, these bodies regularly engage in high level, principles-based discussions of the appropriate level of sanctions.

4.79 The FCA also states that the settlement decision makers strive for consistency in decision making; particular rules or principles will often apply similarly in similar cases.[59] However, the FCA does reserve the right to take different views in two seemingly similar cases. Enforcement cases will rarely be identical and the FCA states that it must be able to respond to a changing principles-based regulatory environment.

F. Advantages and Disadvantages of Regulatory Enforcement Agreements

4.80 As discussed in Chapter 2, a broader regulatory toolbox may improve the ability of regulators to ensure compliance. The "enforcement pyramid" is a useful analytical tool for understanding how a regulator might use the powers available to it and how they might choose between these powers.[60] Regulatory breaches occur on a spectrum of severity, from minor breaches on one end, to severe, on the other. Similarly, the disposition of regulated entities also falls on a spectrum, some regulated entities only contravene regulations through inadvertence and they are quick to resolve the issue once it is highlighted by the regulator; other regulated entities may, on the other hand, be more negatively disposed to co-operation with, or corrective action from, the regulator. Because the offending conduct varies, so too does the appropriate response. Where the breach is inadvertent, providing information may be the appropriate sanction. Where the breach is minor, moral suasion or a warning may be appropriate. Where the breach is significant, deliberate, or repeated, then criminal sanctions may be the appropriate response. The regulator themselves will usually be best placed to assess which tool is appropriate in each circumstance.

4.81 Administrative financial sanctions and regulatory enforcement agreements exist on the intermediate-to-high step on this enforcement pyramid. Providing regulators with regulatory enforcement agreement powers might be one part of a broader policy of providing the regulator with a full array of tools. Broadening the tools available to the regulator allows the regulator to act responsively in choosing the appropriate tool. An incomplete toolbox may result in ineffective regulation where gaps in enforcement powers leave some breaches unaddressed. Where, for example, only relatively lenient powers are available to the regulator, the regulated entity will be insufficiently deterred from engaging in the offending conduct. Conversely, where the only options are overly punitive, the sanction will either be disproportionately severe, or may go unpunished

[59] *Ibid* at paragraph 5.23.

[60] See generally, Ayers and Braithwaite, *Responsive Regulation* (OUP 1992). See also Baldwin and Cave, *Understanding Regulation* 2nd ed (OUP 2012) at 259 to 280.

where the regulator is reluctant to exercise its power. Use of excessive sanctions may be unjustified and could damage relationships with the regulated entity and make them less willing to engage with the regulator. Furthermore, different enforcement tools may be appropriate depending on the disposition or attitude of the regulated entity. If, for example, the regulated entity is not amenable to persuasion, then a more deterrent-based sanction may be appropriate.[61]

4.82 Regulatory enforcement agreements can be particularly useful because of the advantage, discussed below, of cost and time saving, flexibility, the availability of compensation for consumers and publicity. Regard must also be had, however, to the disadvantages that can arise from the ineffective design of the system of regulatory enforcement agreements or their inappropriate use.

1. Advantages

(a) Cost and time saving

4.83 The principal advantage of regulatory enforcement agreements is that they permit the regulator to achieve their enforcement objectives in a timely and cost effective manner.[62]

4.84 As discussed above and in the previous Chapter, regulatory enforcement agreements, as an enforcement tool, are closely aligned with administrative financial sanctions. Administrative financial sanctions are an effective enforcement tool because they fill a gap currently in the "enforcement pyramid[63]" of some regulators. They are easier to impose than criminal prosecutions, they provide a credible threat and they take advantage of the regulator's significant expertise.[64]

4.85 Administrative financial sanctions, although they can be cheaper than court proceedings, are also costly and time-consuming in their own right; an administrative inquiry may take a significant amount of time to reach a decision and the hearing can be expensive to conduct. Regulatory enforcement agreements, on the other hand allow the regulator and regulated entity to agree the sanction in advance, avoiding the unnecessary expense, where appropriate. Where regulatory enforcement agreements are effective, the

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[61] Another school of thought, "Really Responsive Regulation" attempts to improve on responsive regulation by emphasising the importance of, not just adapting regulatory strategies responsively in accordance with the breach. See Baldwin and Cave, *Understanding Regulation* 2nd ed (OUP 2012) at 269 to 280.

[62] See Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014) at paragraph at paragraph 4.2.2.

[63] Baldwin and Cave *Understanding Regulation* 2nd ed (OUP 2012) at 259.

[64] Comreg, *Response to "Regulatory Enforcement and Corporate Offences" Issues Paper from the Law Reform Commission* (2016), at paragraph 5.1 notes this advantage of settlements between regulators and regulated entities: "agreements to settle anticipated litigation, on terms which require the regulated entity to comply with the law, serve the consumer better than the regulator pursuing criminal prosecutions or civil sanctions. Such litigation can take a long time to complete and can be expensive and may not represent the best use of the regulator's limited resources."

regulator may be able to achieve their enforcement objectives quicker and at a much lower cost.[65]

4.86 Regulatory enforcement agreements are an effective addition to the "regulatory toolbox" where they complement an already effective administrative financial sanctions regime. Regulators can be more flexible with their enforcement options, only resorting to the more expensive and time-consuming administrative financial sanctions where regulatory enforcement agreements fail. Accordingly, it is in the interest of the regulated entity to accept the early discount. The experience from the Central Bank confirms this approach, given that all such enforcement actions to date have been settled rather than having proceeded to full ASP inquiry. The high monetary value of the sanctions demonstrates the effectiveness of settlements in achieving early cooperation, arguably as a result of the credible threat of the more formal inquiry. The elimination of delay also makes the enforcement action more effective, such as the mitigation of any financial harm done to consumers through the earlier payment of compensation.[66] In addition, the speedy resolution of the breach gives the impression of a timely and effective enforcement action, which can enhance the deterrent effect.[67]

(b) Flexibility and the expanded regulatory toolbox

4.87 The inclusion of regulatory enforcement agreements in a regulator's powers affords the regulator a certain degree of flexibility. The addition of this tool to the regulatory arsenal means that a regulator has the capacity to move flexibly between tools as appropriate. In addition, regulatory enforcement agreements as a tool also have some inherently flexible aspects.

4.88 The Macrory Report underlines the importance of "responsive sanctioning,"[68] which comes in part from the regulator having a wide range of sanctioning options, varying in severity. This refers to the flexibility of regulators to move up and down the enforcement pyramid. The regulator should have a certain degree of flexibility and discretion to apply the appropriate sanction in the circumstances. Macrory also states that the appropriate sanction will depend on the circumstances of the particular offender.[69] Some regulated entities will respond to moral suasion or administrative financial sanctions, whereas others, repeat offenders for example, may only respond to criminal sanctions. If a regulator has the full array of powers, including intermediate powers such as administrative financial sanctions and regulatory enforcement agreements, it can choose

[65] Financial Conduct Authority, *Enforcement Guide* (2014) at paragraph 5.1

[66] *Ibid* at paragraph 5.1. The FCA observes that this is one of the advantages of their settlement procedure.

[67] The FCA makes this observation in its, *Enforcement Guide* (2014) at paragraphs 5.2 and 5.1.

[68] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)) at 30, principle 3.

[69] An example of Really Responsive Regulation, discussed above.

the correct sanction and change its approach, if earlier strategies do not produce the desired outcome.

4.89 This responsive sanctioning approach has an additional advantage in that it can enhance the effectiveness of individual tools, because of the potential for the regulator to escalate the enforcement of a regulatory breach. For example, the ability to enter into regulatory enforcement agreements complements the ability to impose administrative financial sanctions. Regulatory enforcement agreements are most effective when they are backed by the credible threat of an administrative financial sanction,[70] which encourages regulated entities to agree the sanction in advance. A discount settlement scheme can further encourage early settlement by providing a financial incentive to do so. The combination of regulatory enforcement agreement powers and administrative financial sanctions would arguably help fill in the gap in the enforcement pyramid that is currently present for many regulators, providing greater overall flexibility, while also enhancing the effectiveness of individual powers.[71]

4.90 In addition to the flexibility afforded by the wider availability of powers, regulatory enforcement agreements are an inherently flexible power. This is in part because, administrative financial sanctions, on which regulatory enforcement agreements are themselves based, are a flexible tool. The Central Bank has discretion over the appropriate sanction that results from an ASP inquiry, for example, a reprimand or caution, rather than a monetary sanction, may be appropriate for some breaches. Similarly, the sanction imposed, although determined by guidelines,[72] will be responsive to the circumstances of the breach and the disposition of the regulated entity.

4.91 In addition, regulatory enforcement agreements may be negotiated with the regulated entity and the regulator will have a certain degree of discretion during this process. First, the regulator has discretion as to whether it is appropriate to resolve the breach by way of settlement, which may encourage co-operation from the regulated entity.[73] Overly harsh sanctions can damage the crucial regulator/regulated entity relationship and prevent disclosure by the regulated entity or discourage settlement. Second, in reaching a settlement, the regulator has discretion as to what level of discount it should apply in recognition of early settlement.[74] The discretion regarding settlement is not absolute

[70] This has been observed in a number of the submissions in response to the Issues Paper.

[71] Supervisory warnings provide another example of the complementarity associated with expanding the regulatory toolbox. The warnings are effective, in part because of the possibility of a more severe sanction.

[72] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014) at paragraph 6.3.1.

[73] As noted above, the Central Bank will only initiate discussions with a view to settlement where the Bank feels that it is an appropriate tool in the circumstances.

[74] For the Central Bank settlement procedure, this deduction can be up to 30% (or 10%) depending on how early the settlement is reached.

however; in the two examples above, the Central Bank of Ireland and the FCA,[75] there is an upper limit on the permitted discount for early settlement, arguably to ensure that the deterrent aspect of administrative financial sanctions is not compromised. Third, there will also be discretion regarding the level and method of compensation, if any,[76] paid by the regulated entity to victims of regulatory breaches. Compensation may take various forms, such as monetary payments or the undoing of any harm that was done to victims. This will, by necessity, need to be negotiated flexibly in order to fully address the needs of victims after a breach. Compensation can be significant and can even exceed the financial sanction imposed. The issue of compensation is discussed below.

(c) Information disclosures

4.92 Regulatory enforcement agreements can operate to facilitate and encourage disclosures of information by the regulated entity or individual, which would be difficult or impossible for the regulator to obtain by other means.

4.93 Regulatory enforcement agreements, as an enforcement tool, are much less adversarial than other tools such as administrative financial sanctions or criminal prosecution. One of the key features of regulatory enforcement agreements is that they incentivise co-operation. By contrast, other tools, such as criminal prosecution, create an adversarial atmosphere around a legal dispute. Such oppositional tools, although effective parts of the regulatory toolbox when used appropriately, often do not encourage the sharing of information between the regulator and the regulated entity. This can make it time-consuming and expensive for the regulator to establish the factual circumstances of the breach.

4.94 Regulatory enforcement agreements, on the other hand, reward and incentivise candour and openness on the part of the regulated entity or individual concerned. The regulated entity will be best placed to assess whether or not they are in breach of regulations. It will consume the time and resources of the regulator to investigate and ascertain whether a breach has occurred. If the regulated entity is forthcoming with information about its own organisation, this will greatly assist the regulator in discovering the nature of the breach. The discount awarded in recognition of these disclosures can incentivise compliant behaviour.

4.95 In some complex cases, the regulator will succeed in obtaining information from the regulated entity responsible for the suspected breach that they would have been unable

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[75] The FCA only has a discretion, within parameters, to impose the level of discount in certain circumstances under a "focused resolution agreement". See Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013) at paragraph 6.7.3A. In all other cases, the level of discount is fixed depending on the circumstances.

[76] Compensation will often be required but it will not always be necessary, particularly where there are no specific victims of the regulatory breach as was the case in the settlement between the FCA and Merril Lynch, discussed above.

to obtain without the co-operation of the regulated entity. This point should not be overstated, as regulatory enforcement agreements rely on the credible threat of a sanction. If the regulated entity is aware that the regulator would not ultimately succeed in imposing an administrative financial sanction, they will be less inclined to agree to a regulatory enforcement agreement. Nonetheless, in some cases the regulator may succeed in sanctioning regulated entities or individuals for breaches, where they would otherwise not be able to do so.

4.96 Sometimes regulators can acquire additional information about regulatory breaches via settlements. An example of this can be found in the tracker mortgage scandal, whereby the wider investigation arose out of the initial settlement agreement with a relatively small entity, Springboard Mortgages. Subsequent to this settlement, the Central Bank became aware of a wider pattern of breaches throughout the industry. Arguably, the settlement procedure helped facilitate the further investigation of the tracker mortgage scandal.

4.97 In addition, in many cases, regulated entities are the primary source of information available to regulators about the industry. Although in certain circumstances stricter sanctions will be appropriate, it is also important for regulators to maintain good relationships with firms in their industry, where appropriate. Stricter sanctions can sour relations between the regulator and the regulated entity, which can ultimately be counter-productive to the achievement of a regulator's objectives. This is why, for example, the Central Bank may wish to employ its settlement procedure against a firm with a good record of compliance, whereas a firm with a history of responding poorly to more lenient sanctioning tools may attract sanctions that are more significant.

(d) Compensation

4.98 The opportunity for compensation to be awarded to victims of regulatory breaches is another advantage of regulatory enforcement agreements.

4.99 Compared with other enforcement tools, regulatory enforcement agreements can provide a remedy earlier, and at a lower cost.[77] As noted, one of the general advantages of both regulatory enforcement agreements and administrative financial sanctions is that they can lead to the resolution of the suspected contravention earlier, and more cheaply, than other enforcement mechanisms usually would. This is particularly important where compensation of members of the public is involved. Regulatory breaches have the potential to seriously disadvantage private individuals, who may not have the resources to enforce their own entitlements. Furthermore, any delay in the remedy can compound this problem. Settlements usually take place in the context of a credible enforcement threat; therefore, it may be a more effective tool than some others given that it allows for

[77] The FCA observed that this was one of the advantages of settlement. Financial Conduct Authority, *Enforcement Guide* (2014) at paragraph 5.2.

actually securing a remedy for the victims of the breach. Alternatively, a private civil claim, for example, may be defended by the regulated entity.

4.100 The ability of regulators to seek compensation as part of a settlement agreement can help provide a restorative sanctioning option to the enforcement pyramid. This can afford the regulator additional flexibility to remedy problems as well as impose sanctions. This approach can provide a more commutative, that is, corrective or restorative,[78] element to a regulator's enforcement powers to complement the regulators retributive, that is, more sanction-oriented approaches. Sanctions imposed by the regulator can, by settlement or otherwise, effectively deter future breaches. Compensation, however, has the advantage that it remedies the harm caused by the specific breach. Macrory observes that compensation oriented approaches have the advantage that they are "backward looking" in that they address and remedy the problems arising from the breach, in comparison to the "forward looking" sanction oriented civil fines, which may deter future breaches. Of course, compensation payments also deter future breaches because they impose a financial cost on the regulated entity or individual responsible.

4.101 Compensation can also provide greater flexibility to the regulator. Regulatory enforcement agreements are an enforcement tool, that is, by its nature, flexible, and suited to dealing with the particular circumstances of the regulated entity.[79] This allows the regulator to deal more responsively with the circumstances at hand, employing regulatory enforcement agreements (with the possibility of compensation) where appropriate, and using other, more punitive tools in other circumstances. Macrory refers to compensation approaches having the advantage of flexibility and individual tailoring.[80] Again, this highlights the fact that the ability of regulators to settle proceedings can fill a gap in the enforcement pyramid and ensure that undesirable conduct by regulated entities is effectively remedied and deterred.

4.102 The settlement agreement between the Central Bank and Springboard Mortgages, discussed above, illustrates the advantages of permitting compensation as part of a regulatory enforcement agreement.[81] In the Springboard example, it would have been inefficient, procedurally slow and probably prohibitively expensive for all 222 effected consumers to lodge individual civil claims. However, because of the timely settlement, (encouraged by the 30% discount for early settlement) affected customers received

[78] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)) at paragraph 4.18. The author highlights this advantage of what is referred to as "enforceable undertakings."

[79] *Ibid* at paragraph 4.34. The author highlights the advantages of applying principles of "restorative justice" to enforceable undertakings as to compensation. The author observes that restorative justice is particularly flexible because what is restorative depends on the particular circumstances of the offender and the victim.

[80] *Ibid* at paragraph 4.24.

[81] Central Bank of Ireland, *Settlement Agreement between the Central Bank of Ireland and Springboard Mortgages Limited trading as Springboard Mortgages* (2016).

compensation relatively quickly. In addition, this example highlights the capacity of compensation schemes to remedy the harm caused, instead of merely sanctioning the regulated entity. Many customers were significantly affected by the tracker mortgage scandal, and the compensation was tailored in such a way as to remedy the harm caused by the regulatory breach. Finally, the Springboard example also highlights the flexibility afforded to regulatory enforcement agreements by compensation. The compensation in this case was specific to the nature of the harm caused to the individuals concerned.

(e) Publicity

4.103 The public disclosure of the terms of the regulatory enforcement agreement affords numerous advantages. Although it is not an inherent advantage of regulatory enforcement agreements, because it is possible to provide for confidential agreements, the experience of the Central Bank in this jurisdiction suggests that the public disclosure of the terms of the agreement is beneficial. Many of the advantages of publication apply equally to the benefits associated with publishing public statements along with the imposition of an administrative financial sanction, as discussed in the previous Chapter.

4.104 The regulated entity responsible for the prescribed contravention may be specifically deterred by the sanction imposed on it. In addition, the public statement assists the regulator in deterring non-compliance by other regulated entities. Through this publicity, other firms will become aware that they cannot commit prescribed contraventions and escape sanctions. “Reputational capital” is a valuable asset, which many firms wish to preserve. A firm’s reputation for trustworthiness can influence its profitability, as customers and business partners are more willing to work with them. However, as noted in the previous Chapter, the effectiveness of “naming and shaming” will often depend on the extent to which the public disapprove of the relevant breach,

4.105 As well as deterrence, publicity associated with the use of regulatory tools can also have, positive, compliance effects. First, publicising the nature of the breach and the steps taken to remedy it can have an educational effect, helping other firms in the industry improve their compliance with regulations. Second, publicity can have a norm-setting effect; the public expression of condemnation of a breach, combined with the regulated entity admitting wrongdoing, can add a moral force to the compliance with regulations.

4.106 Another important benefit of public disclosure is the transparency it provides. The use of public statements accompanying regulatory enforcement agreements can also lend transparency to the use of this enforcement tool.[82] Although transparency is generally important to ensure the responsible exercise of regulatory power, it is particularly important in the context of regulatory enforcement agreements. This is because regulatory enforcement agreements will often involve a certain discount, which presents a

[82] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)) at paragraph 5.5. See also ch 5 generally.

risk of undue leniency. Transparency is important, not just to hold the regulated entity publicly accountable, but also to reassure the public that regulatory enforcement agreements are not a comparatively easy or more lenient option for regulators. One of the concerns about regulatory enforcement agreements is that firms may treat the financial sanction as a "cost of doing business" and there may be a perception that firms can evade the full force of sanctions by negotiating with regulators for leniency. Publication of the terms of the agreement provides effective public scrutiny, preventing any real or perceived leniency.

4.107 However, publication of all of the details of a regulatory enforcement agreement may not be warranted in every situation. In certain circumstances, it may be counterproductive to the regulator's overall enforcement strategy; for example, it may prejudice a criminal prosecution of a related matter to identify the regulated entity. Similarly, there may be parties who are innocent of any regulatory breaches who may not wish to remain anonymous, for example, victims of regulatory breaches. Finally, it may not serve any useful regulatory purpose to disclose certain confidential business practices, but it may be very damaging to a company if sensitive commercial information is disclosed.

4.108 Overall, the publication of the terms of the settlement provides numerous advantages including increased transparency, more effective deterrent, and compliance.

2. Disadvantages

4.109 As with administrative financial sanctions, many of the "disadvantages" associated with regulatory enforcement agreements may be more properly described as difficulties in implementation. As with some of the advantages outlined above, many of the disadvantages are not inherent to regulatory enforcement agreements themselves, but are merely a result of their ineffective implementation. Failure to realise the potential advantages of regulatory enforcement agreements can lead to problems, however, and these problems are outlined below.

(a) Settlement at the expense of regulatory objectives

4.110 As noted in the introductory section to this Chapter, regulatory enforcement agreements are different from the ordinary settlement of civil proceedings. Regulatory enforcement agreements engage the public interest in the achievement of regulatory objectives, as well as the interest of the regulator and the regulated entity.

4.111 The Macrory Report warns of the danger of regulators focusing on measurable proxies for success rather than the achievement of regulatory enforcement objectives. Such a problem may arise in regulatory enforcement agreements.[83] For example, the number of successful settlements in a given year may seem like a more obvious or easily recognisable success, than the achievement of more nebulous targets such as a culture of compliance or the prevention of breaches. An effective regulatory regime could be characterised by a relatively low public profile and could therefore, risk being taken for granted. There is a risk, therefore, that regulators could be motivated to settle cases and offer more lenient settlement agreements that regulated entities are more likely to accept. Such an approach may conflict with the public interest in effective enforcement. If regulators have a tendency to treat regulated entities more leniently, regulatory enforcement agreements may be an attractive option for the regulated entities. Regulators may then treat settlement agreements with regulators as part of the "cost of doing business" or a softer option to avoid a more significant sanction.

4.112 There are several solutions to this potential problem. The regulator must be willing to go through with the formal ASP inquiry, if a settlement cannot be agreed. This means that a regulator would only be willing to consider settlements where they are appropriate and fulfil their objectives. The Central Bank acknowledges in its procedures that it will only consider settlement where it is an appropriate enforcement tool. The willingness to proceed to a full ASP inquiry where an agreeable settlement is not forthcoming also creates a credible threat, discussed further below.

4.113 Another means of addressing this disadvantage is by providing for publication of the details of settlements, discussed above, which provides increased transparency and accountability. Due to the important public interest element of regulatory enforcement, the public accountability of regulators is essential.[84] For example, as noted above, the Central Bank routinely publishes the terms of its settlements. The media scrutiny of each public statement[85] arguably provides a valuable check that the regulator is not compromising its objectives. However, there is also the danger that increased public scrutiny will only reward obvious markers of success, such as settlements.

4.114 Another possible solution is to ensure that there are strict guidelines about the sanctions that can be imposed as a result of regulatory enforcement agreements. Again, the Central Bank provides an example of this. The *Central Bank Act 1942* provides that the same criteria will apply to sanctions as a result of settlement as well as sanctions as result of the ASP inquiry. The principal difference between settlement and inquiry sanctions is the level

[83] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)), in his second characteristic that regulators should have regard to in designing appropriate sanctioning regimes, the Author recommends that regulators should "Measure outcomes not just outputs."

[84] Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)) at ch 5 generally sets out the importance of transparency and accountability.

[85] The Central Bank's settlement agreements are often extensively discussed in news media with prominent place in national newspapers. For example Hancock, "Ulster Bank fined €3.5m by Central Bank over IT failure" *The Irish Times*, 12 November 2014.

of discount awarded to the regulated entity and the costs of the proceedings. This ensures that the Regulatory enforcement agreement is itself a sanction with similar deterrent and compliance effects to the ultimate ASP inquiry.

(b) Leniency – real or perceived

4.115 Another potential issue with regulatory enforcement agreements is that the settlement of proceedings might result in more lenient treatment of the regulated entity or the appearance of such treatment.

4.116 A perception of leniency can arise even where there is no basis for it in reality. Regulation is notoriously complex and it will not necessarily be obvious that the sanction imposed is not particularly lenient when compared with what would have been imposed at the ASP inquiry stage. This can give the appearance of “regulatory capture”, that is, regulators serving the interest of the industry rather than the public. For example, it is conceivable that a regulatory enforcement agreement could result in no monetary sanction,[86] where the imposition of a sanction would cause the firm to go out of business. This may give rise to a perception of leniency. However, if the administrative financial sanction would also not result in a monetary sanction then this is not undue leniency.

4.117 Although the regulator’s reputation is arguably of secondary importance to the effectiveness of its enforcement activities, its reputation may affect its capacity to effectively pursue its objectives. The reputation of the regulator is essential for its enforcement actions to be effective.[87] Damage to the regulator’s reputation can affect the regulator’s ability in general, even outside the context of administrative financial sanctions or regulatory enforcement agreements. The use of “naming and shaming” techniques, as discussed above or the provision of information to the public will be less effective if the regulator is viewed as incompetent or untrustworthy. An example of this provided by Baldwin and Cave is food safety inspections; consumers may not trust food safety standards if the regulator does not have a reputation for carrying out effective inspections.[88] Similarly, where, for example, the regulator wishes to deter persistent or deliberate breaches, it may wish to sanction the regulated entity more severely. If however, the regulator has a reputation for leniency, even if this reputation is

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[86] Under section 33AS of the *Central Bank Act 1942*, a fine cannot be so great so as to cause the firm to go out of business or cause the insolvency of the individual. In the Quinn insurance case the fine was waived “in the public interest” due to the insolvency of the insurer that was totally dependent on the Insurance Compensation fund for funding. See media coverage of the settlement between the Central Bank and Quinn Insurance O’Brien and Carolan, “Central Bank settles with Quinn Insurance” *The Irish Times* 19 July 2013.

[87] Baldwin and Cave *Understanding Regulation* 2nd ed (OUP 2012) at 71. The authors refer to the importance of the maintenance of the regulator’s reputation in order to ensure enforcement.

[88] *Ibid.*

undeserved, it might find it difficult to prevent future breaches.[89] Credible threats are discussed in greater detail below.

4.118 Again, a regulator may address this issue by publically announcing the terms of the agreement, for example, by disclosing the amount of the monetary sanction. This helps prevent a perception of leniency. As noted above, this is the approach of the Central Bank in its settlement procedure. In these public statements, responsibility for the breach is admitted and the amount of the sanction is disclosed. The Central Bank also states how severe the sanction was with reference to the maximum allowable sanction,[90] which can allay any concerns that the Regulatory enforcement agreement is a lenient alternative. Furthermore, public statements provide transparency and legitimacy to the actions of the regulator by making it clear to the public that the settlement is not a symptom of regulatory capture, but a clear enforcement action against a regulated entity that has committed a prescribed contravention.

4.119 Careful use of language for the name of the settlement agreement can also help prevent perception problems. Although the Commission has previously employed the phrase "negotiated compliance agreement,"[91] arguably this phrase does not capture the enforcement aspect of the agreement. Other jurisdictions use the phrase "enforceable undertaking" or "enforcement action", which may capture the true nature of the settlement, which is that of an acceptance of sanctions by the regulated entity in recognition of the breach.

(c) The absence of a credible threat of administrative financial sanctions

4.120 The effectiveness of regulatory enforcement agreements depends on the credibility of the threat of administrative financial sanctions. Where there is no credible threat of an administrative financial sanction, the regulated entity will have little incentive to enter into a regulatory enforcement agreement.[92] This is not a disadvantage of regulatory enforcement agreements necessarily but underlines the important link between

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[89] For example, supervisory warnings, a less severe sanction than the regulatory enforcement agreements or administrative financial sanctions, may be less effective if the regulator does not have a credible reputation for enforcing wrongdoing. The threat of escalating the sanction may be taken less seriously if the regulator does not have a reputation for following up on such threats.

[90] An example of this is the Central Bank's settlement agreement with Ulster Bank in whereby the Central Bank stated that the sanction of €3,500,000 was the maximum sanction available, having regard to the settlement discount lower limit of €5 million which was applicable at the time. See Hancock, "Ulster Bank fined €3.5m by Central Bank over IT failure" *The Irish Times*, 12 November 2014.

[91] See, Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016), Issue 3.

[92] For example, section 14B of the *Competition Act 2002* provides the Commission for Communication Regulation (Comreg) and the Competition and Consumer Protection Commission (CCPC) with a statutory mechanism to negotiate agreements with undertakings that are suspected of breaching competition law. Comreg, *Response to "Regulatory Enforcement and Corporate Offences" Issues Paper from the Law Reform Commission* (2016), at paragraph 5.2 notes that section 14B, lacks the credible threat of sizeable sanctions as an incentive for regulated entities to negotiate.

regulatory enforcement agreements and administrative financial sanctions. Where the ASP inquiry is not likely to result in sanctions or the sanction is likely to be too low to provide a strong disincentive, the threat of administrative financial sanctions, and therefore, regulatory enforcement agreements would not deter regulated entities from committing prescribed contraventions.

4.121 As discussed in the previous chapter, in order to be effective, the administrative financial sanctions regime must also provide for effective monetary penalties to prevent the regulated entity from benefitting from the prescribed contraventions and to deter non-compliance effectively. If the likely sanction is not sufficiently strong, then the threat of administrative financial sanctions, and, by extension regulatory enforcement agreements agreed with the threat of sanctions in the background, is unlikely to deter the regulated entity and may be treated as a "cost of doing business." As discussed above, there are advantages to having a full array of regulatory tools, and some of these tools are complementary. Both administrative financial sanctions and regulatory enforcement agreements are important additions to this toolkit and the possibility of the regulator using administrative financial sanctions enhances the effectiveness of regulatory enforcement agreements.

4.122 In addition, as discussed above, the sanctions as a result of regulatory enforcement agreements should also be governed by the same principles as sanctions as a result of an ASP inquiry, to ensure that they meet the enforcement objectives of the regulator. In order to provide a consistent deterrent across both enforcement tools, the monetary penalty that results from the administrative sanctions procedure must be sufficiently high, and the sanction that will result from regulatory enforcement agreements should be lower, but still high enough to provide a significant deterrent.

(d) Enforceability

4.123 The financial sanction imposed by an agreement provides a more effective deterrent where the regulator is able to enforce this agreement effectively. One of the benefits of regulatory enforcement agreements is that they are a quick, relatively inexpensive method of imposing sanctions on regulated entities for prescribed contraventions. Regulatory enforcement agreements are cheaper and quicker than the alternatives of lengthy, expensive administrative financial sanctions proceedings or court hearings. However, this advantage may disappear if the regulated entity subsequently refuses to comply with the terms of the Regulatory enforcement agreement and the regulator is required to issue court proceedings. This makes the sanction more uncertain if the regulated entity is able to undermine the agreed sanction by subsequently resisting its enforcement.

4.124 One potential problem that arises out of enforcement proceedings is that it could introduce the delays and costs associated with litigation. This might frustrate the enforcement ability of the regulator. As a result, the regulator might be tempted to settle the subsequent enforcement proceedings itself for less than the value of the original settlement. This might allow regulated entities to evade the strict enforcement of sanctions by regulatory enforcement agreements and put pressure on the regulator to impose a less severe monetary sanction. In order to prevent this problem, the enforcement should be relatively quick and inexpensive.

4.125 The Macrory Report recommends that ordinary civil debt recovery mechanisms should be employed to ensure the quick, cheap and effective enforcement of sanctions.[93] In Ireland, the *Central Bank Act 1942* provides procedures for the Central Bank to enforce its settlement agreements. As noted above, Section 33AV of the 1942 Act provides that the Central Bank may apply to the High Court to enforce the terms of the settlement agreement. Section 33AV(4) provides that proceedings may be "brought in a court of competent jurisdiction" to "recover as a debt due to the [Central] Bank the amount of any amount agreed to be paid under an agreement entered into under this section." This means that the financial element of the sanction may be enforced in a summary manner, which is an expedited method of resolving legal claims without pleadings. This procedure is appropriate for sums that are "readily ascertained by mere calculation or arithmetic"[94] This means that the agreed financial sanction that results from settlement is treated as an enforceable debt. Of course, a necessary corollary of this is that elements of the sanction that are not readily ascertainable, such as the required imposition of redress schemes, structures or compensation, must be enforced by way of full plenary hearing in the High court, under sections 33AV(3A)and (3B). These sections provide that the High Court may direct the regulated entity to comply with the agreement. The disadvantage of a full High Court hearing is that it is relatively more time consuming and expensive than summary procedure, which weakens the Central Bank's enforcement powers if it renders the sanction less immediate.

4.126 As some elements of the Central Bank's settlements will be able to be enforced summarily and some by way of full plenary hearing, this may create enforcement problems for regulatory enforcement agreements if the same procedure is applied more widely. Of course, there is a reason that summary procedure is the exception rather than the rule; it allows the defendant comparatively less scope to defend the proceedings. For this reason, summary proceedings are reserved for specified types of claims that are amenable to this procedure.[95] However, as noted above, compensation and redress schemes can be a significant part of the Central Bank's settlement agreements. If a regulated entity does not abide by the terms of an agreement, then it may be costly and time-consuming to enforce those terms in the High Court. Of course, this is likely to jeopardise the future relationship between the regulator and the regulated entity, making any settlements in the future less

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[93] Macrory *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive, UK Cabinet Office (2006)), paragraph 3.47. See also Comreg, *Response to "Regulatory Enforcement and Corporate Offences" Issues Paper from the Law Reform Commission* (2016), at paragraph 5.5.2, Comreg recommends that "If undertakings/negotiated compliance agreements are breached, this needs to be treated very seriously and it should result in very significant financial sanctions. These should be imposed by a court following civil or criminal action or directly by the regulator."

[94] *Motor Insurers Bureau of Ireland v Hanley* [2006] IEHC 405, [2007] IR 591, at 605.

[95] Biehler, McGrath and McGrath, *Delany and McGrath on Civil Procedure* 4th ed (Round Hall 2018) at paragraph 27-04.

likely, thereby creating a significant disincentive for the regulated entity undertaking this course of action. Nonetheless, it would be possible that enforcement difficulties could arise after settlement, potentially weakening the regulator's enforcement ability. In addition, if a settlement has elements of both financial sanction and other methods that could not be subject to summary proceedings, it may not be possible to bring both actions by parallel plenary and summary procedure.

4.127 One alternative to the costly enforcement procedure in the High Court would be to provide for the settlements to be confirmed by order of the High Court. This would have the effect of rendering the settlement a judgment of the High Court, preventing some of these enforcement difficulties. In the absence of pre-existing civil proceedings, a court may not make an order confirming the terms of a settlement agreement. In order for the terms of a regulatory enforcement agreement to be enforced by a court order, some specific statutory scheme would be required.

4.128 The *Competition Act 2002* provides a statutory procedure for the enforcement of the terms of agreements between a "competent authority"[96] and regulated entities. Section 14B of the 2002 Act[97] provides an enforcement mechanism for enforcing "commitment agreements," under which a regulated entity may agree to undertake some remedial action for breaches of competition law. This enables the relevant regulator to make commitments by the regulated entity subject to an order of court, a breach of which would constitute contempt. The authority may, following an investigation under their investigatory powers[98] require that the regulated entity do, or refrain from doing, some activity, in return for which, the authority shall not bring proceedings under section 14A of the 2002 Act, which provides for civil enforcement by application to either the Circuit Court or the High Court. Under section 14B(2), the authority may apply to the High Court for an order confirming the terms of the agreement. The Court may make an order provided it is satisfied that:

[96] This phrase refers to either: Competition and Consumer Protection Commission for CCPC (Previously Competition Authority, one of the CCPC's predecessor bodies, performed this function), or the Commission for Communications Regulation (Comreg).

[97] As inserted by section 5 of the *Competition (Amendment) Act 2012*.

[98] Section 10 of the *Consumer Protection Act 2014* and section 47A of the *Competition Act 2002*.

a) the regulated entity that is a party to that agreement consents to the making of the order;

b) the regulated entity that is a party to that agreement consents to the making of the order;

c) the agreement is clear and unambiguous and capable of being complied with;

d) that the regulated entity is aware that failure to comply with any order so made would constitute contempt of court; and

e) the competent authority has complied with subsection (3).

4.129 Section 14B(3) provides that, in advance of the application, the terms of the agreement should be published on the authority's website and the terms of the agreement and the date on which the application will be made shall be published in national newspapers. Section 14B(4) provides that the order will have effect 45 days after it is made. One commentator observes that the 45 delay is unlikely to cause significant difficulties as the subject of the order could always agree to refrain from the offending conduct during that period.[99]

4.130 Section 14B(7) provides that either party to the order may apply to have the order varied where:

a) the party other than the applicant consents to the variation;

b) the initial order contained a material error;

c) there has been a material change in circumstances since the making of the first order that warrants the Court varying or annulling the first order; or,

d) the Court is satisfied that, in the interests of justice, the first mentioned order should be varied or annulled.

4.131 Sections 14B(5) provides that third parties may apply to the High Court to vary or annul the order if the order gives rise to a breach of contract in respect of the applicant. Section 14B(6) provides that no such order shall be made under section 14B(5) if the underlying contract or a term of contract relates to anti-competitive practices[100] or if it breaches certain provisions of EU law.[101]

4.132 Section 14B(8) provides that orders will automatically cease after 7 years, except where an application has been made no later than 3 months before the expiry of the 7 year period

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[99] Power, "Ireland's Competition (Amendment) Act 2012: A By-product of the Troika Deal but Legislation with Long-term Consequences" (2012) 19 CLP 108.

[100] Under sections 4 and 5 of the *Competition Act 2002*.

[101] Article 101 or 102 of the *Treaty on the Functioning of the European Union*.

to the High Court requesting an extension under section 14B(9). The order may be extended for one further period of 3 years, under section 14B(9) .

4.133 An example of an order under section 14B of the 2002 Act can be found in the Competition Authority's[102] enforcement action against Double Bay Enterprises in 2012.[103] Double Bay Enterprises, trading as Brazil Body Sportswear (BBS), was a clothing distributor whose contractual terms with its retailers prohibited mail order and internet sales without the consent of BBS, potentially contrary to Irish and European Competition Law. During the investigation, the Competition Authority obtained evidence that gave rise to a suspicion that BBS had committed such contraventions. The Competition Authority offered BBS the chance to resolve the issue with a commitment agreement. Under the terms of the agreement BBS agreed to cease the anti-competitive practices and that their agreement would be confirmed by an order of the Court. In exchange, the Competition Authority agreed not to bring formal enforcement proceedings. The High Court issued an order pursuant to section 14B of the 2002 in accordance with these terms.

G. Conclusions and Recommendations

1. Regulatory Enforcement Agreements Generally

4.134 The Commission is of the opinion that regulatory enforcement agreements can be an effective enforcement tool. While they may not be appropriate in every instance, regulatory enforcement agreements can be a cost-effective and time saving method of regulatory enforcement, compared with other tools. In addition, regulatory enforcement agreements can be employed more flexibly, particularly with regard to the compensation of consumers who may be victims of regulatory breaches. Other enforcement tools, such as civil enforcement in the courts, or criminal prosecution, can be more time consuming, expensive and less predictable in outcome. Experience from the Central Bank in this jurisdiction, and the FCA in the UK, suggests that regulatory enforcement agreements, where available, are a popular method of imposing sanctions on regulated entities, arguably because of the advantages outlined.

4.135 As well as being a valuable tool in their own right, from a broader perspective, the Commission considers regulatory enforcement agreements to be a useful addition to a regulator's "toolbox". Regulatory enforcement agreements add flexibility to the regulator's sanctioning options. This allows the regulator to act responsively by tailoring its enforcement approach to the individual circumstances of the breach or the disposition of the regulated entity. By having a complete set of tools, a regulator is able to use tools that allow for a proportional response to the breach that has occurred, without being over

[102] The Competition Authority was one of the Competition and Consumer Protection Commission's (CCPC) predecessor bodies.

[103] Eaton, "The Competition Authority and Double Bay Enterprises ltd t/a Brazil Body Sportswear (the Fitflop case)" (2013) 20 CLP 212.

or under inclusive or excessively punitive. In addition, if an enforcement action needs to be escalated, for example because of repeated infringement, the regulator can move up the "enforcement pyramid" with ease. This approach has two advantages: the regulator can use the tool at the appropriate level, and the tools may be complementary. The threat of escalation can also enhance the deterrent and compliance elements of the other tools.

4.136 Regulatory enforcement agreements are particularly complementary of administrative financial sanctions, so the Commission expects that regulators within the scope of this report that are given administrative financial sanctions powers will also be given Regulatory enforcement agreement powers.

R 4.02 The Commission recommends that regulators within the scope of this Report should be provided with the power, subject to the principles set out below, to enter into regulatory enforcement agreements (REAs) to settle administrative financial sanctions (AFS) proceedings with a regulated entity or an individual.

R 4.03 The Commission recommends that a regulator should only enter into regulatory enforcement agreements with the regulated entity or individual in respect of an enforcement action where the regulator is of the opinion that it is appropriate to do so, having regard to the regulator's enforcement objectives, the circumstances of the breach and the interests of justice, and any other relevant matters.

2. The settlement of proceedings and the adversarial process

4.137 In light of the adversarial model recommended for the imposition of administrative financial sanctions in the previous chapter, it is necessary to consider how the recommendations regarding regulatory enforcement agreements interact with this model. The Commission has recommended that an adversarial model would be preferable to the inquisitorial model that governs the Central Bank's administrative sanctions procedure at the time of writing (September 2018). The Commission has recommended that the Central Bank's Administrative sanctions procedure, and administrative financial sanctions more generally applicable to other regulators, should be governed by an adversarial, rather than inquisitorial process. The adjudicative panel, which reaches decisions under the adjudicative panel process, should be a separate body from the internal regulatory investigations body that presents its case.

4.138 The Commission considers that regulatory enforcement agreements are compatible with this adversarial model. As noted above, for the FCA in England, the regulatory decision committee (RDC) adjudicates contested sanctions, whereas the settlement decision makers (a differently constituted panel) makes decisions concerning settlement offers and negotiations with regulated entities. Previously, the RDC were involved in the settlement process; however, this raised concerns that it might compromise the "without prejudice" nature of the settlement discussions if the adjudicator was later aware of concessions made in the course of an unsuccessful negotiation. For the FCA, therefore, the body that engages with the regulated entity is not the body that might ultimately decide on the sanction under the administrative financial sanctions, if the negotiations break down.

4.139 The Commission considers that, for regulatory enforcement agreements, the internal investigator for the applicable regulator, rather than the adjudicative panel, should engage in the settlement negotiations with the regulated entity. The internal investigation team may suggest a sanction to the regulated entity, with a discount, based on what the adjudicative panel is likely to impose in the event of an adverse finding against the regulated entity at the conclusion of the adjudicative panel process. This allows the adjudicative panel to remain an impartial decision maker, while the regulator, or more particularly their enforcement department, is responsible for ensuring that breaches are sanctioned effectively. Furthermore, the Adjudicative panel would not, in such circumstances, be influenced by any concessions made by the regulated entity or individual concerned, during the negotiation.

R 4.04 The Commission recommends that, the regulator, or its internal enforcement department as the case may be, shall be responsible for entering into negotiations for a Regulatory Enforcement Agreement with the regulated entity or individual, in order to settle administrative financial sanctions proceedings against the regulated entity or individual.

3. The finality of enforcement actions

4.140 If a regulator has opted for a particular enforcement tool to address a prescribed contravention, it would be unfair if they were able to subsequently use another enforcement tool in respect of the same alleged breach of regulations. Combinations of tools can be effective where they serve different purposes, for example, informal persuasion (to educate) and written warning (to deter). However, when different tools are intended to address the same conduct, and achieve the same enforcement and compliance result, the regulator should elect one or the other, in light of its enforcement and compliance objectives.

4.141 The Commission considers that, once a regulatory enforcement agreement has been entered into between the regulated entity and the regulator, no subsequent enforcement action should be possible in respect of the same suspected breach. This is in order to ensure that the regulated entity is incentivised to enter into the Regulatory enforcement agreement in the first place. If the regulator could subsequently pursue administrative financial sanctions against the regulated entity in respect of the same contravention, this would remove any incentive for the regulated entity to enter into, or comply with, the agreement with the regulator. Furthermore, the Commission considers that an agreed sanction under a regulatory enforcement agreement will be determined by reference to the regulator's enforcement and compliance objectives, with any discount offered as appropriate. Therefore, to subject the regulated entity or individual to additional sanctions, whether administrative or even criminal, is likely to be excessive.

4.142 However, if it subsequently transpires that the full extent of the breach was not disclosed to the regulator in the course of negotiations, the above conclusions on finality should not apply. The regulator should only be restricted in their enforcement ability to the extent of their knowledge of the breaches. Regulatory enforcement agreements entered into with only partial knowledge may be under inclusive or overly lenient. In such a scenario, to pursue other enforcement tools such as administrative financial sanctions or criminal prosecution would not constitute excessive enforcement by the regulator. Only when the regulator has full knowledge of the nature of the prescribed contravention can they properly assess the appropriate action. The enforcement ability of the regulator should not be compromised by the regulated entity's non-disclosure of salient facts. This approach is in keeping with the importance of incentivising candour on the part of the regulated entity. Regulated entities should not be able to obtain the benefit of regulatory enforcement agreements, which is the discount, if they are not entirely honest with the regulator. This would enhance the effectiveness of regulatory enforcement agreements by ensuring that regulated entities only get the full benefit of regulatory enforcement agreements where they are honest with the regulator.

R 4.05 The Commission recommends that, once a regulatory enforcement agreement has been entered into between the regulator and regulated entity or individual, no other enforcement process should be available to the regulator in respect of the facts that gave rise to the Regulatory enforcement agreement, where those facts are set out in good faith by the regulated entity or individual in their disclosures to the regulator.

4.143 If the settlement of proceedings under a regulatory enforcement agreement is deemed to be conclusive of the enforcement action against a regulated entity, similarly it should not be possible to enter into a regulatory enforcement agreement after the use of another enforcement tool. Once another enforcement proceeding, such as the ASP inquiry, has been concluded in respect of a particular breach, then no Regulatory enforcement agreement should be available. Where a regulatory enforcement agreement is available to a regulator in advance of the conclusion of administrative financial sanctions proceedings, this can complement their administrative financial sanctions powers by encouraging settlement. However, the availability of a regulatory enforcement agreement after the ASP inquiry has concluded would undermine administrative financial sanctions. The threat of administrative financial sanctions without a discount encourages the earlier settlement of proceedings. For this to be effective there must be a deadline after which it is not possible to settle. If there was no deadline, this would cause a reduction in the incentives for the regulated entity to engage with the regulator in advance of the formal inquiry and, as such, would also force the regulator to expend time and resources proving their case.

R 4.06 The Commission recommends that, once enforcement action, such as an administrative financial sanctions proceeding, has been concluded by the regulator in respect of a prescribed contravention, it shall not be possible for the regulator to enter into a regulatory enforcement agreement with the regulated entity or individual in respect of the facts that gave rise to the other enforcement action.

4. The level of sanction and factors applied

4.144 The benefits of regulatory enforcement agreements may be undermined if they are not used in a manner that is consistent with other enforcement tools. Rather than enhancing the effectiveness in of other tools, regulatory enforcement agreements could undermine the deterrent effect of administrative financial sanctions, for example, if regulatory enforcement agreements are seen as a more attractive and lenient alternative by regulated entities. Both administrative financial sanctions and regulatory enforcement agreements are flexible and discretionary, in both cases a range of sanctioning options are available, depending on the overall enforcement context, or disposition of the regulated entities. It is important, therefore, that the sanction agreed as a result of a regulatory enforcement agreement should be calculated on the basis of the same principles that calculated the administrative financial sanctions, to ensure that there is consistent sanctioning across both tools. This would prevent any "gaming" of the regulator by firms that treat settlements as an attractive alternative to more severe sanctions.

4.145 At the same time however, the Commission acknowledges that some distinction must be made between regulatory enforcement agreements and administrative financial sanctions so that the regulator can respond proportionately to the behaviour and disposition of the regulated entity seeking settlement. For example, some regulated entities may be more willing to co-operate than others, and the possibility of a reduced sanction, at the discretion of the regulator, can ensure that the reduction is proportional to the level of co-operation.[104] Additionally, the legislation must strike the correct balance between the two principles of flexibility and consistent enforcement, to ensure that the enforcement and compliance objectives of the regulator are achieved but in a manner that doesn't rigidly restrict the regulator. The level of discount should be sufficiently high to reward and encourage cooperation and the admission of breaches, but not so high as to reduce the deterrent effect.

4.146 Although regulators will only settle in appropriate circumstances, the Commission considers that it is desirable to place a fixed upper limit on the level of discount available. This would reduce the likelihood that settlement would undermine the overall enforcement objectives of the regulator. Furthermore, a strict upper statutory limit would protect regulators from pressure from regulated entities to give a greater discount. However, within the maximum, the regulator should have discretion to set the appropriate discount level. The regulator in its own specific industry is likely to have the expertise and industry knowledge to appreciate and give credit to the level of co-operation by the regulated entity. The Commission considers that this approach provides the regulator with a certain degree of flexibility, but not so much as to potentially lead to conflicts with its enforcement objectives. The maximum level of discount should also be graduated and depend on the stage at which the regulated entity accepts settlement.

R 4.07 The Commission recommends that, subject to the following recommendations regarding the level of discount, in calculating the level of the financial sanction to be agreed as a

[104] In the Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014), paragraph 6.3.1, the Central Bank acknowledges that "the degree of co-operation with the Central Bank or other agency provided during the Investigation of the contravention" is one of the relevant circumstances to be taken account of in determining the level of sanction. See also Central Bank of Ireland, *Outline of the Administrative Sanctions Procedures* (2014), paragraph 4.2.1, the level of co-operation is also relevant to the Central Bank's decision to enter into settlement negotiations and, accordingly, offer the regulated entity or individual a discount for early settlement.

result of a regulatory enforcement agreement, a regulator should be required to take into account all relevant circumstances including, where appropriate, any and all of the factors that the Adjudicative panel committee would have taken into account when deciding the appropriate level of administrative financial sanction.

R 4.08 The Commission recommends that, if the Regulatory enforcement agreement is agreed with the regulator within the first time period prescribed by the regulator, the regulator may impose a maximum discount of 30% of the financial sum that would have been imposed as an administrative financial sanction.

R 4.09 The Commission recommends that if the Regulatory enforcement agreement is agreed with the regulator after the expiry of the time period prescribed by the regulator, but before the end of the second time period prescribed by the regulator the regulator may impose a maximum discount of 10% of the financial sum that would have been imposed as an administrative financial sanction.

4.147 As noted, the Commission considers that the same principles should govern the calculation of the level of sanction for both administrative financial sanctions and regulatory enforcement agreements, subject to the discount for settlement. However, this discount for settlement should exclude any disgorgement of profits gained, or losses averted, as a result of the breach. This is because a regulated entity should not be able to profit from its contraventions. The discount should only apply to the sanction element, which represents the condemnation or disapproval of the regulator, which may be mitigated by acknowledging the breach. The Commission considers, however, that co-operation by the regulated entity cannot justify retaining any profits obtained as a result of contraventions.

R 4.10 The Commission recommends that, in the calculation of the financial sanction element of a regulatory enforcement agreement, any discount should not apply to the portion of the sanction that relates to the removal of the economic benefit derived from a regulatory breach.

5. Required elements of the agreement

4.148 The Commission has considered whether certain terms should be statutorily required to be included as part of all regulatory enforcement agreements.

4.149 As an important regulatory enforcement tool, which may ultimately be the subject of court proceedings if the agreement is not adhered to, regulatory enforcement agreements should be in writing. This is necessary to provide clarity and certainty to the terms of the agreement, which will often be complex and detailed.

R 4.11 The Commission recommends that the terms of a regulatory enforcement agreement, agreed between the regulator and the regulated entity, must be evidenced in writing.

4.150 The Commission considers that in most, but not every, case, there will be a monetary sanction element. The Commission also considers that, while compensation is an important feature of regulatory enforcement agreements, it will not arise in every case.

However, the Commission considers that it should always be a term of the agreement that the regulated entity or individual accepts responsibility for the breach. The administrative financial sanctions, if successful, will result in the finding that the regulated entity or individual has contravened the regulations. Because regulatory enforcement agreements are, in essence, a less resource intensive way of achieving the same result, the Commission considers that it will always be required that the regulated entity accepts responsibility for the breach. Otherwise, the denunciatory element of the Regulatory enforcement agreement would be lessened if firms or individuals could benefit from claiming that they were not responsible for the breach.

R 4.12 The Commission recommends that it should be a precondition of entering into a regulatory enforcement agreement that the regulated entity or individual accept responsibility for the contravention.

4.151 The Commission has not recommended that the terms of the regulatory enforcement agreement agreed between the regulator and the regulated entity should, in all cases, involve a monetary sanction. In some cases, it may be appropriate to forgo this fine element because, for example, the firm would go out of business or the individual would be declared bankrupt.

4.152 In the previous chapter, the Commission considered whether, in light of Article 34 of the Constitution that a decision by the Adjudicative panel should be confirmed by an order of the High Court. Arguably, this is necessary to ensure the constitutionality of the Commission's recommendations; if this requirement were not met then the administrative financial sanctions procedure might be considered to constitute the administration of justice, which would be constitutionally impermissible following the judgment in *Purcell*. Although the requirement of a High Court confirmation might slow down the procedure, it ensures that there is a confirming judicial body formally imposing the sanction.

4.153 This prompts the question as to whether this is also a constitutional requirement for regulatory enforcement agreements. The Commission is of the opinion that it is not. Regulatory enforcement agreements have the crucial feature that they are voluntary. Rather than being imposed by the regulator, they are freely entered into by the regulated entity. It should be noted that, in contrast to the requirement under section 33AW(2) of the 1942 Act requiring confirmation by the High Court of the Central Bank's administrative sanctions that have been imposed under the settlement procedure, there is no such requirement of approval by the High Court in respect of regulatory enforcement agreements. Oversight by the High Court would delay the implementation of regulatory enforcement agreements, adding costs and potentially depriving such agreements of their effectiveness as an enforcement tool. This would reduce some of the benefits that regulatory enforcement agreements have over other enforcement tools. It would also be unnecessary, given the Regulatory enforcement agreement process is entirely voluntary on the part of the regulated entity.

R 4.13 The Commission recommends that, without prejudice to Recommendation 4.29, below, it should not be a requirement of a regulatory enforcement agreement, bearing in mind

that it is a voluntary agreement, that it be confirmed by the High Court for it to come into operation.

6. Without prejudice Nature of Negotiations

4.154 As discussed above, it is the policy of the Central Bank to undertake negotiations on a "without prejudice" basis. This applies equally to both parties to the negotiations.

4.155 The Central Bank, while negotiating a settlement, may continue with its other enforcement tools in respect of the same suspected breach. For example, the Central Bank may continue to investigate the regulated entity under its Administrative sanctions procedure, while negotiations are ongoing. This ensures that negotiation does not disrupt the parallel investigation and that the threat of administrative financial sanctions remains credible. Although most regulated entities will enter into negotiations in a sincere attempt to settle the matter, it should not be possible to compromise or delay the use of other enforcement tools by entering into negotiations. In addition, the initiation of the negotiations concerning a regulatory enforcement agreement does not oblige the Central Bank to reach an agreement with the regulated entity.

4.156 As well as being "without prejudice" to the Central Bank's parallel investigation, the settlement procedure is also "without prejudice" to any disclosures made by the regulated entity. Statements made by the regulated entity in the course of the negotiations cannot be used against them in any subsequent civil or criminal proceedings. This means that the regulated entity or individual can speak candidly during the course of negotiations. This is to ensure that settlements facilitate the acquisition of information by the regulator concerning breaches that they might not otherwise be able to obtain. Given that the regulated entity necessarily has the greatest knowledge of their own activities, co-operation between the regulator and regulated entity is often the most effective ways for the regulator to discover the extent of breaches.

4.157 As discussed above, one of the advantages of regulatory enforcement agreements is that they encourage the sharing of information between the regulated entity and the regulator, when compared with other, more adversarial, enforcement tools. The Commission considers that the procedures surrounding the Central Bank's settlement of its administrative sanctions are effective at securing the co-operation of regulated entities. Therefore, it would be beneficial to the operation of regulatory enforcement agreements if these procedures were included. In particular, the "without prejudice" and confidential nature of the negotiations themselves facilitate open dialogue between the regulator and regulated entity.

R 4.14 The Commission recommends that negotiations between the regulator and the regulated entity or individual concerning the terms of a regulatory enforcement agreement should be undertaken on a "without prejudice" basis, in respect of the disclosures made by the regulated entity as well as the regulator's capacity to use other enforcement tools.

7. Public statement

4.158 The Commission considers that, although the negotiations themselves will be in private and not disclosed, there are a number of advantages associated with the regulator issuing a public statement in conjunction with the settlement agreement, once reached. This affords transparency and accountability to the exercise of this important public power of the regulator. These public statements can have additional compliance effects, by providing information to other firms about how best to comply and by setting standards and norms about appropriate behaviour. Furthermore, the prospect of reputational damage can enhance the deterrent effect, if the contravening conduct is something that would be deprecated by the customers or business partners of the regulated entity or individual concerned.

4.159 The first stage in any Regulatory enforcement agreement is, of course, the negotiation phase itself. The actual negotiations, while they are ongoing, should be otherwise than in public. This is to encourage candour, in particular on the part of the regulated entity or the individual concerned. This will ensure the benefits of regulatory enforcement agreements are preserved. This privacy consideration is related to the "without prejudice" nature of the discussions whereby the regulator guarantees that the statements made will not be used to prejudice the interests of the regulated entity. In order to make this guarantee meaningful, the regulated entity must also be confident that such statement will not be published, until and unless a final agreement is reached. The confidential and "without prejudice" nature of the negotiation ensures that the regulated entity won't be disadvantaged by a sincere attempt to settle, in the event that negotiations break down.

4.160 Additionally, the fact that the regulated entity or individual is engaged in negotiations should not be disclosed. The very fact that a regulated entity is considering accepting responsibility for the prescribed contravention, if it were to go public, may prejudice the regulated entity. This could discourage regulated entities from entering into the negotiation process in the first place.

R 4.15 The Commission recommends that, as a precondition for the initiation of negotiations between the regulator and the regulated entity or individual, all parties to the negotiations shall agree that neither the contents of the negotiations, nor the fact that negotiations are taking place, are to be disclosed while the parties are conducting the negotiations.

R 4.16 The Commission recommends that negotiations between the regulator and the regulated entity or individual, concerning the implementation of a regulatory enforcement agreement shall be conducted otherwise than in public.

4.161 Although the initial negotiation stage of the Regulatory enforcement agreement will be confidential and "without prejudice" to either party, once the agreement is reached, it is the Commission's view that the terms of that agreement should be publicised.

R 4.17 The Commission recommends that, in the interests of transparency and accountability, where the regulator enters into a regulatory enforcement agreement with a regulated

entity, this agreement shall be accompanied by a detailed public statement, outlining the terms and objectives of the regulatory enforcement agreement.

4.162 The Commission, however, acknowledges that, in certain exceptional circumstances, some of the details of the settlement will need to be omitted from the public statement if this would, for example, prejudice ongoing civil actions or affect the reputation of an innocent party. The Commission considers that any undue prejudice to any individual arising from publication would usually be avoided by omitting some details from the statement, rather than by refraining from issuing any public statement. This would ensure that some of the benefits of publicity, such as the compliance and deterrent effects, are achieved, while still preventing any prejudice that might arise.

R 4.18 The Commission recommends that the following terms must be included in the public statement outlining the terms of the regulatory enforcement agreement, unless publication of one or more of the terms from the public statement would unfairly prejudice the interests of the regulated entity or individual concerned or those of a third party:

(1) The name of the regulated entity or individual reaching the settlement with the regulator;

(2) The nature of the breach and the specific provision that the regulated entity or individual has contravened;

(3) That the regulated entity or individual accepts responsibility for the breach;

(4) The level of the monetary sanction agreed, including the criteria relevant to the figure arrived at;

(5) The level of discount applied, if any, and the reasons for the level of discount; and,

(6) The amount of any compensation payments and the nature of remedial action, such as a redress scheme, agreed as part of the settlement, if any.

4.163 The Commission considers that it will be usually be beneficial to disclose as much information as possible about the Regulatory enforcement agreement. Information should only be omitted to the minimum extent necessary to address the injustice that might arise justifying omission. For example, any prejudice arising from the publication of sensitive or confidential information relating to a legitimate commercial interest could be safeguarded by redacting any reference to the specific confidential commercial practices. However, the level of sanction would be retained in the public statement.

R 4.19 The Commission recommends that, where it is necessary for the regulator to exclude any of the information set out in Recommendation 4.18, this should be done to the minimum extent possible to prevent any unfair prejudice from arising.

4.164 The Commission does not consider it necessary to set out an exhaustive list of circumstances that justify the omission of any of the above terms. The Commission considers that the regulator will often be best placed to assess these matters. However, the Commission considers that the following are likely to be grounds for omission, such as the prevention of prejudice arising in respect of separate criminal proceedings or innocent consumers or other third parties, the protection of the legitimate commercial interest of a company or individual, and the prevention of instability in the financial system.

4.165 Where the grounds that previously justified non-publication cease to apply, for example, where criminal proceedings relating to the conduct are concluded or discontinued, the regulator should then publish the previously omitted information. However, this obligation should be limited in duration, as it could be unduly burdensome on regulators.

R 4.20 The Commission recommends that, where one or more of the terms of the regulatory enforcement agreement has or have been omitted from the public statement as originally published, but where subsequent publication would no longer unfairly prejudice the regulated entity, individual or other third party, the regulator shall publish a supplementary public statement including the previously omitted term or terms, provided, in all cases that the passage of time would not make this obligation unduly burdensome on the regulator.

8. Compensation

4.166 The Commission is of the view that compensation is often an important element of regulatory enforcement agreements. Compared with other enforcement tools, regulatory enforcement agreements can provide compensation more flexibly and earlier than would be the case with other enforcement tools. Many other regulatory tools are aimed at securing compliance or punishment, whereas regulatory enforcement agreements have the advantage that they can address and remedy the harm arising out of the contravention directly. These compensation payments can be significant and in some cases compensation can be substantially larger than the amount of the fine.[105]

R 4.21 The Commission recommends that, as part of a regulatory enforcement agreement, a regulator should have the express power to agree financial compensation payments to be paid by the regulated entity responsible for the breach, to any victims of the breach, including by means of a redress scheme.

4.167 The compensation element of any sanction should be excluded from the discount calculation. This is because the compensation is restorative rather than retributive, and the amount required to compensate victims of the regulatory breach would not be dependent on the co-operation or previous record of good conduct on the part of the

[105] See for example Central Bank of Ireland, *Settlement Agreement between the Central Bank of Ireland and Ulster Bank Ireland Limited* (2014), discussed above.

regulated entity. To apply the discount to any compensation or redress schemes would disadvantage any victims of the regulatory breach if the agreement reduced the disadvantage which the breach caused them was not sufficiently offset by the payment or redress. Regulated entities should not be able to avoid the payment of compensation, even where they settle an enforcement procedure at an early stage.

4.168 The Commission considers that such financial compensation elements of any regulatory enforcement agreement should be excluded from the calculation of the discount, if any, of the financial sanction to be imposed on the regulated entity. This is because the compensation is restorative rather than retributive, and the amount required to compensate victims of the regulatory breach would not be dependent on the co-operation or previous record of good conduct on the part of the regulated entity. To apply the discount to any compensation or redress schemes would disadvantage any victims of the regulatory breach, if the agreement reduced the disadvantage which the breach caused them was not sufficiently offset by the payment or redress. Regulated entities should not be able to avoid the payment of compensation, even where they settle an enforcement procedure at an early stage.*]*

4.169 Compensation, just like the removal of the economic benefit derived from a breach (also known as “disgorgement”), should not be constrained by the upper limit on value of €10,000,000 or 10% of the annual turnover. Disgorgement is justified on the principle that a regulated entity or individual cannot profit from their own breach. If there were an upper limit on the amount of disgorgement, then some entities might be able to profit from breaches of regulations. Similarly, if the discount did apply to compensation then the regulated entity responsible for the breach could gain an advantage from the breach at the expense of innocent victims. Compensation is dependent on the level of harm occasioned to innocent third parties; if there was an upper limit on the level of compensation, then the aggrieved party might not be adequately compensated.

R 4.22 The Commission recommends that, in the calculation of the sanction as a result of settlement, any discount should not apply to the compensation element of the sanction.

4.170 The Commission does, however, consider that the level of compensation, like disgorgement, should be constrained by the amount, in that, it should not cause a company to go out of business or an individual to declare bankruptcy. Exceeding this limit would do little to compensate victims of the breach if no money is available. Furthermore, there are many knock-on effects of corporate insolvency that may cause considerable hardship to other innocent parties such as creditors and employees. It is an unfortunate feature of compensation generally, that where the party liable to pay compensation lacks resources then ultimately the victim may go uncompensated.

4.171 This is consistent with recommendations in the previous chapter, which recommend an overriding requirement, in the interests of proportionality and prevention of spillover, that the sanction should not be so severe as to cause a regulated entity to cease business or an individual to declare bankruptcy.

R 4.23 The Commission recommends that, where financial compensation of victims of contraventions is included in a regulatory enforcement agreement, in calculating the level of this compensation, no regard is to be had to the upper monetary limit or percentage of annual turnover or income that may be imposed on the regulated entity or individual.

9. Variation and flexibility

4.172 As we have seen from the above recommendations regarding the level of sanction, regulators would usually be best placed to choose the appropriate level of sanction. The Commission acknowledges, however, that events can render a previously imposed sanction overly oppressive and the interests of justice, as well as the enforcement objectives of the regulator, may justify departing from the strict terms of the original agreement.

4.173 Strictly binding agreements have enforcement advantages. This is discussed in greater detail below, under enforcement. The obvious advantage of binding agreements is that they compel the parties to act in accordance with their terms. The details of regulatory enforcement agreements will be decided on the basis of the enforcement objectives of the regulator. To depart from these terms, therefore, could conflict which the deterrent and compliance aims of the regulator, which inform the agreement. Providing for strictly enforceable agreements also ensures that they are not viewed by regulated entities as an attractive, and leniently policed, alternative to more severe sanctions.

4.174 At the same time, regulatory enforcement agreements need to be flexible. The level of sanction that the Commission has recommended, is discretionary, as with administrative financial sanctions (albeit with a possible percentage discount). The reason for this discretion, as discussed above, is that regulators need to be able to tailor their approach in a responsive manner, taking account of the characteristics and disposition of the relevant regulated entity. This ensures that sanctions are neither overly severe nor unduly lenient, taking account of the regulated entity’s capacity to pay or amenability to persuasion.

4.175 Different approaches will clearly be appropriate when dealing with different firms. In a similar way, the approach for one firm may not always be the same. Changing circumstances can change or affect what a regulator might consider to be an appropriate sanction. A certain degree of flexibility is required if circumstances change, subsequent to the finalisation of a regulatory enforcement agreement, which would justify departure from the original terms. This prevents regulatory enforcement agreements being fossilised at a particular point in time and allows the regulators a degree of flexibility to adjust the terms of the agreement in response to changing circumstances.

R 4.24 The Commission recommends that where financial compensation of victims is included as part of a regulatory enforcement agreement, the regulator, in calculating the overall amount of this compensation to victims (to the extent that this is possible at the time when the regulatory enforcement agreement is entered into), shall endeavour to ensure that that the overall amount, combined with any other financial sanction that is agreed,

is not so high as would be likely to cause the regulated entity to cease business or the individual to be adjudicated bankrupt.

R 4.25 The Commission recommends that regulatory enforcement agreements should be capable of variation, subject to the criteria set out in subsequent recommendations, where the regulator considers that it is appropriate to vary the terms of the original agreement, having regard to its enforcement objectives and the general principles applicable to regulatory enforcement agreements.

4.176 The unified approach to the drafting and construction of regulatory powers is discussed in Chapter 2, above.

10. Enforcement

4.177 The Commission expects that the prospect of more significant administrative financial sanctions will provide an effective incentive for regulated entities to engage in the Regulatory enforcement agreement process and comply with regulatory enforcement agreements. However, the Commission acknowledges that, in some cases, the regulator will need to enforce the terms of the agreements. Where it is necessary to do so, an efficient and streamlined enforcement mechanism would prevent the frustration of regulatory enforcement agreements by regulated entities. Effective enforcement procedures would also encourage compliance *ex ante* by ensuring that little could be gained by trying to avoid compliance with the agreement.

4.178 The Commission is of the view that regulatory enforcement agreements would be made more effective by the provision of efficient and streamlined enforcement mechanisms. This would have the advantage of providing a means by which regulated entities could be effectively bound by their agreements. The Commission is also of the view that many regulated entities would welcome the existence of a method by which they could credibly indicate their willingness to participate in remedial action and demonstrate their sincerity in solving previous contraventions.

4.179 The legislative provisions that set out the ability of regulators to enter into regulatory enforcement agreements should also provide for a right to apply to the High Court to enforce the terms of the agreement. Section 33AV(3A) and 33AV(3B) of the *Central Bank Act 1942* provide a useful template for such a provision. As noted above, these sections empower the Central Bank to apply to the High Court to enforce the terms of the agreement, where it is established that they have failed to comply with this agreement.

R 4.26 The Commission recommends that the terms of a regulatory enforcement agreement may be varied where circumstances outside the control of either party to it have subsequently arisen to the extent that it would not be in the interests of justice to continue to enforce the terms of the original regulatory enforcement agreement and where the regulator and the regulated entity or individual concerned each consent to the variation.

R 4.27 The Commission recommends that where a regulated entity or individual fails to comply with any of the terms of the regulatory enforcement agreement, the regulator may apply to the High Court for an order requiring the regulated entity or individual to comply with that term.

4.180 In addition to the above recommendations, the Commission considers that the monetary element of regulatory enforcement agreements should be enforceable as an ordinary civil debt, by summary proceedings, in order to ensure that a long expensive civil action is not required in cases of non-payment. The monetary element of the agreement would be a readily calculable liquidated sum, and as such, would be appropriate to be resolved by summary proceedings.

R 4.28 The Commission recommends that where the High Court is satisfied that the regulated entity or individual has failed to comply with any of the terms of the regulatory enforcement agreement, the High Court may make an order requiring the regulated entity or individual to comply with that term.

4.181 In addition to the above enforcement actions, which will be available to the regulator in every case, regulators should also be empowered to apply to the High Court to make the agreement an order of court. Section 14B of the *Competition Act 2002*, under which certain agreements between the regulator and regulated entity may be made an order of the High Court, provides a useful template for the enforcement of regulatory enforcement agreements. Non-compliance with such an order would constitute contempt of court. The Commission is of the view that the ability of regulators to have their “commitment agreements” made orders of the High Court to ensure efficient enforcement, would complement the ability of regulators to enter into regulatory enforcement agreements. The Commission also considers that the regulator should usually apply to the court to make the Regulatory enforcement agreement an order of the High Court, but that it should not be an absolute requirement; there may be circumstances in which the regulators considers it inappropriate to make the obtain a court order in the terms of the agreement. The Commission believes that regulated entities will usually agree to the agreement being made an order of the High Court, as part of the terms of the agreement, in order to avoid the more significant administrative financial sanctions.

R 4.29 The Commission recommends that a regulator may, by proceedings brought in a court of competent jurisdiction, recover as a debt due to the regulator any amount agreed to be paid under a Regulatory Enforcement Agreement.

R 4.30 Without prejudice to Recommendation 4.13, above, the Commission recommends that the High Court may, upon the application of a regulator, make an order in the terms of a regulatory enforcement agreement (REA order) if the Court is satisfied that:

(1) the regulated entity or individual consents to the making of the order;

(2) the regulated entity or individual obtained legal advice before so consenting;

(3) the agreement is clear and unambiguous and capable of being complied with,

(4) the regulated entity or individual is aware that failure to comply with any order so made would constitute contempt of court;

(5) the regulator has, not later than 14 days before the making of the application, complied with the requirements, set out in the above recommendations, that the details of the regulatory enforcement agreement are to be publicised; and

(6) the terms of the regulatory enforcement agreement are proportionate to the contravention involved and are in the interests of justice.

4.182 The Commission also acknowledges that third parties may be prejudiced by regulatory enforcement agreements that are enforced as binding orders of the High Court. If such orders were incapable of variation, it may cause hardship to third parties who were not represented in the initial application. The Commission is of the view that the High Court should be capable of hearing subsequent applications to vary or depart from the terms of the original order if third parties wish to apply to the High Court to do so, and where the terms would result in breach of contract with the applicant third party. This is consistent with the Commission's view, stated above, that administrative financial sanctions and regulatory enforcement agreements should primarily sanction the regulated entity responsible for the breach, while minimising any collateral effects on third parties who are not responsible.

R 4.31 The Commission recommends that the High Court should have the jurisdiction, on the application of any affected third party (that is, other than the regulator or the regulated entity or individual to which a regulatory enforcement agreement order applies), to vary or annul a regulatory enforcement agreement order if the Court is satisfied that the Regulatory enforcement agreement in respect of which the Regulatory enforcement agreement order was made requires the regulated entity or individual to which the Regulatory enforcement agreement order applies, to do, or refrain from doing, anything that would result in a breach of any contract between, on the one hand, the regulated entity or individual concerned and, on the other hand, the affected third party applicant, or that would otherwise render a term of that contract not capable of being performed.

4.183 However, where the contract between the third party and the regulated entity itself is in violation of the law or contravention of regulations, for example, where it amounts to anti-competitive practices or other competition law offences, then the High Court should not have the ability to vary or discharge a court order in order to facilitate such breaches.

R 4.32 The Commission recommends that the High Court shall not make an order under the previous recommendation if it is satisfied that the contract or term of the contract to which the application for such order relates, is in breach of the law or is otherwise a contravention of regulations.

4.184 In addition to innocent third parties being prejudiced by the strictness of enforceable High Court orders, the regulator or regulated entity may later seek to vary or discharge the order. The parties themselves might be prejudiced if circumstances change subsequent to the granting of the order, which may justify departure from the terms of the Regulatory enforcement agreement. For example, the economic situation for a regulated entity or individual could change to the extent that strict adherence to the terms of an agreement could cause that regulated entity to become insolvent or the individual to be declared bankrupt. Another example which may justify variation of an order would be where the regulator, who has intimate knowledge of their particular industry and enforcement objectives, considers that it is no longer in the interest of these objectives to insist on strict adherence to the terms of the Regulatory enforcement agreement.

4.185 One of the advantages of regulatory enforcement agreements, outlined above, is their flexibility. This advantage could arguably be undermined by the overly rigid adherence to the terms of the original court order. High court orders in the terms of an agreement should encourage adherence to the terms of the agreement, but should be, at the same time be capable, of accommodating changes in circumstance.

R 4.33 The Commission recommends that the High Court should have jurisdiction, on the application of the regulator or a regulated entity or individual to which a regulatory enforcement agreement order applies, to vary or annul the Regulatory enforcement agreement order if:

(1) the party (other than the applicant for the order) to the Regulatory enforcement agreement to which the Regulatory enforcement agreement order applies consents to the application,

(2) the Regulatory enforcement agreement order contains a material error,

(3) there has been a material change in circumstances since the making of the Regulatory enforcement agreement order that warrants the Court varying or annulling the order; or,

(4) the Court is satisfied that, in the interests of justice, the Regulatory enforcement agreement order should be varied or annulled.

4.186 The Commission is of the view that orders of the High Court relating to the terms of a regulatory enforcement agreement should last a significant, albeit not unlimited, length of time. In balancing the interests of ensuring the achievement of the regulators' enforcement objectives, with the need for certainty concerning historic court orders which may have little practical relevance as a result of the passage of time, the Commission is of the view that 7 years is the appropriate default duration of such an order. Such an order of the High Court should, however, be capable of extension, for additional periods of three years, if the interests of justice so require.

R 4.34 The Commission recommends that a regulatory enforcement agreement order of the High Court shall cease to have effect 7 years after the making of the latest order of the Court in relation to the Regulatory enforcement agreement order.

R 4.35 The Commission recommends that, notwithstanding Recommendation 4.32, the High Court may, on the application of the relevant regulator not earlier than 3 months before the expiration of a regulatory enforcement agreement order, make an order extending

the period of the Regulatory enforcement agreement order (whether or not previously extended) for a further period not exceeding 3 years.

CHAPTER 5

DEFERRED PROSECUTION AGREEMENTS

A. Introduction

5.01 This Chapter considers whether a regime of Deferred Prosecution Agreements (DPAs) should be introduced in this jurisdiction. DPAs are agreements between a prosecutor and a corporate body (or other undertaking, such as a partnership) in which the prosecution agrees to dismiss a criminal charge if the corporate body fulfils specified obligations. Such obligations may include: accepting responsibility for the offence; cooperating with regulatory bodies; punitive measures such as financial penalties; surrender of ill-gotten financial gains; and compensation to victims through for example a redress scheme.[1] DPAs resemble the type of alternative approach to enforcement that has been applied to individuals, such as with addicted drug offenders who may defer a final decision on a drugs-related charge by agreeing to complete a rehabilitation course: if the course is successfully completed the charge may be dismissed.

5.02 Corporate crime can be difficult to detect due to its covert and sophisticated nature, and this in turn poses challenges for Irish law enforcement and regulatory bodies applying traditional models of investigation and prosecution. Corporate criminal conduct is often challenging to identify, time-consuming and difficult to prove given complex corporate structures and increasingly sophisticated methods of channelling funds and hiding illegal behaviour, as well as the reluctance of corporate bodies to report misbehaviour due to the adverse effects of criminal convictions.

5.03 Consideration of a DPA scheme in Ireland would not replace the option to prosecute; rather, it would be an additional tool to be used by the prosecutor where an immediate prosecution would not be suitable. In addition, since the effect of a DPA is to permit a corporate body to avoid conviction if it complies with the terms of the DPA, DPAs may encourage self-disclosure of misconduct and therefore enhance detection and enforcement in circumstances where prosecution would be difficult.

5.04 In this Chapter, Part B examines the key features of the US and UK models of DPAs. Part C analyses the arguments for and against the introduction of a DPA regime in Ireland, and

[1] Mazzacuva, "Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US systems of Criminal Justice" (2014) 78 JCL 250.

concludes that a model based on the UK approach should be introduced. Part D outlines the key features of the DPA that that the Commission recommends.

B. The Irish Context and Models Abroad

1. What is a DPA?

5.05 A Deferred Prosecution Agreement (DPA) is an agreement between a prosecutor and a corporate body (or other undertaking such as a partnership) in which the prosecution agrees to dismiss a criminal charge if the corporate body fulfils its obligations during a given period. Underpinning the DPA procedure is the concept of voluntary cooperation between the offending corporate body and the prosecutor. DPAs are, in other words, agreements by which criminal proceedings for certain (predominantly economic) crimes are commenced but are subsequently suspended in exchange for the corporate body submitting to agreed terms. Any material breach of the DPA by the corporate body usually results in a prosecution for the offences involved.

5.06 DPAs have been in place in the United States for several decades, where they are operated by prosecutors primarily outside a statutory setting and with little or no judicial oversight or supervision. In the United Kingdom, DPAs were placed on a statutory footing in 2013, and can be activated only after judicial approval.

5.07 The general concept of a DPA-type approach to corporate crime was based on the type of alternative approach to criminal law enforcement that has long been applied to individual offenders in certain settings. For example, where an addicted drug user is charged with possession of a small quantity of drugs, the prosecution may choose to defer a final decision on the drugs-related charge where the accused agrees to complete a rehabilitation course. If the accused successfully completes the course, the charge may later be dismissed. DPAs involve an admittedly more complex form of this conditional deferment of prosecution of an individual.

5.08 DPAs can be seen as a third option or middle-ground, between the "either or" choice of a prosecution or no prosecution, that is, a "stark choice when [the prosecution] encounters a corporation that has engaged in misconduct – either indict, or walk away".[2]

5.09 The rationale of DPAs is therefore that, in some circumstances, prosecution of the corporate body might not fully satisfy the interests of justice. In such circumstances, the public interest may necessitate sanctions other than prosecution. This can be the case because prosecution has the potential to destroy a corporate body, or affect innocent

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[2] Breuer, Assistant Attorney General, U.S. Department of Justice, *Speech at the New York City Bar Association* (2012). Available at: *http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html*.

parties such as employees, shareholders, pensioners, customers and suppliers.[3] As such, competing economic interests, the behaviour of the company and the pervasiveness of the misbehaviour need to be balanced before a prosecution or a DPA is deemed to be the most appropriate agreement. If such collateral consequences of corporate conviction would be significant, it may be more appropriate to recommend a DPA with conditions designed, among other things, to promote compliance with applicable law and to prevent repeat offending.

5.10 Under appropriate circumstances, a DPA can therefore restore the integrity of a corporate body's operations and preserve its financial viability even though it has engaged in criminal conduct, while still preserving the option to prosecute if there is a significant breach of the DPA. Other objectives can also be achieved under a DPA, such as prompt restitution for victims.

2. Criminal Justice Responses in Ireland

5.11 The Director of Public Prosecutions (the DPP) has exclusive responsibility for bringing criminal prosecutions on indictment.[4] Section 2(5) of the *Prosecution of Offences Act 1974* provides that the DPP is independent in the exercise of his or her functions. It follows from the DPP's independence that he or she has discretion in deciding whether to prosecute a particular case.

5.12 The decision to prosecute is not a straightforward one. In *K(M) v Groarke*,[5] the Supreme Court described the task of the DPP in deciding whether or not to prosecute as a "complex decision involving the balancing of many factors."[6]

5.13 The decision to prosecute must include the public interest and is not always, therefore, limited to considerations as to whether the DPP believes an offence has been committed. The DPP has published *Guidelines for Prosecutors*,[7] which set out the nature of this complex decision. Part 4 of these *Guidelines* outlines the factors that prosecutors should consider. The paramount consideration is the public interest, although it is not always

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[3] For example, under federal procurement regulations in the US, companies under investigation or indictment are suspended from applying for or receiving government contracts, subsidies, and assistance — effectively suspending any and all of their government-related business. Publicly traded corporations typically face a sharp drop in share value and debilitating class action lawsuits. A conviction could effectively result in a corporate death sentence, harming innocent employees, stockholders, and the economy.

[4] Before the DPP was established by the *Prosecution of Offences Act 1974*, the office of the Attorney General was entrusted with this responsibility. For summary offences, several other bodies such as the Garda Síochana can also bring prosecutions in the District Court.

[5] [2002] IESC 51.

[6] *Ibid.*

[7] *DPP Guidelines for Prosecutors* (revised October 2016). Available at: *https://www.dppireland.ie/filestore/documents/Guidelines_for_Prosecutors_[4th_Edition_-_October_2016].pdf*.

clear which course of action best promotes this interest. The successful prosecution of crime is clearly in the public interest, so the likelihood of success of bringing a prosecution will undoubtedly have a bearing on the DPP's decision. The strength of the evidence will in turn inform this decision, as it will not be in the public interest to expend scarce resources on hopeless prosecutions. Other, less easily measurable, considerations emphasise the complexity of the decision. For example, while a decision not to prosecute can be upsetting for a complainant, an unsuccessful prosecution can undermine faith in the criminal justice system. The *Guidelines* also state that it is not possible to list exhaustively the factors of relevance.

5.14 A *nolle prosequi* is a decision by the DPP to discontinue a prosecution and is currently the formal method by which the DPP indicates that a prosecution will not proceed in respect of a particular matter. Section 12 of the *Criminal Justice (Administration) Act 1924* provides that a *nolle prosequi* can be entered at any time after an indictment has been preferred and until a verdict has been returned. Usually a *nolle prosequi* is entered before charges are preferred.[8] As with all powers of the DPP, in deciding whether to exercise this power, the DPP has regard to the public interest.

5.15 In seeking to balance the competing considerations inherent in prosecutorial discretion, a number of options to assist the DPP in striking the appropriate balance between prosecuting or not prosecuting. For example, the prosecution may pursue lesser charges than those potentially supported by the evidence. Similarly, the prosecution may take a more rehabilitative approach that falls short of full criminal sanction, such as adult cautions or, if the case is suitable to be tried summarily in the District Court, accepting that it may be suitable for the Court to apply section 1(1) of the *Probation of Offenders Act 1907*, which amounts to an acquittal.[9]

3. Current processes that are comparable to DPAs

5.16 A criminal prosecution is clearly often necessary, but may not be appropriate for a number of reasons. A prosecution may excessively criminalise minor or first-time offenders with the resultant punishment being disproportionate. In addition, a full, contested trial can be costly, time-consuming and where it leads to an acquittal may be argued to have involved inappropriate use of public resources. Not prosecuting, on the other hand, has the obvious disadvantage that it does not acknowledge publicly the commission of an alleged crime. As a result, underlying problems might not be addressed. Where the public interest

[8] O'Malley, *The Criminal Process* (Round Hall 2009) notes at paragraph 12.39 that the 1924 Act has been interpreted as permitting the entry of a *nolle prosequi* prior to the preferring of charges, because otherwise the DPP would be required to initiate criminal proceedings prior to dropping them.

[9] See generally the Law Reform Commission's 2005 *Report on the Court Poor Box and Probation of Offenders* (LRC 75-2005). In 2014, the Government published the *Scheme of a Criminal Justice (Community Sanctions) Bill* that proposes to implement the Commission's 2005 Report, repeal the *Probation of Offenders Act 1907* and provide the courts with a wider range of rehabilitative or restorative justice community sanctions.

is not well served by either option, other intermediate strategies may be effective. Such strategies may not suffer from the same disadvantages and can lead to outcomes that are more effective for prosecutors.

5.17 Adult cautions, for example, may be appropriate for first-time offenders, where the prosecution does not wish to punish the offender excessively but where a simple non-prosecution would not carry a sufficient deterrent effect. Adult cautions involve a Garda Superintendent giving a written warning to someone for behaving in an offensive manner, in lieu of prosecuting them.[10] There is a similar scheme, the Juvenile Diversion Scheme, available for offenders under the age of 18.[11] In deciding whether to administer a caution, the Gardaí take into account the public interest and the views of the victim. This option represents a compromise, and adds flexibility to the powers of An Garda Síochána, who are responsible for prosecuting the majority of summary offences. Adult cautions have the advantage that they can specifically deter the offender without punishing him or her excessively where the offence is relatively minor and the subject of the caution has no previous convictions.

5.18 Fixed penalty notices exist for certain offences, whereby the offender pays a fixed penalty in lieu of prosecution. Fixed penalty notices are most common in road traffic and public order offences. They have also been applied to certain corporate offending. For example, under section 874 of the *Companies Act 2014*, if a company remedies an earlier failure to file documents and pays a fixed penalty, it will avoid prosecution. Unlike the other examples given above, fixed penalty notices do not involve the specific exercise of prosecutorial discretion, but rather provide a generalised entitlement to avoid prosecution. This can represent an effective means of securing compliance, encouraging acknowledgement of wrongdoing in an efficient manner. Furthermore, such fixed penalties avoid over-criminalisation in cases where the offences are often committed out of inadvertence rather than wilful misconduct.

5.19 The *Probation of Offenders Act 1907*, although invoked by the court at the sentencing stage, represents another alternative to criminal sanctioning that may be employed in the public interest. Under section 1(1) of the 1907 Act, concerning summary offences, where the court thinks that the charge is proved but that it would be "inexpedient" to proceed to conviction, having regard to the extenuating circumstances and other features of the offences, it may dismiss the charge or discharge the offender on certain conditions of good behaviour.[12] Although the 1907 Act is usually invoked by way of plea in mitigation by the defence, rather than at the prosecution stage, it represents an acknowledgement that,

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[10] The Adult Caution Scheme came into operation in Ireland in 2006. Under the scheme, a Superintendent may give an adult caution to someone who has been acting in an offensive manner, based on the recommendation of a Garda of any rank. The subject of the caution must have no previous convictions and must acknowledge in writing that he or she engaged in the conduct complained of.

[11] The Juvenile Diversion Scheme was placed on a statutory footing by section 18 of the *Children Act 2001*.

[12] Section 1(2) of the 1907 Act makes similar provision for convictions on indictment.

in some cases, it may not be just or in the public interest to impose a conviction.[13] In 2014, the Government published the *Scheme of a Criminal Justice (Community Sanctions) Bill*, which proposes to repeal the *Probation of Offenders Act 1907* and provide the courts with a wider range of rehabilitative or restorative justice community sanctions.

5.20 Walsh notes that plea bargaining is available in Ireland, although in an informal, and often unacknowledged manner.[14] "Prosecutorial plea bargaining"[15] is the term used to refer to an understanding between the defendant and the prosecution that, in exchange for a guilty plea for some of the charges, the more serious charges will be dropped. This avoids the expense and uncertainty of a contested trial. However, Walsh also comments that this system is arguably unsatisfactory, because the informal nature of the process undermines transparency and accountability in the prosecution of serious offences.

5.21 In the context of corporate crime, prosecutorial discretion is also at the heart of the Cartel Immunity Programme operated by the DPP and the Competition and Consumer Protection Commission (CCPC).[16] 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.[17] 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 of the 2002 Act. The CCPC may recommend that the DPP should grant immunity where the applicant is the first to apply in respect of the cartel and 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.

5.22 Although not strictly related to the prosecution of offences, Regulatory Enforcement Agreements (REAs), discussed in further detail in Chapter 4, share some similarities with DPAs. An REA is the agreed imposition of Administrative Financial Sanctions (AFS) between the regulator in a particular industry and a regulated entity in respect of a prescribed contravention, in settlement of the more formal AFS proceedings. Under an REA, a regulator may enter into negotiations with the regulated entity with a view to settlement, as an alternative to a formal enforcement procedure or criminal prosecution. REAs may be considered similar to DPAs, in that the authority responsible may forgo more severe sanctions in the interest of saving cost and time and ensuring effective, immediate

[13] See generally the Commission's 2005 *Report on the Court Poor Box and Probation of Offenders* (LRC 75-2005).

[14] Walsh, *Criminal Procedure* 2nd ed (Thomson Reuters 2015), at paragraph 19-118.

[15] *Ibid.*

[16] See generally Competition and Consumer Protection Commission "Cartel Immunity Programme" (2015). Available at: *https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/2015-01-20-Revised-CIP-Final.pdf*.

[17] *European Competition Network Model Leniency Programme* (2012). Available at: *http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf*.

deterrent. The advantage of such an approach is that it facilitates the imposition of sanctions to deter conduct and acknowledge wrongdoing, while avoiding the expense and risk involved in full enforcement proceedings. REAs, and arguably DPAs, are particularly effective in a corporate context, where the imposition of sanctions on complex entities may be costly and time consuming. REAs arguably preserve the deterrent aspects of enforcement while making the process more efficient and effective.

5.23 In light of these challenges in prosecuting corporate offenders, intermediate options such as DPAs may provide an effective addition to the strategies available to prosecutors in Ireland.

C. DPAs in the US and UK

5.24 The Commission now turns to examine the DPA models in the United States and the United Kingdom.[18]

1. DPAs in the United States

5.25 Deferred Prosecution Agreements have long been a feature of the US criminal justice system. The concept of deferring prosecutions was originally developed in Chicago juvenile courts[19] in the early 20th century as a means of allowing the criminal justice system to respond to juvenile offending without permanently labelling young offenders as criminals. Using deferred prosecution agreements became common throughout the US by the 1960s.[20]

5.26 The increased reliance upon DPAs from the 1960s onwards eventually led to the enactment of the (US) *Speedy Trials Act 1974,* which provided a partial legislative basis and framework for dealing with deferred prosecutions[21] but did not consider the application of DPAs to corporate offenders.[22]

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[18] At the time of writing, a UK-type DPA model is under consideration in Australia and Canada. In Australia, the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* was introduced into the Australian Senate in December 2017. The Bill contains several new measures including the establishment of a statutory, judicially supervised, DPA regime in Australia. A consultation on a draft DPA Code of Practice was also launched by the Attorney General for Australia on 8 June 2018. In Canada, responses to a Government consultation launched in 2017 favoured the UK model over the US model: see "Expanding Canada's toolkit to address corporate wrongdoing: What we heard". Available at *https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/rapport-report-eng.html*

[19] Willrich, "Boyz to men … and back again? Revisiting a forgotten experiment in juvenile justice" (2003) 86 *Judicature* 258, the juvenile court in question was the "Boys' Court of Chicago" founded in 1914.

[20] Greenblum, "What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements" (2005) 105 Colum L Rev 1863, at 1866.

[21] Greenblum, *Ibid* at 1867.

[22] Greenblum, *Ibid* at 1868.

5.27 It was not until 1997 that the US federal Department of Justice (the DoJ) provided for standards for the deferral of federal prosecutions for individual offenders in the *US Attorney's Manual* (guidance for federal level prosecutors).[23] This standardised regime was described as "Pretrial Diversion".[24] At the time of writing, the pre-trial diversion form of DPA is still provided for under the *US Attorney's Manual.*

5.28 In the *Holder Memorandum* (1999) the DoJ set out non-binding guidance which codified the principles to be applied when determining whether criminal charges should be filed against a corporate body.[25] It has been noted that this guidance only began to have more than minimal influence on prosecutions following a series of corporate scandals beginning in the early 2000s.[26]

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[23] US Department of Justice, *US Attorney's Manual*, 9-22.010 (1997).

[24] Greenblum, "What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements" (2005) 105 Colum L Rev 1863, at 1868, suggests that the drafters of these standards "likely did not contemplate the use of deferral on corporations, as they were looking back on thirty years of deferral of individual offenders."

[25] Deputy Attorney General Holder, *Memorandum to all Component Heads and United States Attorneys: Bringing Criminal Charges Against Corporations* (US Department of Justice, June 1999). This memo set out nine factors to be applied when determining whether to charge a corporate body:

1. the nature and seriousness of the offence;
2. the pervasiveness of wrongdoing within the corporate body;
3. the corporate body's history of similar conduct;
4. the corporate body's timely and voluntary disclosure of wrongdoing;
5. the corporate body's willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges;
6. the existence and adequacy of the corporate body's compliance program;
7. the corporate body's remedial actions;
8. collateral consequences, including disproportionate harm to shareholders and employees adequacy not prove personally culpable; and
9. the adequacy of non-criminal remedies.

[26] Bohrer and Trencher, "Symposium: Corporate Criminality: Legal, Ethical and Managerial Implication: the Challenge of Cooperation: Prosecution Deferred: Exploring the Unintended Consequences and Future Cooperation" (2007) 44 Am Crim L Rev 1481, at 1485, notes scandals including Enron, Tyco, Adelphia, and WorldCom and driving factors behind US prosecutors' change of attitude regarding corporate crime.

This increased focus is also evidenced by: an increase of resources allocated to corporate prosecutions, including the establishment of specialist group with in the US Department of Justice to respond to corporate crime: the Corporate Fraud Task Force (initially established in relation to the Enron investigation and prosecution, and now known as the Financial Fraud Enforcement Task Force): Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) at 6.

See also Greenblum, "What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements" (2005) 105 Colum L Rev 1863, at 1874.

5.29 One particular instance of a corporate prosecution taken pursuant to the DoJ's *Holder Memorandum*'s guidance is the *Arthur Andersen* case (2002).[27] This case is considered in more detail in below.

5.30 The US DoJ codified the use of DPAs as a "third way" option for Federal prosecutors in 2008 when, for the first time, the *United States Attorney's Manual* was amended to provide guidance on negotiating and entering a DPA with a corporate defendant.[28] The current version of the *United States Attorney's Manual* continues to provide for the use of DPAs in response to corporate offending. It states that federal prosecutors should invite a defendant to enter DPA negotiations where the collateral consequences of a corporate conviction for innocent third parties, such as employees, would be significant, provided that the conditions attached are designed, among other things, to promote compliance with applicable law and to prevent recidivism.

5.31 Although DPAs are available to natural persons under the United States system, the Commission considers that it is appropriate to confine any model that might be applied in Ireland to corporate bodies only. While the Commission is aware of the arguments in favour of the application of DPAs to natural persons, there would appear to be a risk that, at least in the United States, the extension of DPAs to such individuals has had an insufficient deterrent effect on offending. This has included the risk of removing the focus of attention from the primary wrongdoing of the corporate body to the derivative liability of an individual. In this particular context, the Commission considers that the correct focus of DPAs should be on the corporate body alone.

2. DPAs in the United Kingdom

5.32 In the UK, DPAs were introduced on a statutory basis under section 45 and schedule 17 of the *Crime and Courts Act 2013*.[29] The 2013 Act describes a DPA as an agreement between a designated prosecutor and a person whom the prosecutor is considering prosecuting for an offence.[30] Under a DPA, the person agrees to comply with the requirements imposed on it by the agreement, and the prosecutor agrees that, upon approval of the DPA by the court, the prosecution of the person for the alleged offence is deferred.[31] DPAs in the UK

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[27] *United States v Arthur Andersen,* No. 02-121 (SD Tex June 15 2002); *United States v Arthur Andersen, LLP,* 374 F 3d 281.

[28] This amendment came on foot of the Acting Deputy Attorney General Morford, *Memorandum for Heads of Department Components United States Attorneys: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (March 2008).

See Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* 1st ed (Sweet & Maxwell 2015) at 17 and 97 for further discussion of the *Morford Memo.*

[29] Bisgrove, and Weekes, "Deferred Prosecution Agreements: A Practical Consideration" (2014) 6 *Criminal Law Review* 416, at 416.

[30] Schedule 17 paragraph 1(1) of the *Crime and Courts Act 2013*.

[31] Schedule 17 paragraph 1(2) of the *Crime and Courts Act 2013*.

can be only be used in relation to certain specified offences. These include offences under the *Bribery Act 2010*, as well as certain offences under the *Fraud Act 2006*, the *Companies Act 2006*, the *Proceeds of Crime Act 2002* and the *Financial Services and Markets Act 2000*.

5.33 In 2014, the Serious Fraud Office (SFO) and the Crown Prosecution Office (CPS) published a statutory Code of Practice under the 2013 Act that provides prosecutors with a non-exhaustive list of factors to consider in offering a DPA and the process to follow in the event of breach.

5.34 Proceedings in respect of the alleged offence are to be instituted by the prosecutor in the Crown Court charging the person with the alleged offence. As soon as proceedings are instituted they are automatically suspended. The suspension may only be lifted on an application to the Crown Court by the prosecutor. No such application may be made when the DPA is in force. When proceedings are suspended under the DPA, no other person may prosecute the person for the alleged offence.[32]

5.35 Under the UK's statutory DPA model, the Serious Fraud Office and the Director of Public Prosecutions may reach agreements with a company, partnership or unincorporated association (but not an individual)[33] to suspend a prosecution on agreed conditions. These conditions can relate to payment of compensation, financial penalties or costs, implementing compliance procedures, training of staff, disgorging profits, payments to charity or other remedial action.[34] Time limits can also be imposed.[35]

5.36 A DPA under the UK 2013 Act must be approved by the Crown Court. The Court must be satisfied that the DPA meets the following statutory criteria: "(a) the DPA is in the interests of justice, and (b) the terms of the DPA are fair, reasonable and proportionate."[36] If the corporate entity complies with the conditions of the DPA, the prosecution will not be resumed. In the alternative, it may be resumed and additional steps may be imposed.[37]

(a) Origins of the UK Approach

5.37 The DPA scheme enacted in the UK in 2013 is a product of a number of factors. First, was the recognised need for a "third way" option, between declining to prosecute or proceeding with a prosecution, for responding to corporate crime in a commercial context. As to its specific form, in particular its statutory nature and the inclusion of

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32 Schedule 17 paragraph 2 of the *Crime and Courts Act 2013*.

33 Schedule 17 paragraph 4(1) of the *Crime and Courts Act 2013*.

34 Scott, "Financial Crime Update" (2014) 1 *Journal of International Banking and Financial Law* 61.

35 Part 1 section 5 of the *Crime and Courts Act 2013*.

36 Schedule 17 paragraph 8(1) of the *Crime and Courts Act 2013*.

37 Schedule 17 paragraph 2(2) of the *Crime and Courts Act 2013.*

judicial oversight, the DPA regime in the 2013 Act is a response to criticisms of failed attempts by UK prosecutors to develop plea bargaining as a "third way" option in the UK.

(i) *R v Innospec*

5.38 The decision of the English Crown Court (Thomas LJ) in *R v Innospec*[38] in 2010 had a significant impact on the development of the UK DPA regime, and particularly the need for any such regime to have a statutory basis, to incorporate judicial oversight, and for this oversight to be exercised in public. The Court's decision included strong criticisms of attempts by prosecutors (in this case the SFO) to agree specific sentences with a corporate defendant in a plea bargain. The Court criticised these attempts for impinging on the UK's constitutional principle of transparency and open justice. The decision reaffirmed the constitutional boundaries of the prosecutors' discretion to negotiate a criminal response to criminal wrongdoing. This decision also reaffirmed, in strong terms, the exclusive role of the court in determining sentence. It is notable that the *Crime and Courts Act 2013* explicitly provides for the courts to exercise an oversight role in approving the terms of DPAs.

(ii) *R v Dougall*

5.39 Also in 2010, the English Court of Appeal in *R v Dougall*[39] criticised prosecution-led plea agreements conducted in a manner that usurped the sentencing role of the court. This case concerned a specific statutory regime, which provided for prosecuting entities to enter plea agreements with individuals alleged to have played a role in serious cases of organised or serious economic crime.[40] Such agreements were available where an individual had offered to assist the investigation or prosecution of offences committed by others[41] in return for the prosecution petitioning the court for a reduced sentence.[42] The relevant legislation expressly provides that there is no mandatory obligation on the court to impose the sentence reduction sought. Rather, the legislation provides that the court "may" take the defendant's assistance, provided pursuant to the agreement, into account.[43]

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[38] *R v Innospec Ltd* [2010] EW Misc 7 (EWCC); [2010] Crim L R 665; [2010] Lloyd's Rep FC462.

[39] *R v Dougall* [2010] EWCA Crim 1048.

[40] Various forms of agreement are provided for under sections 71 to 75 of the (UK) *Serious Organised Crime and Police Act 2005* ("SOCPA").

[41] As described by the Crown Prosecution service, *SOCPA Agreements: Practical Note for Defence Advocates* (May 2014) at 1.

[42] Section 73 of the *UK Serious Organised Crime and Police Act 2005*.

[43] Crown Prosecution Service, *Queen's Evidence – Immunities, Undertakings and Agreements under SOCPA 2005,* at paragraph 61.

5.40 It is notable that, following the *Innospec* and *Dougall* cases, the UK did not further develop their plea bargaining regime as a means of satisfying the need for a "third way" between declining to prosecute and bringing a prosecution.

(iii) *The BAE Systems Affair*

5.41 The BAE Systems Plc affair has been described as a long and unhappy episode in the history of the Serious Fraud Offence, but that it contributed to the introduction of DPAs in the 2013 Act.[44] The central points to this affair are two decisions of the Serious Fraud Office, both of which have garnered significant criticism in terms of the merits of the decision themselves, and the process by which these decisions were made. Both of these decisions, and the response to them, also appear to have influenced the development of the deferred prosecutions agreement regime introduced in the 2013 Act.

5.42 The first relevant decision was that the Director of the SFO declined to proceed to a criminal prosecution of BAE Systems in relation to part of the criminal allegations being investigated, despite acknowledging that there was sufficient evidence of criminality to proceed to prosecution on foot of these allegations.[45]

5.43 The second relevant decision was the SFO's decision to enter a "global settlement", in conjunction with US Department of Justice, in relation to the remaining criminal allegations that had been subject to the SFO's criminal investigation.[46]

(iv) *Aftermath of BAE Systems*

5.44 Following the conclusion of these proceedings, various aspects of the SFO's settlement with BAE Systems was subject to criticism. As a result, a parliamentary inquiry was launched, which considered whether reform of the law was required.[47] In the course of this inquiry, the Director of the SFO noted that "cases involving financial crime presented new issues which judges and prosecutors had not come across before", and, in reflecting upon these cases and the BAE prosecution in particular, the Director acknowledged that "there needed to be earlier judicial involvement in the process."[48]

5.45 Regarding the specific issues that arose in the BAE Systems case, the Director concluded that it was unsatisfactory that a settlement had been reached without judicial

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[44] Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* 1st ed (Sweet & Maxwell 2015) at 340.

[45] The Director's decision was analysed by the UK House of Lords in *R (iCorner House Research and Ors) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin); [2009] 1 AC 756.

[46] This decision was considered by the English Crown Court in *R v BAE Systems PLC* [2010] EW Misc 16 (CC).

[47] UK Parliament's International Development Committee, *Eleventh Report: Financial Crime and Development* (30 November 2011), at paragraphs 9, 10 and 41. Available at: https://publications.parliament.uk/pa/cm201012/cmselect/cmintdev/847/847.pdf.

[48] *Ibid* at paragraphs 48 and 49.

involvement. In complex financial crime prosecutions, the Director believed that it would be "helpful if the SFO and company involved could take a proposed resolution to a judge before the criminal justice process has been engaged by a formal charge. [The Director] saw judicial involvement in reaching a settlement as a way of providing public confidence in the decisions."[49] The Parliamentary committee did not reach a definitive view on this issue, but recommended that Government respond to the Director of the SFO's proposal.

(v) *The Need for a "Third Way" and the 2013 Act*

5.46 Against this backdrop of judicial disapproval of negotiated disposals of corporate criminal cases, the UK began to investigate the possibility of adopting the US model of DPA.[50] In 2012, the UK government published a consultation document to consider legislation on DPAs.

5.47 The UK government observed that the then-existing options for dealing with offending corporate entities were limited and that the amount of successful prosecutions was too low. Furthermore, the need for a "third way" response to offending corporate entities was highlighted by the difficulty which policing these offences presented as it mostly relied on self-reporting and whistleblowing. Prosecutors tackling economic crime primarily had two key approaches available to them: criminal prosecution or pursuing a civil recovery order against the commercial entity. The complexity and size of commercial organisations meant that it was increasingly complicated and expensive in both approaches to investigate their criminal activity and bring them to justice.[51] The best outcome for a prosecutor without a "third way" alternative to economic crimes cases was the conviction and fining of the corporate entity, which was considered unsatisfactory.

5.48 The UK Ministry of Justice noted that there was a requirement to look at the "range of tools" available to prosecutors, and expressed its belief that DPAs could make a valuable contribution to efforts to identify and address corporate economic crime, sitting alongside other measures including criminal prosecution and civil proceedings.[52]

5.49 The need for a "third way" response was welcomed by most (86%) respondents to the consultation who agreed to create a new tool for prosecutors to tackle economic crime. It was agreed that DPAs had the potential to improve the way in which corporate economic crime was dealt with and would enable prosecutors to bring more cases to justice:

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[49] *Ibid* at paragraph 49.

[50] Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* 1st ed (Sweet & Maxwell 2015) at paragraph 1.65.

[51] Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations*. (2012).

[52] *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements*, Consultation Paper CP9/2012, May 2012, at paragraph 5.

> "By encouraging organisations to self-report not only their own wrongdoing, but also wrongdoing within their business sector or market, DPAs have the potential to ensure that the Serious Fraud Office and the Crown Prosecution Service are made aware of more crimes and obtain better evidence of them. Prosecutors will be able to bring more cases to justice, and secure restitution for more victims".[53]

5.50 Crucial to the UK approach enacted in the 2013 Act is judicial oversight of the procedural aspects of entering into a DPA. This was a direct response to the criticism of the US model where it was argued that corporations could "buy their way out" of criminal penalties through an opaque and unsupervised deal with the prosecutor.[54] Overall, the main objective was to create a proportionate way of identifying, investigating and resolving economic crime cases.

5.51 Under the UK 2013 Act, it is (unlike in the US system) ultimately the court who decides whether (a) the DPA is in the interests of justice and (b) the terms of the DPA are fair, reasonable and proportionate.[55] As set out above, the DPA process in the UK model is intended to be transparent. To achieve that goal, unlike the US system, the UK model of DPAs is on a statutory footing. In addition, the Director of Public Prosecutions and Director of the Serious Fraud Office published a Deferred Prosecution Agreement Code of Practice (DPA Code) pursuant to the 2013 Act.[56] The purpose of the DPA Code is threefold. It ensures guidance for the prosecutor during:

- Negotiation of a DPA with a corporation that the prosecutor is considering prosecuting regarding an offence specified in the 2013 Act;
- Application to the court for the approval of the DPA;
- Oversight of DPAs subsequent to their approval by the court, notably regarding their variation, breach, termination and completion.

5.52 The guidance provided by the DPA Code, and the degree of judicial involvement, were drafted to take account of the judicial concern expressed in the *Innospec* and *Dougall* cases discussed above.

5.53 Another example of the judicial influence of DPAs in the UK as a reaction to criticisms of the US model is the requirement in the 2013 Act that the amount of the financial penalty

[53] *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations*. October 23, 2012. Ministry of Justice.

[54] Uhlmann, *"Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability*", University of Michigan Law School, paper No. 352, October 2013, at 1341.

[55] Schedule 17 paragraph 8(1) of the *Crime and Courts Act 2013.*

[56] Schedule 17 paragraph 6(1) of the *Crime and Courts Act 2013.*

agreed under a DPA must be broadly comparable to the fine that a court would have imposed on a corporate entity on conviction for the alleged offence following a guilty plea.[57] This degree of official judicial scrutiny differs once again from the US procedure for negotiating DPAs, which has historically been relatively *ad hoc* and guided by the policies and practices of the government agencies conducting the investigation.[58]

(b) The UK DPA system in practice

5.54 At the time of writing, 4 DPAs have been approved under the UK 2013 Act.

(i) *Serious Fraud Office v Standard Bank plc*

5.55 The first UK DPA was approved by Leveson LJ (sitting as judge of the Crown Court) in 2015, in *Serious Fraud Office v Standard Bank plc*[59] The UK bank was charged with failing to prevent bribery contrary to section 7(1) of the UK *Bribery Act 2010*.

5.56 Standard Bank (which was regulated in the UK by the SFO) and its former sister company, based in Tanzania, had persuaded the government of Tanzania to obtain a joint mandate to act as lead managers for a sovereign note issue. During negotiations, a US$6 million payment was made by the former sister company of Standard Bank to a “local partner”, a Tanzanian company (EGMA) partially owned by a member of the Government of Tanzania. The payment was made in March 2013. Standard Bank reported itself to the SFO through its solicitors in April 2013.

5.57 The SFO contended that the payment to EGMA was intended to persuade the Government of Tanzania to endorse Standard Bank in its bid to enter into the financing transaction and generate the resulting transaction fees. The SFO therefore concluded that Standard Bank had failed to prevent bribery contrary to section 7 of the UK *Bribery Act 2010* and that the prospect of conviction was real.

5.58 Applying the statutory test in the 2013 Act, the Court (Leveson LJ) held (a) that the DPA was in the interests of justice and (b) that its terms were fair, reasonable and proportionate. The Court therefore approved the terms of the DPA. In determining the level of financial penalty, the Court considered that “the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.” The terms were as follows:

(1) payment of compensation of US $6 million plus interest of US $1,153,125;

(2) disgorgement of profit on the transaction of US $8.4 million;

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[57] Schedule 17 paragraph 5(4) of the *Crime and Courts Act 2013*.

[58] 2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs), Gibson, Dunn & Crutcher LLP, July 9, 2013.

[59] *Serious Fraud Office v Standard Bank plc* [2016] Lloyd's Rep FC 102.

(3) payment of a financial penalty of US $16.8 million;

(4) past and future co-operation with the relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft indictment;

(5) at its own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the UK *Bribery Act 2010* and other applicable anti-corruption laws; and

(6) payment of the £300,000 costs incurred by the SFO.[60]

5.59 In assessing the relevant penalty, the Court held that the core point was the total fee that Standard Bank had received in respect of the transaction and concluded that an appropriate multiplier would be 300%, being the starting point for high culpability. In mitigation, the Court noted that Standard Bank had cooperated with the investigation and self-reported and that the penalty should therefore be reduced by one third.

5.60 It was noted that there was no allegation of participation in an offence of bribery against Standard Bank or its employees. The payment to the local company was made by the former sister company of Standard Bank. The offence was therefore limited to the allegation that Standard Bank had inadequate systems to prevent associated persons from committing an offence of bribery.[61]

5.61 The Court held that a DPA would not have been available had the offence of bribery been committed by Standard Bank:

> "The first consideration must be the seriousness of the conduct for the more serious the offence, the more likely it is that prosecution will be required in the public interest and the less likely it is that a DPA will be in the interests of justice."[62]

5.62 The Court identified three other relevant features in this respect:

> "The way in which the organisation behaved once it became aware of it, any history of previous similar conduct: and the extent to which the current corporate entity has changed from the one at the relevant time."[63]

[60] Deferred Prosecution Agreement, *SFO v ICBC SB PLC.* Available at: https://www.sfo.govuk/download/deferred-prosecution-agreement-sfo-v-icbc-sb-plc/?wpdmdl=7600.

[61] Standard Bank, *The Times*, 27 August 2014.

[62] Available at: https://www.judiciary.govuk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf at 25.

[63] *Ibid.*

5.63 It was noted that Standard Bank had no previous conviction relating to bribery or corruption and was solely subject to an unrelated regulatory enforcement action by the FCA in respect of shortcomings in its anti-money-laundering procedures.

5.64 In relation to future penalties, the Court made reference to the relevant Sentencing Council Definitive Guideline and stated that: "the fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law".[64]

5.65 In *Standard Bank*, the willingness of the bank to engage with the investigative authority at the earliest opportunity persuaded the SFO to conduct its own internal investigations and convinced the SFO that a DPA was appropriate. The Court emphasised the fact that Standard Bank had referred itself to the SFO on the "earliest possible date."

(ii) *Serious Fraud Office v XYZ Ltd*

5.66 A second DPA was approved in 2016, in *Serious Fraud Office v XYZ Ltd*.[65] The company was the subject of an indictment alleging conspiracy to corrupt and conspiracy to bribe, contrary to section 1 of the UK *Criminal Law Act 1977*, as well as failure to prevent bribery, contrary to section 7 of the UK *Bribery Act 2010*. These allegations related to contracts to supply its products to customers in foreign jurisdictions between June 2004 and June 2012. During that time, some of the company's employees and agents had been involved with systematic payment of bribes to obtain contracts in a number of foreign jurisdictions. Concerns were raised in 2012 and the offending company took immediate action and instructed a law firm to undertake an internal investigation.

5.67 A report was delivered to the SFO in 2013 and the SFO subsequently followed with its own investigation, after which it concluded that 28 of the 74 contracts examined were found to have been procured as a result of bribery. When the DPA application was brought, the indictment was immediately suspended.

5.68 The terms of the DPA included financial orders totalling £6,553,085, comprised of a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty. The duration of the DPA was 3 to 5 years. The company also agreed to fully cooperate with the SFO and provide a report that addressed anti-bribery and corruption controls every 12 months during the DPA.

5.69 The Court (Leveson LJ) held that a "core purpose of the creation of DPAs [is] to incentivise the exposure (and self-reporting) of corporate wrongdoing", and relevant to this is the timeliness of the self-report, whether the misconduct would otherwise have been

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[64] Available at: *https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf*.

[65] [2016] Lloyd's Rep FC 509.

uncovered, and the totality of the information that the organisation provides to the prosecutor.[66]

5.70 The Court also held that:

> "The DPA provides an example of the value of self-report and co-operation along with the introduction of appropriate compliance mechanisms, all of which can only improve corporate attitudes to bribery and corruption."[67]

5.71 As to whether the company would remain solvent, the Court stated: "The interests of justice did not require [the company] to be pushed into insolvency."[68] Due to the company's means to pay, late payment was conceded and SFO costs were not requested.

5.72 The decision in *Serious Fraud Office v XYZ* indicates that financial penalties under the UK 2013 Act are usually limited to what the corporate entity can reasonably afford, at least in cases where the Court is of the view that the company should not be put into liquidation (which are likely to be rare).

(iii) *Serious Fraud Office v Rolls-Royce plc*

5.73 The third DPA was approved in 2017 in *Serious Fraud Office v Rolls-Royce plc*.[69] Rolls-Royce admitted to having made corrupt payments in favour of local agents in order to secure contracts in 7 countries over 30 years and in 3 of its business streams. Instances of corruption included giving US $2.25 million and a luxury car to an individual agent concerning a contract for Rolls-Royce aeroplane engines to be provided to the national airline in Indonesia. Cash bribes were also given in Thailand as well as providing a luxury Rolls-Royce car to intermediaries for the provision of aircraft engines. Rolls-Royce also used sham contracts and pretended that bribes it gave to local agents were legitimate consultancy fees. In China, Rolls-Royce offered cash credit to airline employees to secure aircraft engine orders.

5.74 Rolls-Royce's conduct was described by the Court (Leveson LJ) as a "most serious" breach of criminal law in bribery and corruption, covering 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. It was therefore much more serious than the *Standard Bank* and *XYZ* cases: it involved, by contrast, egregious criminality over decades and the investigation was the largest ever carried out by the SFO.

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[66] *Serious Fraud Office v XYZ* [2016] Lloyd's Rep FC 509, at paragraphs 55, 58–61.

[67] Available at: *https://www.sfo.govuk/download/xyz-preliminary-redacted/?wpdmdl=13249*.

[68] *Ibid.*

[69] [2017] Lloyd's Rep FC 249.

5.75 Rolls-Royce was ordered to pay US $825 million in penalties concerning the bribes paid to secure export contracts.

5.76 The following terms were declared by the Court as passing the statutory test that they were (a) in the interests of justice and (b) fair, reasonable and proportionate:

- Past and future co-operation with the relevant authorities in all matters relating to the conduct arising from the circumstances of the draft indictment.
- Disgorgement of profit on the transactions of £258,170,000.
- Payment of a financial penalty of £239,082,645.
- Payment of the costs incurred by the SFO (£12,960,754).
- At its own expense, completing a compliance programme following the recommendations of the reviews commissioned by Rolls-Royce on the approach to anti-bribery and corruption compliance.[70]

5.77 Unlike the two previous UK DPAs, Rolls-Royce did not self-report and the SFO as prosecutor had to uncover the crime by examining public internet postings. The Court (Leveson LJ) was nonetheless convinced that a DPA would be in "the interests of justice" and that the terms were "fair, reasonable and proportionate" in accordance with the statutory test in the 2013 Act.

5.78 While the "interests of justice" test usually lies in the promptness to self-report,[71] the judge attempted to create an exception since Rolls-Royce's cooperation was held to be extraordinary,[72] revealing widespread misconduct on an international level. To justify the use of a DPA in this case, there was an association made between self-reporting and extensive cooperation.[73] Because of its extraordinary cooperation and change of senior management and culture, Rolls-Royce was awarded a one-half discount (*Standard Bank* received a one third discount and *XYZ* received a financial penalty which it could just afford to pay "without going into insolvency"). This was due to Rolls-Royce's waiver of legal professional privilege, its cooperation with independent counsel and its cooperation with the prosecutor's request to conduct an internal investigation, such that Rolls-Royce "could not have done more" to expose its misconduct.[74]

[70] Available at: *https://www.judiciary.govuk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf*.

[71] *Standard Bank* at 14, *XYZ* at 16.

[72] *Rolls-Royce* at 22, 121, 123.

[73] Cheung, "Deferred Prosecution Agreements: cooperation and confession" (2018) 77 CLJ 12, at 12.

[74] *Rolls-Royce* at 38.

(iv) *Serious Fraud Office v Tesco Plc*

5.79 The fourth UK DPA, *Serious Fraud Office v Tesco Plc*, was approved by the Court (Leveson LJ) in 2017 and involved overstating of profits in Tesco's accounts. The agreement allowed the company to account for its conduct and compensate shareholders without facing the full extent of a criminal prosecution.

5.80 The DPA came about following investigations into Tesco after accounting irregularities had emerged in 2014. These irregularities resulted in Tesco overstating its profits by £326 million due to the accelerated recognition of commercial income and delayed accrual of costs.

5.81 The terms of the DPA include certain non-financial conditions, as well as a financial penalty of almost £129 million and the SFO's full costs. At the time of writing, further details on the DPA remain the subject of reporting restrictions.[75]

5.82 From the analysis above it appears that self-reporting, co-operation and agreed remedial measures have been considered important factors in the assessment and approval by the court of UK DPAs, and of applicable financial penalties. It is also worth noting that these measures (including self-reporting) have led to financial penalties that appear comparable to the penalties that would be imposed upon conviction after an early guilty plea.[76]

3. Comparing the US and UK Models

5.83 The following Table provides a useful summary of the similarities and differences between the US and UK DPA models.

	United States	United Kingdom
Negotiating Body	US Department of Justice (DOJ) & Securities and Exchange Commission (SEC).	Crown Prosecution Service & the Serious Fraud Office.
Statutory Basis	None: general authority and discretion of the prosecutors.	*Crime and Courts Act 2013.*

[75] "SFO agrees Deferred Prosecution Agreement with Tesco" *https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/*.

[76] Lewis, "Deterring Corporate Crime through the Use of Deferred Prosecution Agreements: An Analysis of the Proposed Australian Deferred Prosecution Agreement Regime" (2018) 42 Crim LJ 76, at 87.

	United States	United Kingdom
Scope of Parties (legal and/or natural)	Business organisations or individuals.	Business organisations, including companies, partnerships and unincorporated associations, but not individuals.
Scope of Applicable Offences	US DOJ and SEC have broad discretion as to types of crime for which DPAs may be entered into, subject to some exclusions.	DPAs only available for offences listed in the *Crime and Courts Act 2013*.
Publication Requirements	DOJ has no obligation to publish DPAs, though they are often publicly available. SEC DPAs must be published on the SEC website.	Prosecutor must publish the DPA, unless it is in the interests of justice to postpone publication.
Authorisation Discretion	Only the prosecutor takes the decision to invite a person to enter a DPA.	The prosecutor takes the decision to invite a person to enter a DPA and makes an application to the Crown Court. The Crown Court must then decide whether (a) the DPA is in the interests of justice and (b) the proposed terms are fair, reasonable and proportionate.
Variation Discretion	DPAs are varied by prosecutors with no judicial supervision.	Prosecutors must obtain judicial approval to initiate DPA variation.
Breach Discretion	At the sole discretion of the prosecutor.	Judicial approval required if the breach is material and/or serious. Notification of the court required even for minor breaches.

	United States	United Kingdom
Supervision Mechanism	DPAs are often negotiated by prosecutors with limited (if any) judicial involvement.	Prosecutors must obtain judicial approval to initiate DPA negotiations, declare and/or modify a DPA.
Certainty Mechanisms (guidance)	*United States Attorneys' Manual: Principles of Federal Prosecution of Business Organisations* and *SEC Enforcement Manual.*	*DPAs' Code of Practice.*

Table 5.1 Summary of Comparison and Contrast between United States and United Kingdom DPA Regimes

4. Summary of Submissions

5.84 The Commission received a number of submissions concerning DPAs in response to the Issues Paper.

5.85 Many submissions agreed that DPAs would be a useful addition to the "regulatory toolkit," and there was a clear preference in favour of the UK, rather than the US, model. One submission noted that the UK model might not sufficiently incentivise companies to enter into DPAs because of disclosure requirements and the unavailability of discounts on fines. Nonetheless, the majority of submissions argued that DPAs would provide flexibility by the inclusion of an intermediate sanction option to investigatory bodies. Some submissions noted that "responsive regulation", the type of risk-based regulation favoured in Ireland in the financial and economic context since at least 2010, requires both compliance and sanction-based approaches. Both of these approaches can be achieved with DPAs. It was also observed that DPAs can address wrongdoing and secure compliance, while maintaining the threat of a more significant sanction. One of the submissions noted that DPAs could be usefully employed as a "coercive middle" of the "enforcement pyramid" where criminal prosecution is not yet warranted, but where the threat of escalation should remain.

5.86 Many submissions that supported the use of DPAs also advocated for the employment of certain safeguards. The submissions argued that DPAs should have a clear legislative basis; and that the offences that might attract a DPA should be clearly set out in legislation. Other submissions recommended that there should be judicial oversight or approval as a requirement for DPAs. One submission noted that the requirement for court involvement might make DPAs unduly onerous, impart because of the lack of sectoral expertise of the courts, weakening the argument in favour of DPAs.

5.87 Other submissions, on the other hand, highlighted potential problems with the use of DPAs in Ireland, including perceived constitutional obstacles. One of the submissions argued that provision for DPAs in Ireland, unless restricted to summary offences, could be unconstitutional. The submission argued that DPAs would breach the accused's right to trial in due course of law under Article 38.1 of the Constitution. Arguably, the imposition of fines on a corporate entity, which still enjoys a presumption of innocence prior to any formal prosecution, would offend this presumption. In addition, this submission argued that DPAs would be an administration of justice by a body other than the courts, and, therefore, would infringe Article 34 of the Constitution.

5.88 In particular, even among submissions that supported the use of DPAs, many submissions addressed concerns about the waiver of the privilege against self-incrimination. Many submissions, referring to the practice in the US whereby a corporate body that is subject of a DPA waives their right to silence, suggested that such a model should not be followed in Ireland. One submission suggested that such a proposition would be "worrying" if extended to Ireland. Similarly, other submissions advocated the preservation of due process entitlements throughout a DPA process, including legal professional privilege.

5.89 Regarding the types of offences against which DPAs should be employed, most submissions that addressed this suggested that they should be used for serious, indictable offences, whereas a minority argued that they should only be employed for less serious, summary offences.

5.90 In conclusion, submissions received indicated that if DPAs were to be introduced they should be (a) on a statutory basis, (b) with judicial oversight, (c) subject to guiding principles and (d) containing sufficient procedural safeguards.

D. Arguments for and against the introduction of a DPA regime in Ireland

1. Constitutional Considerations

5.91 If a DPA scheme were to be introduced in Ireland, it is clearly important that consideration is given to whether it would be constitutional. A number of submissions raised constitutional issues with a DPA regime, and these are considered below.

(a) Use of Judicial Power

5.92 One question raised was whether DPAs might constitute the imposition of a punitive sanction, therefore resulting in an encroachment on the exclusive constitutional role of the judiciary. It is likely, however, that DPAs do not unconstitutionally encroach on the judicial power for 2 reasons: their voluntariness, and the fact that DPAs do not constitute a final determination of rights and therefore do not constitute an administration of justice.

5.93 First, the voluntary quality of DPAs. Upon receiving an invitation, the corporate entity would not be obliged to accept it and enter into the DPA process, and even where an invitation has been extended and accepted, no obligation on either party to conclude the DPA would result. Moreover, provided there are sufficient procedural safeguards in place, the terms of a DPA are freely negotiated between the corporate entity and the prosecutor. It follows that the corporate entity can decide not to enter into a DPA if it considers its terms to be too oppressive or disproportionate compared to the alleged offence, and a DPA regime could also provide that the DPA's terms can be changed to mitigate unwanted consequences as they arise.

5.94 Second, a deferred prosecution itself, as distinct from the ultimate decision to prosecute, is not an administration of justice. A comparison can be made in this respect with the constitutionality of Administrative Financial Sanctions (AFSs), discussed in Chapter 3. In *Purcell v Central Bank of Ireland,*[77] the High Court upheld the constitutionality of the Central Bank's AFS power. In *Purcell*, the Court cited in support the decision in *McDonald v Bord na gCon (No.2)*,[78] where the High Court (Kenny J) held that the administration of justice under Article 34 involves making a decision that is final as regards the existence of legal rights or liabilities or the imposition of penalties. As noted, administrative financial sanctions – and by analogy DPAs – do not constitute a criminal prosecution and penalty but are civil agreements.[79] The High Court in *Purcell* held that the statutory inquiry procedure of the Central Bank that could lead to an AFS did not infringe Articles 34 or 38 of the Constitution as it did not amount to the administration of justice or the imposition of a criminal penalty. Although the *Purcell* decision refers specifically to the Administrative Financial Sanctions regime of the Central Bank, the discussion can be applied to comparable powers. It therefore provides useful guidance as to the types of safeguards and features DPAs would require in order to comply with the relevant constitutional provisions. In this respect, DPAs may incorporate terms that appear to resemble criminal penalties, such as fines. However, in a DPA, these are not *imposed* by the prosecutor; rather, they are agreed upon between the parties. This means that they still do not constitute an administration of justice. Furthermore, as the DPA is subject to court approval, even if the terms of a DPA were considered to be "imposed" criminal penalties, they could not be said to have been *unilaterally* imposed by a prosecutor without court approval.

5.95 Since DPAs, as stated above, suspend the criminal process, they do not infringe Article 34.1 of the Constitution. If a DPA scheme was enacted in Ireland based on the UK model, the criminal process would be suspended (subject to the court's approval) and the agreement entered under the DPA regime would not impose criminal liability, but rather would involve an agreement under court supervision.

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[77] [2016] IEHC 514. See the discussion above.

[78] [1965] IR 217.

[79] In *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185, the Supreme Court had previously found constitutional the confiscation of the proceeds of crime through civil procedures as not constituting a means of punishment of criminal behaviour: see the discussion in Chapter 3 above.

(b) Right to Silence

5.96 A second issue raised in submissions is whether the ability to rely upon a voluntarily entered statement of facts in a resumed prosecution following a breach of a DPA would contravene the constitutional right to silence.

5.97 The Constitution provides for a number of legal and procedural protections to those accused of committing crimes. The test of the admissibility of a statement, such as a confession, was traditionally based on whether it had been made voluntarily.[80] Such a DPA would not infringe the court's exclusive constitutional jurisdiction to determine a criminal sentence. In such a DPA, even though the court would retain a role in confirming or rejecting the terms of a DPA, it would not possess any role in reviewing those terms.

5.98 It is clear that the constitutionally guaranteed right to fair trial under Article 38.1 applies to corporate entities, as it does to individuals. In *Criminal Assets Bureau v Mac Aviation Ltd,*[81] the High Court (Feeney J) held that it was evident that a corporate entity had a constitutional right to a fair trial. In the English case *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass Ltd,*[82] the English Court of Appeal held that "we can see no ground for depriving a juristic person of those safeguards which the law of England accords even to the most undeserving of natural persons".

5.99 In *Re National Irish Bank (No.1),*[83] the Supreme Court considered whether employees of a Bank were entitled to refuse to answer questions of inspectors appointed to investigate the bank, on the ground that those answers might tend to incriminate them. The Court held that the interviewees were not entitled to refuse to answer questions posed to them by the inspectors. The Court also held, however, that any confession of a bank official obtained by the inspectors would not in general be admissible at a subsequent criminal trial of the official unless the trial judge was satisfied that the confession was voluntary. Accordingly, involuntary confessions resulting from civil or regulatory investigations are clearly inadmissible. However, such reasoning would have no application where, as is the case with DPAs, the earlier civil process was itself voluntary. DPAs are always voluntary and statements of facts are freely negotiated between the prosecution and the corporate entity. It therefore seems unlikely that a statement of facts in a DPA could be considered an involuntary confession for the purpose of its admissibility as evidence.

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[80] The voluntariness requirement is so fundamental that in *Re National Irish Bank Ltd (No 1)* [1999] 3 IR 145, the Supreme Court held that Article 38.1 of the Constitution – that no person is to be held on any criminal charge save in due course of law – requires that any statement admitted against an accused person at trial should be a voluntary statement.

[81] *CAB v Mac Aviation Ltd* [2010] IEHC 121.

[82] *Triplex Safetyglass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395.

[83] [1999] 3 IR 145.

5.100 As a result, it appears that DPAs would not contravene the right to silence provided for in the Constitution. A suitable warning in the legislation would constitute an adequate safeguard to ensure that DPAs comply with the Constitution.

(c) Constitutional Limits on Prosecutions and Prosecutorial Discretion

5.101 Some submissions raised the question as to whether DPAs would be regarded as extending impermissibly prosecutorial discretion. However, it should be noted that there is no legal obligation on the DPP to prosecute every offence brought to its attention, even where there appears to be sufficient evidence to obtain a conviction.[84] The DPP may also bring a trial to an end by entering a *nolle prosequi*[85] and doing this does not provide complete protection against the person being re-charged and tried.[86] Some commentators have also noted that fresh proceedings following a *nolle prosequi* are unlikely to be objectionable where they do not deprive the accused of any procedural or other advantage.[87] It is only in the most exceptional circumstances that the courts will review the DPP's decision whether to prosecute.[88] Furthermore, the courts have held that the DPP is free to resume a prosecution even where it has previously informed a person that they will not be prosecuted. However, this is subject to the test that a court may prohibit a prosecution under Article 38 where there is a real and substantial risk of an unfair trial.[89] Some restrictions may be placed on the DPP where a trial that was initially postponed is reinitiated. Such circumstances may ground an order for prohibition if it is apparent that the requirements of fair procedures were not observed by the DPP.[90] Since DPAs are entirely voluntary, fresh proceedings following a DPA would also not be questionable under Article 38.1 of the Constitution. In fact, because fresh proceedings are specifically envisaged if the terms of the DPA are breached in a sufficiently serious way, it is difficult

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[84] Forde and Leonard, *Constitutional Law of Ireland* 3rd ed (Bloomsbury 2013) at paragraph 17.15.

[85] O'Malley, *The Criminal Process* (Round Hall 2009) notes at paragraph 12.40 that fresh proceedings following a *nolle prosequi* are unlikely to be objectionable where they do not deprive the accused of any procedural or other advantage (*Ward v DPP* [2007] 1 IR 421 at 444, *per* Dunne J). He further adds that "the entry of a *nolle prosequi* followed by fresh proceedings would seldom be unjust in these circumstances and, from the perspective of the public interest, would be preferable to allowing the trial to proceed to a point where it would almost inevitably end with a directed acquittal."

[86] *Kelly v DPP* [1996] 2 IR 596 and *Ward v DPP* [2007] 1 IR 421. O'Malley, *The Criminal Process* (Round Hall 2009) notes at paragraph 12.39 that the entry of a *Nolle prosequi* does not prevent the institution of fresh criminal proceedings in respect of the same matter, nor does it amount to a discharge or acquittal on the merits citing *Goddard v Smith* (1704) 3 Salk 245, 91 ER 803).

[87] *Ibid.*; *Ward v DPP* [2007] 1 IR 421 at 444, per Dunne J.

[88] *State (Ennis) v Farrell* [1966] 1 IR 107.

[89] This can be seen from the case law on unfair publicity barring prosecutions under Article 38: *Z v Director of Public Prosecutions* [1994] 2 IR 184; *Quinlaven v Conroy (No 2)* [2000] 3 IR 154; *Rattigan v Director of Public Prosecutions* [2008] IESC 34.

[90] *Eviston v DPP* [2002] IESC 62, [2002] 3 IR 260; *Carlin v Director of Public Prosecutions* [2010] 3 IR 547.

to see how a defendant company could convincingly assert that it could not expect prosecution in such circumstances.

(d) Trial in Due Course of Law

5.102 Article 38.1 of the Constitution provides a guarantee that trials must be held in due course of law and that a cardinal right of the accused person is the "presumption of innocence". It has been recognised by the courts of Ireland that a person who is accused of an offence is entitled to be treated as innocent of the offence until such time as he is duly convicted in a court of law.[91] Article 38.1 dovetails with the State's internationally recognised obligation to afford a criminal defendant a fair trial under Article 6 of the ECHR.[92] The wording of Article 38.1 has been described as being of "a phrase of very wide import which includes in its scope not merely matters of constitutional and statutory jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function."[93] The generality of the phrase "due course of law" has complicated the task of the courts in identifying the necessary criteria to give effect to the provision.[94] Article 38.1 has been used by the courts as a means of giving constitutional protection to principles of fairness pertaining to criminal trials, as well as to safeguard basic principles of natural justice and a range of substantive and procedural rights.[95]

5.103 Since the terms of a DPA are imposed regardless of proof of guilt at a trial, some submissions drew analogies with pre-trial detention of individuals. However, placing a burden on the defendant before any establishment of guilt does not necessarily breach the presumption. Notwithstanding the requirement that the corporate entity should not challenge the agreed statement of facts, it does not appear that if the corporate entity were formally prosecuted, it would have waived any of the protections afforded in a criminal defence, including the presumption of innocence. This is especially so in circumstances where the Commission has concluded, and recommended below, that legal professional privilege should not be waived. Such arguments could equally be advanced for example to declare unconstitutional bail hearings imposing movement restrictions. These are, however, widely held acceptable in Ireland. Besides, the presumed offender

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[91] *Hardy v Ireland* [1994] 2 IR 550.

[92] Incorporated into Irish law at a sub-constitutional level by the *European Convention on Human Rights 2003*. The 2003 Act places an obligation on the courts to interpret Irish domestic law in a manner which is consistent with the Convention. The right to fair trial is also protected by Articles 47-50 of the European Union's Charter of Fundamental Rights and article 14 of the International Covenant on Civil and Political Rights.

[93] *State (Healy) v Donoghue* [1976] IR 325 at 335 (*per* Gannon J.).

[94] Hogan and Whyte, *Kelly: The Irish Constitution* 4th ed (Butterworths 2003) at paragraph 6.5.11.

[95] *State (Healy) v Donoghue* [1976] IR 325; *Heaney v Ireland* [1994] 3 IR 593.

here is a corporate entity, not a human being, and therefore does not fall within the ambit of Article 40.1 of the Constitution.

5.104 It should also be noted that corporate entities receive a benefit when entering into DPAs: they continue to operate and can still be profitable. DPAs are to the benefit of both parties and it is within the scope of that benefit to impose a burden in response of a past breach of the criminal law. The agreement is just that – an agreement – and is not coercive in the way that preventive detention of a natural person defendant is. As a result, DPAs do not violate Article 38.1 of the Constitution or the presumption of innocence.

(e) Conclusion on the Constitutionality of DPAs

5.105 The Commission is of the view that, provided certain safeguards are observed, the introduction of DPAs would meet relevant constitutional requirements.

2. Arguments in Favour of DPAs

5.106 In discussing above the background to the introduction of DPAs in the UK, it has already been noted that prosecutors face an uphill struggle when attempting to prosecute corporate entities for corporate wrongdoing. The main obstacle for prosecutors is the difficult, costly and lengthy investigation process involved, as offences such as forgery, bribery and money laundering committed by organisations tend to be extremely difficult to identify, investigate and prove. It is also important to note that fraud is an extremely difficult criminal offence to detect, prosecute and expensive to enforce.[96]

5.107 The increased cost of corporate prosecution compared to the prosecution of individuals is due to various factors. For instance, corporate entities are likely to be able to fund and afford high-calibre representation, which in turn demands much greater allocation of the prosecutor's resources. The complexity of the offence and the difficulty in gathering enough evidence to establish the culpability of the controlling mind will also likely require greater allocation of resources. The volume of documentation and onerous disclosure obligations can be added to the list of resources required to successfully investigate corporate crime. For example, the Office of the Director of Corporate Enforcement (ODCE) had to collate several million files as evidence in the criminal prosecutions of former executives of Anglo-Irish Bank.[97]

[96] For a discussion of the practical difficulties in prosecuting fraud cases see Lloyd-Bostock "The Jubilee Line Jurors: does their experience strengthen the argument for judge-only trial in long and complex fraud cases?" [2007] *Criminal Law Review* at 255-273, Julian "Judicial perspectives in serious fraud cases - the present status of and problems posed by case management practices, jury selection rules, juror expertise, plea bargaining and choice of mode of trial" [2008] *Criminal Law Review*, at 764-783 and Julian "Judicial perspectives on the conduct of serious fraud trials" [2007] *Criminal Law Review* at 751-768.

[97] Horan, *Corporate Crime,* (Bloomsbury Professional 2011) at 17. See the discussion of these trials in Chapter 1.

5.108 In 2004, the UK SFO started investigating alleged extensive corrupt practices at BAE Systems. In 2007, it disclosed that its investigations into BAE had cost £2.17 million from its annual budget of less than £60 million. The report further stated that "this figure does not take into account the salaries of permanent staff working on BAE or central overheads, so the full cost would be greater".[98] The SFO will also have to regularly liaise with external agencies such as the police force and the Financial Conduct Authority. It will also be required to employ intelligence and case officers, case managers, forensic accountants, lawyers, professional investigators, information technology and other support staff to successfully investigate and prosecute a corporate offence. Surveillance monitoring video and sound recordings, IT and forensic support, as well as traditional witness statements and other supporting documentation will be used for evidential purposes. This can in turn result in months of investigations, if not years.[99] Investigating and then prosecuting a case resulting in a late guilty plea has been estimated to cost the SFO £1.8 million and take 8 years to conclude.[100]

5.109 As a result, commercial economic crimes can require significant resources in terms of both expertise of investigators and prosecutors, and finances, in order to investigate and prosecute instances of offending which are detected. These difficulties, and the requirement of significant resources to mitigate them, automatically place an "upper limit" on the ability to impose accountability upon this type of offending by way of prosecution alone.[101]

5.110 Even an in-depth investigation can prove to be unfruitful due to a factually complex, legally challenging and lengthy prosecutorial ordeal, which can lead to an abandoned prosecution.

(a) The "Corporate Death Penalty"

5.111 Courts that convict a corporate entity following misconduct on its behalf can impose sanctions that have the effect of putting the defendant entity out of business. The "corporate death penalty" is typically imposed by the courts when the corporate entity possesses no legitimate business operations.[102] The consequences collateral to losing at a criminal trial puts the corporate defendant in a position "akin to so-called exceedingly

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[98] "*SFO spend over £2 million on BAE probe*", October 4, 2007, BBC.

[99] Allen, "Recession pushes white-collar crime to new highs", 31 December 2009, *The Guardian*.

[100] *Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements,* CP9/2012, paragraph 41.

[101] Gobert and Pascal, *European Developments in Corporate Criminal Liability* (Routledge 2011).

[102] Wray, "Corporate Probation Under the New Organizational Sentencing Guidelines" (1992) 101 Yale L J 2017, at 2027.

vulnerable eggshell plaintiffs in tort law" who "subject as they are to market pressures, may not be able to survive indictment, much less conviction and sentencing."[103]

5.112 Some commentators have also called for the expansion of the scope of the corporate death penalty. This can take the form of revoking the charters of corporate entities that are convicted of environmental crimes.[104]

5.113 Corporate entities convicted of crimes can also unravel merely because they do not own the necessary assets to pay the fines. In the US, while the Organizational Sentencing Guidelines allow courts to depart from the recommended fine range when it is considered that it would jeopardise the corporate entity,[105] courts are not required to adjust those fines down even though the recommended fine would result in the corporate entity's demise.

(b) Debarment, Exclusion and Delicensing

5.114 Not only is the morally blameworthy corporate entity faced with the risk of losing at trial, resulting in its demise, it also could - subject to debarment and exclusion provisions - be debarred or excluded in many ways. A variety of laws and regulations can effectively put firms convicted of a crime out of business. As a result, a conviction can result in fatal consequences for corporate entities even when a modest penalty is given at trial for the defendant corporation.

5.115 In the UK, when the SFO entered into a DPA with Rolls-Royce PLC, of particular note was the importance that the Court placed on the risk to Rolls-Royce's future prosperity if it was to be prosecuted. The Court (Leveson LJ) noted that "Debarment and exclusion would clearly have significant, and potentially business critical, effects on the financial position of Rolls-Royce. This could lead to the worst case scenario of a very negative share price impact, and, potentially, more serious impacts on shareholder confidence, future strategy, and therefore viability."[106] The Court also noted that "A conviction would undeniably affect the ability of Rolls-Royce to trade in the world… It is well known that many countries operate public sector procurement rules which would debar participation following conviction."[107]

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[103] Bharara, "Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants" (2007) 44 *American Criminal Law Review* 53, at 72.

[104] Crusto, "Green Business: Should We Revoke Corporate Charters for Environmental Violations?" (2003) 63 *Law Review* 175, at 175.

[105] US Sentencing Guidelines Manual § 8C3.3 *Reduction of Fine Based on Inability to Pay* (2016).

[106] *Serious Fraud Office and Rolls-Royce Plc & Anor*, at paragraphs 52-57, available at *https://www.sfo.govuk/download/deferred-prosecution-agreement-sfo-v-rolls-royce-plc/?wpdmdl=14777*.

[107] *Ibid.*

5.116 Furthermore, firms in regulated industries can lose their license following a criminal conviction. In the *Arthur Andersen* case,[108] the penalties that were imposed on the corporation were relatively modest (a $500,000 fine and 5 years of probation).[109] These penalties were, regardless, fatal for the corporate entity since SEC rules prevent any accounting firm convicted of a felony from serving as the auditor of publicly traded corporate entities.[110] KPMG almost faced the same fate before prosecutors decided against charging the firm for marketing tax shelters.[111]

5.117 Likewise, in the US, the federal government is allowed to forfeit the franchise of national banks facing a criminal conviction for money laundering offences[112] and corporations that operate in regulated industries can also lose their license following a conviction.[113] Firms convicted of specific offences such as health care fraud may also be excluded from contracting with the government.[114] Convictions of corporations can also result in government agencies debarring or suspending firms from conducting business with the government and many US statutes impose mandatory debarment.[115] This might be translated into a fatal blow for corporate entities that rely on government contracts as a key source of revenue.

(c) Market Reaction

5.118 Corporate entities' ability to survive in the marketplace depends mostly on their reputation for honesty and quality of service.[116] Legal scholars have claimed that because of the high market value of reputation, corporate entities cannot survive a conviction or an indictment.[117] The perception that the reputational impact of a conviction can surpass

[108] *Arthur Andersen LLP v United States*, 544 US 696 (2005).

[109] Ainslie, "Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution" [2006] 43 *American Criminal Law Review* at 107.

[110] 17 CFR § 201.102(e)(2); Landsman, "Death of an Accountant, The Jury Convicts Arthur Andersen of Obstruction of Justice" (2003) 78 *Chicago Kent Law Review* 1203, at 1223.

[111] Reilly, "Narrow Escape: How a Chastened KPMG Got By Tax-Shelter Crisis" *Wall Street Journal* 15 February 2007, at A1.

[112] 12 USC § 93(d).

[113] *Commodity Exchange Act* 7 USC. § 12a; *Federal Deposit Insurance Act* 12 USC § 1818(a)(2); *Securities Act of 1933*, 15 USC § 77t(b); *Investment Advisers Act of 1940*, 15 USC § 80b-3(e)–(f); *Social Security Act*, 42 USC § 1320a-7.

[114] Bucy "Civil Prosecution of Health Care Fraud" (1995), 30 *Wake Forest Law Review* 693, at 720.

[115] 48 CFR § 9.406-2.

[116] Khanna "Corporate Criminal Liability What Purpose Does It Serve?" (1996) 109 Harv L Rev1477, at 1499.

[117] Bharara "Corporations Cry Uncle and Their Employees Cry Foul, Rethinking Prosecutorial Pressure on Corporate Defendants" [2007] 44 *American Criminal Law Review* at 73.

the substantial monetary fines of parallel civil litigation explains the propensity of corporate entities to do whatever it takes not to face an indictment.[118]

5.119 The indictment of Milberg Weiss for bribery and fraud charges for example illustrates the destructive impact a criminal conviction can have.[119] The company was crippled by its indictment and agreed to pay a $75 million penalty to escape trial.[120]

(d) Spill-over Effect

5.120 Another "unwanted collateral consequence" of imposing a criminal conviction is the potential for deterrent spill-over. Even if the consequences to the corporate offender are entirely proportionate, the result of the conviction may have unwanted negative consequences for legal or natural persons reliant upon the entity in question, or society as whole. Sometimes, these consequences can be disproportionate to the culpability of the conduct involved both for the offending commercial entity and for third parties relying on it.

5.121 In the UK, the Court (Leveson LJ), in approving the *Rolls-Royce* DPA,[121] emphasised the adversarial consequences that would have resulted had the DPA not been approved, In particular, the impact that prosecution would have had on employees and others innocent of any misconduct or what might otherwise be described as consequences of a conviction. The Court acknowledged that a conviction would "undeniably affect the ability of Rolls-Royce to trade in the world where … it is a world leader and has a reputation for excellence".[122] The Court also outlined the potential adverse effects of a conviction on the financial position of Rolls-Royce,[123] losses to revenue[124] and third party interests,[125] and concluded that there was "no difficulty in accepting that these features demonstrate that a criminal conviction against Rolls-Royce would have a very substantial impact on the company, which, in turn, would have wider effects for the UK defence industry and persons who were not connected to the criminal conduct, including Rolls-Royce employees, and pensioners, and those in its supply chain".[126]

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[118] Buell "The Blaming Function of Entity Criminal Liability" (2006) 81 *Indiana Law Journal* 473, at 505.

[119] Kobayashi & Ribstein, "The Hypocrisy of the Milberg Indictment: The Need for a Coherent Framework on Paying for Cooperation in Litigation" (2007) 2 *The Journal of Business & Technology Law* 369, at 372.

[120] Glater, "Big Penalty Set for Law Firm but Not a Trial" *New York Times* 17 June 2008, at A1.

[121] [2017] Lloyd's Rep FC 249 at 52. Available at: *https://www.judiciary.govuk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf*.

[122] *Ibid* at 53.

[123] *Ibid* at 55.

[124] *Ibid* at 54.

[125] *Ibid* at 56.

[126] Para?

5.122 The US *Arthur Andersen* case[127] provides a classic example of such undesirable collateral consequences and strongly informed the US DoJ's view that the risk of wider societal harm which can result from a corporate conviction must be considered by prosecutors when deciding how to respond to corporate crime. *Arthur Andersen* was an accountancy firm (one of the world's "top 5" at the time) which acted for Enron Corporation, auditing its accounts. In June of 2002, *Arthur Andersen* was convicted of obstruction of justice flowing from the "Enron scandal" and resulting from Arthur Andersen employees' shredding of documents relating to Enron's audits. Even by the time of its conviction, Arthur Andersen had already lost around 28,000 staff in the US, and significant amounts of its business. Following its conviction, a series of multi-million dollar lawsuits were brought against the firm by Enron investors and shareholders, arising out of the firm's wrongdoing. Bankruptcy soon followed.[128] The final evaluated effect of the firm's collapse was stark. In 2001, Andersen employed 85,000 people in approximately 390 offices in 85 countries. By the end of the following year, only 3000 people remained.[129]

5.123 Ultimately, the US Supreme Court reversed Arthur Andersen's conviction, but by this stage the collateral consequences of the prosecution and conviction had crystallised. Aside from the firm's former employees having lost their jobs, it has also been noted that many of those employees (particularly lower level employees and administrative staff, rather than higher-level partners or auditors who are more likely to have culpably engaged in the firm's wrongdoing) experienced difficulty finding new employment due to their prior relationship to the firm. The detrimental effect that this case had on "innocent" pensioners and suppliers has also been noted.[130] It has been suggested that "[o]n balance, the public benefits generated by prosecuting Andersen criminally were minimal or, if they existed at all," given the comparatively greater sanctioning power which could have been effected by civil regulatory sanction, on the one hand, and the significant deterrent spill-over which resulted from the prosecution, on the other.[131]

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[127] *United States v Arthur Andersen,* No. 02-121 (S.D. Tex. June 15 2002); *United States v Arthur Andersen, LLP* 374 F. 3d 281.

[128] "Andersen guilty in Enron case", *BBC News* 15 June 2002. Available at *http://news.bbc.co.uk/1/hi/business/2047122.stm*.

[129] Ainslie, "Indicting corporations revisited: Lessons of the Arthur Andersen prosecution" [2006] 43 *American Criminal Law Review* 107, at 109.

[130] Garnier "Parliamentary debates on the Crime and Courts Bill" (2013) *Hansard*, Col. 655.

[131] Ainslie, "Indicting corporations revisited: Lessons of the Arthur Andersen prosecution" [2006] 43 *American Criminal Law Review* 107, at 109, provides further analysis noting: "On balance, the public benefits generated by prosecuting Andersen criminally were minimal or, if they existed at all, were exceedingly subtle. No one went to jail as a result of its conviction, nor could they have under the law. The criminal fine paid by Andersen was the maximum under the criminal law but was still vastly less than the fines and penalties that might have been, and had been, levied against the firm in civil enforcement actions taken by various government agencies. Yet, the indictment, the conviction, and the consequent prohibition against appearing before the Securities and Exchange Commission were sufficient to kill the company, a company made up not only of partners and managers, but also, of course, of lower-level

(e) Issues with Declinations and Civil Recovery Orders

5.124 Where state authorities foresee potential collateral consequences that might flow from pursuing a prosecution and conviction,[132] the only other criminal justice response which can be relied upon in the US (even if there is strong evidence of criminality, sufficient to proceed to prosecution) is a declination.[133] The power to dismiss a case already rests with the prosecutor by virtue of the ability to enter a *nolle prosequi*. Thus, a consistent issue in criminal justice administration is upon what grounds, and guided by what criteria, do prosecutors exercise their discretion not to pursue formal prosecution. There are also very few formal ways in which decisions to decline indictment can be reviewed. Although the focus of legal scholars is mainly on the interests of the criminal defendant,[134] the decision to decline a prosecution can have significant consequences for the alleged victim as well. Declination also raises issues in relation to broader questions of deterrence and as to differences in treatment between similarly situated defendants.[135]

5.125 Civil recovery is a mechanism by which English and Welsh prosecuting agencies can take forfeiture proceedings against property obtained through unlawful conduct (*in rem* proceedings), rather than against the party who obtained the property (*in personam*).[136] These orders perform a similar role to those played by the forfeiture orders obtained by the Criminal Assets Bureau in this jurisdiction, under the *Proceeds of Crime Act 1996*.

5.126 Civil recovery orders do not represent an alternative to prosecution and do not require a prior criminal conviction in order to proceed. While the prosecuting entity must prove that the property was obtained through unlawful conduct (though not necessarily the conduct of the party in possession of the property), these orders do not themselves result in either a conviction, or a finding of wrongdoing against the party in possession of the property.[137]

5.127 While these orders may provide a valuable tool for prosecutors of economic crime in the UK, they do not fulfil the goals of either a criminal prosecution or a DPA (particularly as they still require lengthy investigation, and a potentially lengthy and resources intensive

employees and shareholders. In 2001, Andersen employed 85,000 people in approximately 390 offices in 85 countries. By the end of the following year, only 3000 people remained."

[132] See, for example, the *BAE Systems* case, discussed above.

[133] Koehler, "The Need for a Consensus 'Declination' Definition" *FCPA Professor* 15 January 2013. Available at *http://fcpaprofessor.com/the-need-for-a-consensus-declination-definition/* described "declination" as "an instance in which an enforcement agency has concluded that it could bring a case, consistent with its burden of proof as to all necessary elements, yet decides not to pursue the action".

[134] Doss "Resentencing Defendants and the Protection Against Multiple Punishment" (1985) 133 U Penn L Rev 1409, at 1409-1432.

[135] Brown, "Third-Party Interests in Criminal Law" (2002) 80 Tex L Rev 1383, at 1401.

[136] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (CP9/2012, May 2012), at 8.

[137] Attorney General for England and Wales, *Asset recovery powers for prosecutors: guidance and background note 2009* (2012), (available at *https://www.govuk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009*).

trial, which effectively limits the number of cases which they can be applied in).[138] Furthermore, victims may not be compensated and commercial organisations are ultimately not penalised for their conduct.[139]

(f) The need for coordinated, cross-border, "global" responses to corporate economic crime

5.128 Due to the growing list of countries implementing laws that prohibit bribery and other financial crime, and the increasing presence of corporate entities in multiple markets, investigations and prosecutions that involve multiple jurisdictions are becoming increasingly prevalent.[140] Multinational corporations act across borders with ease due to technological advances and favourable corporate, trade and investment laws. However, some jurisdictions do not provide for the criminal liability of corporate entities or do not have jurisdiction over cross-border offences that involve corporations operating from their State.[141]

5.129 Even when such legislation does exist, law enforcement officials may face pressure not to pursue cases against powerful corporations. In other jurisdictions, officials might give less priority to corporate crime or they might lack the experience and expertise to pursue cases, especially when they involve complex company structures or require specialised knowledge.[142] Misconduct identified by a corporate entity will likely fall within the jurisdiction of multiple prosecutors, regulators and law enforcement bodies. Liaising with such a multitude of agencies, often in different countries, requires the corporate entity to navigate conflicting laws and court procedures in an attempt to seek a coordinated resolution with all possible agencies at once.[143]

5.130 In cross-border cases especially, host States may be unwilling or unable to pursue cases due to the significant power and influence of the corporate entity involved, or due to a lack of institutional capacity.[144] In home States, law enforcement officials may be unaware that they can assert jurisdiction or be reluctant to do so because the harm occurred in another country. If a home State does exercise jurisdiction, obtaining evidence and assistance can be difficult because of the degree of formality involved in requesting

[138] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (CP9/2012, May 2012), at 8.

[139] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (CP9/2012, May 2012), at 9.

[140] Srivastava, Mason, Keltie, *A Practitioner's Guide to the Law and Regulation of Financial Crime* 1st ed (City & Financial Publishing 2010) at 49.

[141] Gobert and Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis 2003) at 156.

[142] Lord, "Transparency International, Obstacles to enforcement: the role of criminal law and transnational corporate bribery". Available at *http://www.transparency.org.uk/obstacles-to-enforcement-the-role-of-criminal-law-and-transnational-corporate-bribery/#.WwLVIUxFzN9*.

[143] Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* 1st ed (Sweet & Maxwell 2015) at 497.

[144] Garrett, "Globalized Corporate Prosecutions" (2011) 97 Va L Rev 1775, at 1778.

cooperation under mutual legal assistance treaties and equivalent mechanisms. There may also be additional legal or practical barriers to overcome in gathering evidence from another jurisdiction.

5.131 A number of cases have demonstrated how complicated the international cooperation between domestic investigatory and enforcement bodies to bring about settlements can be, especially in the field of bribery and corruption, such as *Innospec.*[145]

5.132 The results of international settlements are therefore often highly unpredictable, the process behind them opaque, and the legitimacy uncertain.[146] Settlements reached through coordination between several jurisdictions with claims against an offender form a significant part of this problem.[147] Furthermore, most countries do not have clear guidelines for the settlement process, and the level of discretion afforded to prosecutors makes it appear as if their integrity can always be taken for granted – which is not necessarily the case.[148]

(g) The need for corporate cooperation in investigations and prosecutions of other legal or natural persons

5.133 As discussed above, due to the "accountability gap", the more organisationally complex a corporate body is, the greater the practical difficulties there will be in investigating and prosecuting it. A special case of the "accountability gap" arises where managerial agents, or corporate bodies organisationally connected to the principal offender, escape the attention of prosecutors. This can happen because the complex structure of corporate bodies, both in terms of their internal organisational structure and their network of relationships with associated bodies, makes it difficult to identify and successfully prosecute those responsible for the commission of offences. Accordingly, investigators and prosecutors will face challenges holding legal and natural persons, other than the principal offender itself, accountable for their wrongdoing. Arguably, DPAs provide a solution to this problem.

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[145] *R v Innospec Ltd* [2010] WL 3580845; [2010] EW Misc 7 (EWCC); [2010] Crim LR 665; [2010] Lloyd's Rep FC 462 (Crown Ct (Southwark)), discussed above.

[146] Rui, Søreide, "Governments' Enforcement of Corporate Bribery Laws: A Call for a Two-Track Regulatory Regime" (2018) *Norwegian School of Economics, Department of Accounting, Auditing and Law*.

[147] Rui, Søreide, *Ibid.*

[148] Rose-Ackerman and Lagunes, *Greed, Corruption, and the Modern State: Essays in Political Economy* (Edward Elgar 2015) at 46- 70.

3. How a DPA regime mitigates the above issues

(a) Reducing the "Accountability Gap"

5.134 DPA negotiations create a high degree of certainty for both parties as compared to prosecution and leave little ambiguity around the penalties and reforms required.[149] Moreover, DPAs increase the effectiveness of justice by promoting cooperative relationships between prosecutors and defendant corporations, and decreasing the turnaround time of cases.[150] DPAs also motivate self-reporting of offending, thereby increasing the detection of corporate crime.[151]

5.135 Some commentators have compared DPAs with full criminal prosecutions under the utilitarian theory of punishment – especially the effect of DPAs in deterring future crime - and to do so have drawn a distinction between general deterrence and specific deterrence.[152] General deterrence refers to "deterrence concerned with trying to persuade others who might be inclined to offend not to do so," while specific deterrence refers to "attempts to persuade the individual before the court not to commit further offense."[153] DPAs have generally been considered to achieve specific deterrence in three ways.

5.136 First, the substantial fine is a significant deterrent for defendants who are trying to make a profit from their activity.[154] Secondly, remedial action supervised by the government is part of DPAs and reduces the opportunity for punished corporate entities to commit future wrongdoing.[155] Thirdly, a breach of a DPA will lead to a full prosecution of the corporate entity.[156]

5.137 As a result, corporate entities under a DPA are faced with many reasons not to reoffend, and in terms of specific deterrence, perhaps even more reasons than upon completing a prison term.[157] As regards general deterrence, DPAs, because of the substantial fines they

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[149] Bildfell, "Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases" (2016) 20 *Canadian Criminal Law Review* 161.

[150] Xiao, "Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime" (2013) 23 *Cornell Journal of Law and Public Policy* 233, at 243.

[151] Xiao, *Ibid* at 243.

[152] Xiao, *Ibid* at 251.

[153] Ferris, *Sentencing: Practical Approaches* (Butterworths 2005) at 367.

[154] Press Release, "U.S. Attorney's Office for the E. Dist. of N.Y., Schiavone Construction to Pay $20 Million and Costs of Investigation to Resolve Public Works Hiring Fraud" (November 29 2010).

[155] *Ibid.*

[156] Wray and Hur, "Corporate Criminal Prosecution in a Post Enron World: The Thompson Memo in Theory and Practice" (2006) 43 *American Criminal Law Review*, at 1104-1106.

[157] Xiao, "Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime" (2013) 23 *Cornell Journal of Law and Public Policy* 233, at 252.

include, likely achieve the same result as full prosecutions. Furthermore, the publicity and transparency requirements that accompany a UK DPA bring a degree of public shame to the offending corporate entities, which may dissuade them from reoffending, as well as competitor corporate entities.[158] Therefore, DPAs likely achieve the same general deterrence as fully litigated cases.[159]

5.138 When the UK considered the enactment of legislation permitting prosecutors and defendants to enter into deferred prosecution agreements, the cost and complexity of corporate prosecution proved a decisive factor, according to the May 2012 consultation on the issue and it has been widely accepted that DPAs can bring about the same results as convictions without requiring the same amount of resources.[160] As one commentator puts it:

> "DPAs… reduce the time, energy, and cost prosecutors need to spend on a case because it allows them to bypass many of the procedural requirements involved in a formal judicial proceeding, from jury selection and pre-motions to post-trial hearing and appeals. This enables the government to make better use of its efforts and expenses to prosecute more corporate criminals that may otherwise go unnoticed because of procedural or practical challenges."[161]

5.139 As a result of this, DPAs would "free up resources to concentrate on prosecuting the most egregious cases".[162]

5.140 DPAs thus confer a political benefit to the government by conserving judicial resources and raising government revenue. In addition, DPAs result in a shift in investigation and maintenance costs from the prosecutor to the corporate entity while avoiding the payment of legal fees resulting from multiyear trials for all parties.[163]

(b) Mitigating "unwanted collateral consequences"

5.141 During the UK Government's consultation process leading to the UK DPA regime, it was observed that while "full criminal proceedings are (often) the only course of action" respondents to the consultation had "recognised [that] prosecution can pose significant challenges because of the very nature of corporate crime. In a globalised and specialised

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[158] Xiao, *Ibid* at 253.

[159] Xiao, *Ibid* at 252.

[160] Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* 1st ed (Sweet & Maxwell 2015).

[161] Xiao, "Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime" (2013) 23 *Cornell Journal of Law and Public Policy* 233, at 242-243.

[162] Transparency International Canada, Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada, July 2017, at 6.

[163] Bildfell, "Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases" (2016) 20 *Canadian Criminal Law Review* 161, at 187.

business environment, offences can take place across multiple jurisdictions and in complex technical fields. Investigations and prosecution can often take many years and cost millions of pounds”.[164]

5.142 The “third way” offered by DPAs mitigates against a number of these negative outcomes:

5.143 “Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company’s operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government’s ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims.”[165]

5.144 Moreover, it is notable that guidance in both the UK and the US permits prosecutors to consider “collateral consequences” in which destruction of a viable corporate entity as well as unwarranted costs to innocent employees, shareholders or creditors, is an argument against prosecution and in favour of alternative disposal.[166]

5.145 Fairness is the overriding principle at the core of all DPAs. In the UK, the judiciary are keen to ensure that the rights, lives and careers of innocent employees are actively protected, or at least guaranteeing that their disruption is minimal. In *Serious Fraud Office v XYZ*,[167] the Court (Leveson LJ) provided an even clearer example of this fairness in action. The very structure of the *XYZ* DPA was designed to allow the survival of a corporate entity that would have become insolvent if punished using more conventional mechanisms. The Court’s reasoning further demonstrates this goal:

> “Quite apart from the fact that prosecuting and convicting XYZ would invariably lead to significant legal costs and financial penalty at an unfavourable time in the global steel industry, counsel for XYZ explained that, even without the potentially detrimental effect of a prosecution, the company is currently operating on an “economic knife-edge”, In addition, conviction would mean that XYZ would be debarred from participating in [public procurement contracts]… Taken together, XYZ would risk

[164] Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (2012) at 3.

[165] *US Attorney’s Manual: Criminal Resource Manual*, Chapter 9-28.000.

[166] Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* 1st ed (Sweet & Maxwell 2015).

[167] *Serious Fraud Office v XYZ* [2016] Lloyd’s Rep FC 509, Leveson CJ, 8 July 2016, at paragraphs 3-4. Available at: ***https://www.sfo.govuk/download/xyz-preliminary-redacted/?wpdmdl=13249***.

becoming insolvent (even assuming that such an outcome was not inevitable), harming the interest of workers, suppliers and the wider community."[168]

5.146 DPAs, therefore, provide a mechanism for the punishment of corporate wrongdoing that seeks to minimise any collateral harm to employees with no involvement in or factual nexus with the wrongdoing. Indeed, they may be specifically designed to protect the interests of those same individuals, and wider community.[169]

5.147 DPAs also mitigate the potential unwanted consequences of a declination by preserving the government's ability to prosecute a recalcitrant corporation that subsequently materially breaches the agreement.[170]

5.148 DPAs therefore enable corporate entities to avoid the legal (debarment, delicensing and exclusion) and reputational (loss of share value, investor confidence and contract opportunities) ramifications of a conviction, as well as spill over consequences to third parties.[171] The negotiation of the terms of the DPA between the prosecutor and the company charged with an offence permits the government to require the disgorgement of illegally earned profits, payment of fines, and adoption by the company of correction compliance measures to reduce the risk of subsequent offences, and therefore more certain and more positive outcome for both parties.[172]

(c) Enabling "global" Responses to Corporate Offending

5.149 Given the globalised nature of the modern corporation, a move towards greater international cooperation on the part of national prosecutors is desirable.

5.150 Allowing for DPAs can help achieve this goal by enabling increased cooperation between jurisdictions and between prosecutors in resolving allegations of corporate criminality and multi-jurisdictional responses to corporate offending, in the form of "global settlements". As stated above, the complexity of corporate offences requires the work of specialists and cooperation between different branches of law enforcement internationally. To acquire the relevant evidence required for a prosecution, investigators are often required to manage mutual legal assistance treaties as well as considerations of attorney-client

[168] *Ibid* at paragraph 32.

[169] Cooke and Hyde, "DPAs: still dividing opinion?" (2018) 168 *New Law Journal* 11, at 12.

[170] Memorandum from Mark Filip, Deputy Attorney General on Principles of Federal Prosecution of Business Organizations to Heads of Department Components and United States Attorneys § 9-28.1000 (Aug. 28, 2008).

[171] Transparency International Canada, "Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada" (July 2017), at 7. Available at: *http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf*.

[172] *Ibid.*

privilege and protection of witnesses in multiple locations around the world.[173] By encouraging increased levels of disclosure, DPAs would likely increase the number of cases brought forward which would enable the development of investigative and prosecutorial knowledge and expertise with regards to serious corporate crime.[174]

(d) Encouraging Corporate Cooperation in Investigations and Prosecutions of Criminality in other Legal or Natural Person

5.151 In addition to the above benefits, DPAs also assist prosecutors in holding other legal persons accountable, such as managerial agents of a corporation or its associated bodies. As discussed above, the principal advantage of DPAs is that they incentivise corporations to self-report in cases where the full extent of criminality may otherwise go undiscovered. In addition to providing information about the wrongdoing of the party entering into the agreement with the prosecutor, the wrongdoing of others can also be disclosed. DPAs will usually require full disclosure of wrongdoing, in some cases it will be a term of the agreement that the corporate body discloses the wrongdoing of its officers or associated companies.[175]

5.152 By reducing the "accountability gap," the wrongdoing of all culpable individuals and organisations can be investigated, because of which the prosecutor may take the steps it considers appropriate, including prosecution or entry into a DPA. By encouraging the disclosure of wrongdoing of others, not just the party to the agreement, DPAs further enhance the enforcement powers of prosecutors and regulators.

5.153 As noted later in this Report,[176] there can be legal challenges to the attribution of criminal liability to managerial agents within large, complex organisations. This is a problem because companies by necessity act through their agents; where a company commits a crime, this may be the result of criminality by one or more managerial agents within that company.[177] One commentator in the US notes that, disclosure of a managerial agent's wrongdoing can lead to adverse consequences for that person that fall short of

[173] Reading, "International co-operation in fighting financial crime" in Rider (ed), *Research Handbook on Internationals Financial Crime* (Edward Elgar 2015) at 658.

[174] Transparency International Canada, "Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada" (July 2017) at 6.

[175] Nasar, "In Defence of Deferred Prosecution Agreements" [2017] *NYU Journal of Law and Liberty* 838. The author notes at page 859 that the likely result of the US Deputy Attorney General's Memo of 2015 ("the Yates Memo") is that DPAs will only be offered to corporations that agree to provide evidence of the wrongdoing of individuals.

[176] See Chapter 9.

[177] See Chapter 9. For example in *The People (DPP) v Hegarty* [2011] IESC 32 the Supreme Court clearly articulates the importance of prosecuting officers, who are often instrumental in the decision making process that leads to the commission of crime.

prosecution, such as dismissal or civil sanction.[178] Similarly, disclosure of the wrongdoing of another corporate body may also impact that body, for example with negative publicity. DPAs can contribute to prosecutors discovering wrongdoing of individuals or corporate bodies, leading to negative consequences for that individual or corporate body. However, in the absence of an effective system of attributing criminal liability to culpable managerial agents of corporate offenders, the additional deterrent effect would be modest. Accordingly, this benefit of DPAs should be viewed as complementary to, rather than a substitute for, an effective regime of prosecuting companies and their agents. DPAs can help uncover wrongdoing in others, but in order to prosecute other persons (or credibly threaten prosecution) a legal mechanism for attributing liability to individuals must be strengthened.

5.154 Despite the criticism that DPAs constitute an inadequate substitute for jail sentence of the individuals responsible, the use of DPAs with respect to a corporation does indeed not necessarily foreclose the option of pursuing criminal charges against an individual director, executive or employee.[179] That is, it is not necessarily an "either/or" proposition with respect to DPAs and full criminal prosecution.

5.155 Allowing for an effective method of prosecution, a DPA regime would lead to greater accountability of other legal and natural persons. This prevents criminality from going unpunished; there is a clear public interest in the detection and prosecution of criminal activity. In turn, the prospect of detection and prosecution results in greater deterrence against wrongdoing.[180] As discussed in greater detail elsewhere in this Report, deterring the specific officer responsible for the conduct, in addition to the corporation as a whole, enhances overall deterrent effect of the criminal justice system. DPAs, therefore, can provide ancillary benefits beyond the prosecution and deterrence of the principal offender itself.

4. Arguments Against Introducing DPAs

(a) Public Perception of DPAs

5.156 Some commentators have warned that DPAs may "allow a corporate criminal to escape without consequences."[181] Commentators in the US have also stated that alternative

[178] Nasar, "In Defence of Deferred Prosecution Agreements" [2017] *NYU Journal of Law and Liberty* 838, at 858.

[179] Bildfell, "Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases" (2016) 20 *Canadian Criminal Law Review* 161, at 174.

[180] Ryder, "Too Scared to Prosecute and Too Scared to Jail? A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK" (2018) 82 *The Journal of Criminal Law* 215, at 262.

[181] Nanda, "Corporate Criminal Liability in the United States: Is a New Approach Warranted?" (2010) 58 *American Journal of Comparative Law* 605, at 605.

mechanisms such as DPAs reflect the Department of Justice's "soft-on-corporate-crime" approach – as such they are said to excuse business executives and corporate entities from serious criminal charges by merely paying for a fine and a promise to correct their behaviour.[182] One commentator argued that these mechanisms create "no disincentives for committing fraud or white-collar crime, in particular in the financial space."[183]

5.157 Many commentators and members of the public believe that cooperation agreements such as DPAs allow corporations to escape "deserved punishment" such as public shaming[184] or prison sentences for officers.[185] Some commentators also note that DPAs allow corporations — perhaps unfairly — to avoid the negative media scrutiny common in a formal criminal proceeding.[186]

5.158 Furthermore, despite the difficulties and costs of prosecutions (discussed above), the public benefits of prosecuting corporate criminality cannot be minimised. When the threat of successful corporate prosecutions does not exist, public and investor trust in the integrity of financial systems and markets is undermined. Consumers and other companies can get the impression that they are put at a risk of trading with unscrupulous and unlawful corporates and that legislation enacted to protect the public from these risks is rendered meaningless.[187]

5.159 The UK's Joint Guidance on Corporate Prosecutions emphasises this point in its "general principles", underlining the important public interest in having a robust methodology for the prosecution of corporations: "A thorough enforcement of the criminal law against corporate offenders, where appropriate, will have a deterrent effect, protect the public and support ethical business practices. Prosecuting corporations, where appropriate, will have a deterrent effect, protect the public and support ethical business practices. Prosecuting corporations, where appropriate, will capture the full range of criminality involved and thus lead to increased public confidence in the criminal justice system."[188]

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[182] Editorial, "Going Soft on Corporate Crime" *New York Times* (10 April 2008). Available at: *http://www.nytimes.com/2008/04/10/opinion/10thu2.html*.

[183] Xiao, "Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime" (2013) 23 *Cornell Journal of Law and Public Policy* 233.

[184] Editorial, "Going Soft on Corporate Crime" *New York Times* (10 April 2008). Available at: *http://www.nytimes.com/2008/04/10/opinion/10thu2.html*.

[185] *Ibid.*

[186] Press Release, U.S. Attorney's Office, "Schiavone Construction to Pay $ 20 Million and Costs of Investigation to Resolve Public Works Hiring Fraud" (Nov 29, 2010)

[187] Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* 1st ed (Sweet & Maxwell, 2015).

[188] *Joint Guidance on Corporate Prosecutions*, General Principles, paragraph 7.

5.160 The US Department of Justice has also designated the prosecution of corporate crime "a high priority". According to the Principles of Federal Prosecution of Business Organizations,[189]

> "By investigating allegations of wrongdoing and bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. These interests include, among other things: (1) protecting the integrity of our economic and capital markets by enforcing the rule of law; (2) protecting consumers, investors, and business entities against competitors who gain unfair advantage by violating the law; (3) preventing violations of environmental laws; and (4) discouraging business practices that would permit or promote unlawful conduct at the expense of the public interest."

5.161 Finally, critics argue that DPAs simply do not offer the same deterrent effect as criminal prosecutions and that "the approach of letting corporations escape with monetary fines as long as they promise to self-regulate creates no disincentives for corporations to abstain from fraud or white-collar crime."[190] As one commentator summarises: "DPAs may make it financially viable for corporations to bear the risk of criminal business practices due to financial gains made from such practices without the threat of an indictment."[191]

5.162 However, taking into consideration the American and British experience, and by ensuring that a strict framework is established, which guarantees that DPAs are not used too widely or seen as too lenient to corporate wrongdoers, it is possible to put procedures in place that guide prosecutors in employing DPAs in an appropriate and efficient manner.

(b) Are DPAs Unfair to Corporate Offenders?

5.163 Another criticism is that DPAs may lead corporations to plead guilty to crimes that they are not guilty of, or accept punishments harsher than what is deserved for their misbehaviour, out of fear that not doing so could be seen as non-cooperation and be subject to potentially worse consequences through trial proceedings.[192]

5.164 DPAs are also said to be unfair to corporate offenders since, should a case ultimately go to trial, prosecutors can use previous DPAs as shortcuts to secure a conviction.[193] DPAs usually necessitate corporate entities to acknowledge misbehaviour and enforce remedial

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189 *US Attorney's Manual: Criminal Resource Manual*, Chapter 9-28.010.

190 Martin, "Deferred Prosecution Agreements: 'Too Big to Jail' and the Potential of Judicial Oversight Combined with Congressional Legislation" (2014) 18 *North Carolina Banking Institute* 457, at 468.

191 Martin, *Ibid* at 469.

192 Xiao, "Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime" (2013) 23 *Cornell Journal of Law and Public Policy* 233.

193 Wray and Hur, "Corporate Criminal Prosecution in a Post Enron World: The Thompson Memo in Theory and Practice" [2006] 43 *American Criminal Law Review* 1095, at 1104-1105.

measures along with paying fines and penalties.[194] As a result, admission of guilt by a defendant corporation renders it particularly vulnerable should the case later proceed to trial. This would be the case if the defendant corporation breached the DPA after it failed to implement a required measure. As some commentators observed: "[t]he government … [is] armed with the company's admission and all the evidence obtained from its cooperation, making conviction virtually a foregone conclusion."[195]

5.165 The corporate world has indeed not always welcomed the use of DPAs, and in particular, in the US, the power it places in the hands of prosecutors and regulators. The criticisms levied against the agreements have made unlikely bedfellows of corporate criminal defence lawyers and activists protesting against globalisation and corporate greed. Corporate criminal defence lawyers object to DPAs as a "state-sponsored shakedown scheme in which corporations are extorted to pay penalties grossly out of proportion to any actual misconduct".[196] Activists campaigning against corporate greed claim that "the vast majority of major corporate criminals which now are granted deferred and non-prosecution agreements when twenty years ago they were forced to plead guilty… are immune from federal prosecution."[197]

5.166 Corporate defence lawyers also question the use of DPAs, claiming that "prosecutors have exploited their virtually unchecked power to extract and coerce even greater concessions, jeopardizing the very nature of our adversarial system. It is destruction by accretion – a staged but seemingly inexorable concentration of power that has skewed the system. The net result has been the emasculation of the defence bar and the enforcement of the criminal law in a way that is often wildly out of proportion to the perceived wrongdoing. […] Criminal sanctions, administrative sanctions and director liability make the payment of tribute to the federal government essentially a cost of doing business"[198] Epstein also points to the fact that the corporate entity's procedural protections are essentially nil when negotiating a DPA.[199]

5.167 From both camps, the greater concern is that under the existing US model of DPAs, the concentration of powers is in the hands of the prosecutor and not with the courts.

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194 Xiao, "Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime" (2013) 23 *Cornell Journal of Law and Public Policy* 233.

195 Wray and Hur, "Corporate Criminal Prosecution in a Post Enron World: The Thompson Memo in Theory and Practice" [2006] 43 *American Criminal Law Review* 1095, at 1105.

196 Janis, "Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is being Destroyed" (2005) Washington Lawyer.

197 "US Injustice Department: 'Collateral Consequences' Prohibit Prosecuting Criminals", Russell Mokhiber, Occupy.com, 31 May 2013.

198 Janis, "Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is being Destroyed" (2005) Washington Lawyer.

199 Epstein, "The Deferred Prosecution Racket" *Wall Street Journal* 28 November 2016. Available at: *www.wsj.com/articles/SB116468395737834160*.

According to one critic, “the approach to law enforcement embodied in the Thompson Memorandum [the US Attorney’s Manual on DPAs] can fairly be described as moving the process governing the American System away from the form the Founders expressly meant it to take – an accusatorial system - and toward something they feared – an investigative, charging, and plea processes toward an inquisitorial system by shifting power from courts and juries to the Department of Justice and the US Attorneys who work for it.”[200]

5.168 However, these concerns for the corporate offenders as regards the imbalance in the bargaining power of the parties and the virtually unchecked powers of the prosecutor can be remedied by a more transparent, codified and supervised DPA. It is these concerns which led the UK to place a greater emphasis on the role played by the judiciary (see above). The development of DPAs in the UK, following the US model but differing in this key aspect, has been actually conscious of the objection by the judiciary to any agreement that allows the prosecutor to effectively arrive at the sentence for an offence without recourse to the bench.

5. Conclusion

5.169 The Commission has concluded that the benefits of the DPA system introduced in the UK overcome the drawbacks that are evident in the US system. The UK approach, as compared to the US model, better upholds public confidence and fairness to corporate offenders leading up to and maintaining a DPA.[201] The marginal cost of requiring court approval of DPAs is far outweighed by the benefits derived from greater transparency, fairness and predictability in the DPA process.

5.170 While pursuing corporate convictions should be the default where the evidence is sufficient, DPAs should be an option for the prosecutor when merited by the circumstances.[202] The significant fines associated with DPAs bring about appropriate punishment and sufficient retributive value.[203]

[200] Ellard, “Making the Silent Speak and the Informed Wary” (2005) 42 *American Criminal Law Review* 985, at 985.

[201] Bildfell, “Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases” (2016) 20 *Canadian Criminal Law Review* 161, at 206.

[202] Tabes, *“*Les procédures de guilty plea: plaidoyer pour le développement des formes de justice “négociée” au sein des procédures penales modernes”, Étude de droit comparé des systèmes pénaux français et anglais” (2012) 83 *International Review of Penal Law,* at 89.

[203] Xiao, “Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime” (2013) 23 *Cornell Journal of Law and Public Policy* 233.

5.171 DPAs seek to achieve, in a pragmatic way, the goals of any prosecution, that is, education and deterrence, rehabilitation of offenders and vindication of the law.[204] As such, they also benefit the public by providing a corporate entity genuinely seeking to rehabilitate with an opportunity to do so.[205]

5.172 While DPAs have been subject to controversy, it nevertheless appears that prosecutors and corporate entities all around the world have found that a negotiated settlement to a corporate crime in appropriate circumstances leads to a solution which is just, efficient and responsive to public demands for punishment and should continue to be utilised in the future.[206] The strong incentive for corporations to deal responsibly and proactively with allegations of misconduct is a key reason to embrace DPAs.[207] DPAs achieve general deterrence by simulating the results of a guilty plea or conviction.

5.173 Indeed, some commentators suggest that prosecutors can achieve through DPAs, "all that they could win at trial... without the significant expenditure of time and resources."[208]

5.174 The current Irish system does not allow for flexible alternatives to prosecution for corporate economic crimes. DPAs would enable the Irish justice system to deal with wrongdoing more effectively, proportionately and with a greater degree of certainty. DPAs would indeed result in more timely and effective processes and best use of resources in Ireland, as well as bringing more offending commercial entities to justice through incentivising self-policing, self-reporting and admission of wrongdoing, with appropriate and proportionate penalties for offenders and restitution for victims. The issues relating to corporate crimes are no less of a concern in Ireland, and therefore the rationale for importing DPAs is equally strong in Ireland.

R 5.01 The Commission recommends the introduction of Deferred Prosecution Agreements (DPAs) in Ireland which, to ensure that it is consistent with constitutional requirements, must be (a) on a statutory basis, (b) subject to judicial oversight, (c) subject to guiding principles and (d) contain sufficient procedural safeguards.

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[204] Mazzacuva, "Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US systems of Criminal Justice" (2014) 78 *Journal of Criminal Law* 249.

[205] Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) at 47.

[206] Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties*, 1st ed (Sweet & Maxwell 2015).

[207] Bildfell, "Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases" (2016) 20 *Canadian Criminal Law Review* 161, at 192.

[208] Bohrer, Trencher, "Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation" (2007) 44 *American Criminal Law Review* 1481, at 1483.

5.175 The key elements and structure of the recommended statutory DPA regime are considered below.

E. Conclusions and Recommendations

1. Judicial Oversight

5.176 Judicial oversight and approval of DPAs is at the very heart of the DPA scheme. As set out below, entry into a DPA requires judicial approval at the initial application stage and at its approval. These steps of the DPA procedure are intended to guarantee judicial independence: the sentencing of the offender should remain solely within the judge's purview.

5.177 The Commission also recommends that the DPA scheme be overseen by the High Court. This is intended to avoid the risk that, if DPAs were administered by another court, they might be delayed by judicial review.

R 5.02 The Commission recommends that the statutory scheme of DPAs should be operated under the control of the Director of Public Prosecutions (DPP), that the DPP would bring the terms of a DPA to the High Court and that a DPA would come into effect only when approved by the Court.

2. Guiding Principles

5.178 The Commission proposes that, as is the case under the UK DPA scheme, the test for the court to apply in considering whether a DPA would, in principle, be appropriate, should be whether the DPA would be "in the interests of justice". This should help to ensure that the judge is considering whether, taking into account the circumstances of the case, a DPA is the appropriate course of action. This will give the judge an opportunity to decide whether the facts are such that an approach other than DPAs might be more appropriate, thereby preventing DPAs that do not adequately reflect the wrongdoing that has taken place.

5.179 The judge will be able to give an indication to the parties whether the emerging terms, including financial considerations, are likely to be appropriate. The Commission proposes that the test for this should also be as is the case under the UK DPA scheme, that is, whether the conditions are "fair, reasonable and proportionate".

5.180 This test was applied by the Court (Leveson LJ) in each of the 4 DPAs in the UK. From these judgments, the following principles are clear:

5.181 The first consideration in determining this is the seriousness of the conduct of the corporate body. Serious offences are more likely to warrant prosecution and are thus less likely to merit a DPA. Second, considerable weight is attached to prompt reporting to the authorities. A third important consideration is that no history of similar conduct on the part of the corporate body exists.

5.182 A requirement to pay a financial penalty broadly comparable to the fine that a court would have imposed is a fourth important feature. For example, in *Standard Bank*, the Court (Leveson LJ) conducted a careful analysis of the UK Sentencing Council Guideline and considered the cases of *R v Innospec Ltd*[209] and *R v Thames Water Utilities Ltd*.[210]

(1) Cooperation and future compliance on the part of the corporate body are also important to ensure fairness, reasonableness and proportionality of the DPA;
(2) A final legitimate requirement is the payment of the prosecutor's reasonable costs by the corporate body.

5.183 The Court (Leveson LJ) also noted that "a critical feature of the statutory scheme […] is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA."[211]

R 5.03 The Commission recommends that the High Court should carry out a review of each term of the DPA, and the DPA in its entirety, and that before the DPA can be approved, the Court must determine that the terms individually, or when taken as a whole, satisfy the following two part test at both a preliminary and final hearing:

(1) that the DPA as a whole and its individual terms are fair, reasonable and proportionate; and

(2) that approval of the DPA is in the interests of justice.

3. Scope

5.184 The Commission considers that DPAs should apply to corporate bodies only, and therefore not to natural persons.

5.185 Due to the difficulty in successfully prosecuting corporate bodies, DPAs are in the view of the Commission better suited to the context of offending by corporate bodies. In addition, information provided by corporate bodies during DPA negotiations may assist with the identification and prosecution of individuals for the role they played in the offences. This would maintain the deterrent effect posed by the possibility of prosecution of individual company officers.

R 5.04 The Commission recommends that DPAs should only be applicable to corporate bodies (and other unincorporated undertakings such as partnerships) but not to natural persons.

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[209] (26th March 2010 Southwark CC), discussed above at paragraph 5.38.

[210] [2015] EWCA Crim 960.

[211] See: *https://www.judiciary.govuk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf* at paragraph 2.

5.186 The Commission has also concluded that DPAs should be restricted, as in the UK, to criminal offences that relate to serious economic crime. This is due to the challenges posed to prosecuting corporate economic crime not being replicated in less serious offences and in other criminal offences generally.[212]

5.187 The use of DPAs for summary offences is inappropriate for a number of reasons. Firstly, in order for DPAs to function effectively, a credible risk that the corporate body will suffer significant consequences as a result of conviction must exist. Should DPAs be used for summary offences, the suspected corporate body would have little incentive to seek a DPA given the substantial disclosure requirements. Furthermore, summary offences are by their very definition 'minor'[213] in nature. The purpose of a summary trial is for the expedient disposal of offences that are not sufficiently serious to warrant a formal trial.[214] Corporate economic crime is a serious issue and to allow the use of DPA for summary offences would send the wrong message to corporate offenders.[215]

5.188 The UK scheme applies to specified economic crimes listed in Schedule 17, Part 2, of the *Crime and Courts Act 2013*. The Irish DPA scheme should apply to a similar set of offences concerning economic crime as those covered by the UK scheme. The list of such offences could include:

(1) The common law offence of conspiracy to defraud;
(2) The common law offences of bribery and conspiracy to make corrupt payments;
(3) Offences under the *Criminal Justices (Theft and Fraud Offences) Act 2001*;
(4) Offences under the *Competition Act 2002*;
(5) Offences under the *Companies Act 2014*;
(6) Offences under the *Criminal Justice Act 2011*;
(7) Offences under the *Taxes Consolidations Act 1997*, the *Stamp Duties Consolidation Act 1999*, the *Capital Acquisitions Tax Consolidation Act 2003*, and the *Value-Added Tax Act 1972* ;
(8) Offences under the *European Union (Market Abuse) Regulations 2016* (S.I. 349 of 2016); and

212 UK Ministry of Justice, *Deferred prosecution agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organizations* (2012 CM 8463) at 6. This is the same reason given by UK Ministry of Justice in their response to the consultation paper on DPAs.

213 As mentioned in Part A, Article 38.2 of the Constitution provides, "Minor offences may be tried by courts of summary jurisdiction".

214 Article 30.3 of the Constitution of Ireland provides, "All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

215 McCarron, "Deferred prosecution agreements: A Practical Proposal" (2016) 6 *King's Inns Law Review* 54.

(9) Offences under the *Criminal Justice (Corruption Offences) Act 2018.*

5.189 The Commission also proposes that the list of offences should be re-assessed by the Oireachtas from time to time as part of a broader review of the scheme.

R 5.05 The Commission recommends that the DPA scheme should only be available in cases concerning specified offences, in which the offending is of sufficient seriousness to warrant a prosecution on indictment. The offences, which should be reviewed from time to time by the Oireachtas, could include:

(1) The common law offence of conspiracy to defraud;

(2) The common law offences of bribery and conspiracy to make corrupt payments;

(3) Offences under the *Criminal Justices (Theft and Fraud Offences) Act 2001*;

(4) Offences under the *Competition Act 2002*;

(5) Offences under the *Companies Act 2014*;

(6) Offences under the *Criminal Justice Act 2011*;

(7) Offences under the *Taxes Consolidations Act 1997*, the *Stamp Duties Consolidation Act 1999*, the *Capital Acquisitions Tax Consolidation Act 2003*, and the *Value-Added Tax Act 1972*;

(8) Offences under the *European Union (Market Abuse) Regulations 2016* (SI No 349 of 2016); and

(9) Offences under the *Criminal Justice (Corruption Offences) Act 2018*.

4. Supporting Guidance: a Public Code of Practice for Prosecutors

5.190 Consistency in the application of the DPA scheme is essential for ensuring the effectiveness of that scheme.

5.191 When a prosecutor is determining whether to enter DPA negotiations with a corporate body, it is important that it should be a clear understanding as to whether the case in question can be appropriately dealt with by a DPA. Similarly, when a prosecutor is determining whether to conclude DPA negotiations, and applies to the court for approval, it is important that there be a clear understanding as to whether the preliminarily agreed terms are a suitable response to the corporate body's criminal conduct.

5.192 From the corporate body's perspective, a lack of certainty as to whether the negotiation process is likely to result in an agreed (and subsequently court approved) DPA, and what the likely terms of that DPA will be, would be a barrier to the body entering negotiations. Without some level of certainty in this regard, the corporate body is unlikely to be willing to enter a process where it will frankly discuss its criminality and otherwise cooperate with the prosecuting entity during the course of negotiations.

5.193 In order to ensure this certainty and consistency of application of the recommended scheme, the statutory framework of the scheme will require the prosecutor to produce and publish a *Code of Practice* which will outline in detail how it will perform its role under the scheme, and the standards it will apply in the process of negotiating and preliminarily agreeing a DPA.

5.194 In addition, designated prosecutors will also take into account the *Guidelines for Prosecutors* published by the DPP (which sets out the general principles prosecutors in Ireland should follow when they make decisions on cases) when deliberating over the suitability of a DPA.[216]

R 5.06 The Commission recommends that the statutory framework for DPAs will provide that the Director of Public Prosecutions (DPP) is to produce and publish a Code of Practice (comparable to the DPP's Guidance for the Cartel Immunity Programme), which will set out the detailed substantive and procedural elements of the DPA scheme, including the role of the DPP, the standards the DPP will apply in the process of negotiating and preliminarily agreeing a DPA and the relationship between the DPP and any relevant regulator in this context.

5. Process

5.195 The Commission is of the view that the DPP will be the only authority with the capacity to invite a corporate body to enter into DPA negotiations. The fact of negotiations does not represent a guarantee that the offer of a DPA may follow.

5.196 The DPP and any relevant regulator (similarly to the Cartel Immunity Programme, discussed above) would be responsible for identifying cases that are suitable for consideration under the DPA scheme. Cases may be brought to the DPP's attention for consideration under the Irish scheme where a corporate body self-reports misconduct and seeks to initiate DPA discussions, or when criminal behaviour is detected and the corporate body offers full and genuine cooperation.

5.197 A successful DPA scheme will need to strike an appropriate balance between the priorities of the DPP and corporate bodies during the pre-negotiation period. The DPP will need to be made aware of the nature and significance of the company's offending such that the DPP can be satisfied that the misconduct will be appropriately addressed by a DPA.

R 5.07 The Commission recommends that the decision to invite a corporate body to negotiate a DPA will be a matter for the DPP's discretion based on a case made to the DPP by any relevant regulator.

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[216] Director of Public Prosecutions, *Guidelines for Prosecutors,* 4th edition. Available at: *https://www.dppireland.ie/filestore/documents/Guidelines_for_Prosecutors_[4th_Edition_-_October_2016].pdf*

5.198 A corporate body might be deterred from providing evidence of misconduct if it is unclear whether it is likely to be offered formal DPA negotiations. As a result, clear and detailed guidance on the circumstances in which the DPP will be likely to offer formal DPA negotiations will need to be provided in the *Code of Practice,* which will include the types of public interest consideration that would guide the DPP in deciding whether to initiate formal DPA negotiations.

5.199 Certainty and transparency are central to the success of any DPA scheme introduced and there should be clearly established factors to which the DPP must have regard in exercising its discretion to enter into DPA negotiations. The *UK DPA Code* provides that "considerable weight" will be given to the *cooperation* factor.[217] The *UK DPA Code* provides specific guidance on this cooperation, relating to providing material in relation to individual officers who contributed to the offending conduct, in anticipation of potential prosecution of those culpable individuals. An indication of protecting such individuals is deemed a "strong factor in favour of prosecution".[218] The earliness of self-reporting, and level of involvement of the prosecuting entity in in the early stages an internal investigations will also be considered under the *UK DPA Code*.[219] Failing to self-report at an early stage will militate in favour of a prosecution, particularly if the prosecuting entity is of the view that this failure may have prejudiced the investigation into the corporate body, or any incriminated individuals, and whether any internal investigation may have compromised evidence of wrongdoing.[220]

5.200 This has also been confirmed in the *Rolls-Royce*[221] DPA (discussed above) in which the Court (Leveson LJ) equated extensive cooperation with self-reporting. The Commission agrees with this approach.

5.201 In order to facilitate full and open discussion between the parties during the negotiation period where the corporate body provides full details and evidence of its criminality, negotiations under the scheme will take place otherwise than in public. To either require or allow that details of these negotiations be made public could raise a fear in a corporate body of potential adverse consequences flowing from such publicity. This would be at a point where no DPA has been agreed, and the corporate body does not yet know whether a DPA will be agreed or approved by the court. This fear would likely inhibit corporate bodies from seeking to engage in the DPA process (by self-reporting, cooperating with investigations, and negotiating), and thereby undermine the effectiveness of the recommended scheme.

[217] See Article 2.8.2(i) of the *UK DPA Code.*

[218] See Article 2.9.1 of the *UK DPA Code.*

[219] See Article 2.9.2 of the *UK DPA Code.*

[220] See Article 2.9.3 of the *UK DPA Code.*

[221] *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249.

5.202 Allowing for such free discourse will allow an agreed DPA to be formulated to best respond to the criminality in question, and the circumstances of the would-be defendant.

R 5.08 The Commission recommends that the DPA negotiations that take place between the DPP and the corporate body shall take place otherwise than in public, and the fact of the negotiations shall remain confidential during the negotiations.

5.203 Having made a decision in principle that a DPA is likely to be suitable and having secured initial agreement of the corporate body to enter into a DPA, the prosecutor will begin DPA proceedings before the High Court.

5.204 In order to maintain public confidence in the criminal justice system, and to avoid an image that the recommended DPA scheme is allowing corporate bodies to “get away with” criminality, judicial oversight and approval of the terms of a DPA is necessary before a DPA agreed under the scheme, can be finalised, and become binding.

5.205 The preliminary hearing(s) will give the judge notice of the prosecutor’s provisional decision to enter into a DPA.

5.206 The judge would then be invited to approve the DPA in open court in a final approval stage, thereby ensuring openness and transparency. Before approving the DPA, the judge would determine whether its approval would be in the interests of justice and, whether the agreement and its constituent parts were fair, reasonable and proportionate.

5.207 In making this determination and in order to satisfy the requirements of the Irish Constitution, the judge would not be permitted to revisit matters of fact, but may have regard to the agreed statement of facts and the terms and conditions of the DPA, including compensation granted to third parties, the seriousness of the offending conduct and the level of cooperation demonstrated by the corporate body.

R 5.09 The Commission recommends that the DPP shall, where the DPP has determined that a DPA is likely to be the appropriate outcome for a specific case, make an initial application to the High Court for preliminary approval of the DPA, and that the matter may not proceed further unless the Court considers that the application meets the criteria set out in Recommendation 5.03.

R 5.10 The Commission recommends that, notwithstanding the High Court’s indicative approval in the preliminary hearing, the DPA can only come into effect where the Court approves of a DPA in a final approval hearing.

6. Procedural safeguards

5.208 Legal professional privilege protects from disclosure communications by a client and his lawyer, where those communications relate to advice given or sought. It also protects communication between a client or his lawyer and third parties, where those communications came into existence for the purpose of litigation.

5.209 This can create a tension where a corporate body is entering into negotiations to obtain a DPA: prosecutors will demand full cooperation with law enforcement investigations in order to consider a corporate body as a candidate for a DPA, and the corporate body will wish to be perceived as offering full cooperation while ensuring that it is protected under the principles of legal professional privilege. The corporate body will therefore be able to assert legal professional privilege under the scheme, and nothing provided in the statutory framework or the *Code of Practice* will alter such a right.

R 5.11 The Commission recommends that the statutory framework for DPAs should expressly provide that nothing in the legislation, or in any guidance or Code of Practice, shall alter or affect the corporate body's rights in relation to asserting legal professional privilege.

5.210 The preliminary hearing or hearings, at which both the prosecution and the corporate body will be represented, should be held otherwise than in public. This will enable the judge to take an early view on whether or not it is in the interests of justice to proceed with an individual DPA, thereby safeguarding the public interest, as well as satisfying the requirements of Article 34.1 of the Irish Constitution.

R 5.12 The Commission recommends that the preliminary approval hearing shall be held otherwise than in public.

5.211 The public should be entitled to know what wrongdoing has taken place, and what sanctions have been imposed. The DPA procedure is novel and there will inevitably be a perception amongst some that either big business is "getting away with it" or that the DPA procedure offers a way for big business to buy their way out of trouble. Consequently, a balance needs to be struck between permitting the parties to engage with the court in as full and as frank a manner as possible, and ensuring that there is no perception of deals being struck in private.[222]

R 5.13 The Commission recommends that the final approval hearing shall be held in public.

5.212 Deferred Prosecution Agreements should be published in full, except in exceptional circumstances (for example, where full publication would prejudice court proceedings). At the end of the DPA process, the DPP will publish details on how the company has complied with the DPA's terms and conditions. The DPP will also be required to publish details of any breach, variation or termination of the agreement.

R 5.14 The Commission recommends that DPAs approved by the High Court shall be published in full on the DPP's website.

[222] Bisgrove and Weekes, "Deferred Prosecution Agreements: A Practical Consideration" (2014) 6 *Criminal Law Review* 416, at 435.

7. Content of DPAs

5.213 As noted above, the DPAs under this scheme are intended to represent a criminal justice response to economic crime. In order to maintain public confidence in the criminal justice system, and to ensure that each DPA adequately responds to the criminality in question, it is important that the content of each DPA meets as many of the goals of a criminal sanction as possible, while remaining flexible enough to respond to the circumstances of the case in question.

5.214 The terms and conditions of a DPA will be specific to individual cases and to the purposes to be addressed and determined by the parties. However, the Commission is of the view that there are certain core terms that should be a feature of any DPA.

5.215 The following terms have been selected to ensure that, in the case of each DPA approved, certain key aims of a criminal sanction are satisfied.

5.216 Requiring a *Statement of Facts,* which outlines the full extent of the corporate body's wrongdoing and includes admissions, mirrors many aspects of the public finding of wrongdoing that would result from a criminal conviction. The requirement that this statement includes admissions by the corporate body, will have an important impact on the ability for the prosecutor to prove its case, should the prosecution against the corporate body be recommenced due to non-compliance by the corporate body. The statement and these admissions will also ensure that third parties who have suffered harm because of the corporate body's wrongdoing will not suffer the prejudice of being prevented in a civil claim for damages from relying upon the corporate body's conviction.

5.217 It is a necessary aspect of the DPA scheme that the period for which the prosecution is deferred is limited that will allow for the terms of the agreement to be complied with by the corporate body. Should the body satisfy these terms within the given period, the prosecution will be permanently discontinued at that point. Should the body fail to comply with all the terms of the DPA by the conclusion of this period, the prosecutor will have discretion to recommence the prosecution at this point, subject to the ability for the terms of the agreement to be varied.

5.218 A *financial penalty* represents the primary means by which a court will sanction offending by a corporate body, in the case of a criminal conviction. The agreement and approval of a DPA is intended to act as an alternative to a conviction and sentence, rather than a response to offending which appears lower on the enforcement pyramid. It is therefore important that the consequences of entering a DPA mirror the consequences of a conviction and sentence as closely as possible while still allowing the DPA scheme to achieve its separate goals. For this reason, it is the Commission's view that it is essential that a financial penalty is included in each DPA agreed.

R 5.15 The Commission recommends that, without prejudice to any other terms that the Court shall approve, the following mandatory terms shall be included in each approved DPA:

(1) A statement of facts outlining the full extent, nature, and circumstances of the corporate body's offending.

(2) A time period after which the agreement will expire.

(1) A financial penalty.

8. Variation of a DPA

5.219 Situations where compliance with the DPA becomes impossible require that mechanisms by which the parties can apply to court to vary its terms must be put in place. The Irish DPA process should clearly envisage that circumstances may arise in which a corporate body, through no fault of its own, is likely to breach a concluded agreement unless some variation is made to its terms. The duration of a DPA is likely to be one to three years, and a corporate body's position might change over time and lead certain conditions of the DPA to become inappropriate, for example if the corporate body's turnover has dropped significantly.

5.220 Application can be made by the prosecutor, but not the defendant corporate body. If the court finds that the corporate body is in breach of a term of the DPA, it may invite the parties to make an application to vary the terms of the DPA, for example, by extending time limits or adding supplementary obligations.

5.221 The court will then consider the proposed variation in the same manner and against the same test as the original agreement: that the variation is in the interests of justice and the terms of the DPA, as varied, are fair, reasonable and proportionate. Even when the hearing to consider the matter is held in private, the prosecutor must, unless the court orders otherwise, publish the DPA as varied together with the court's declaration that the variation is in the interests of justice and the terms are fair, reasonable and proportionate, as well as the reasons that led to the decision. This will enable the variation to be transparent.

5.222 Variations will be appropriate to rectify relatively minor breaches of a DPA where the parties have been unable to find a remedy without the involvement of the court.

5.223 A variation may be necessary either when a breach has occurred and the prosecutor has applied to the court to consider the matter, upon which the court will invite the parties to agree a solution to the breach through variation of the agreement, or a breach has not yet occurred but is likely to absent the variation.

R 5.16 The Commission recommends that the terms of the DPA may be varied by order by the High Court, or as agreed between the parties and with the approval of the High Court.

9. Breach of DPAs

5.224 The objective of entering into a DPA is to ensure that the defendant corporate body takes certain reparative steps contained in the agreement. Through the period during which the DPA is operable, the prosecutor is under the obligation to monitor the successful performance of those terms. The *UK DPA Code* notes that in drafting the terms of the agreement, "the terms must set out clearly the measures with which [the corporate body] must comply. Clarity is important so [the corporate body] understands what is required. Further, in the event of breach of a term drafting ambiguity will complicate breach proceedings".[223]

5.225 The response to possible breaches of a DPA should be adapted to the seriousness of the breach.

5.226 The fact of a breach does not automatically cause proceedings to be commenced against the corporate body: the court and the parties are able to propose variation to the terms of the agreement where the breach is relatively minor. Indicative and non-exhaustive examples of minor breaches may include failure to adhere to strict timetables set out in the agreement through some unforeseen circumstance, or failure to implement some aspect of a compliance program in the precise fashion envisaged by the DPA.

5.227 For more serious breaches, or if the parties cannot agree a variation of the terms of the DPA, the court shall order that the DPA may be terminated, following which the prosecutor will have discretion to have the suspension of the indictment lifted.

5.228 If this step is taken, the prosecutor shall publish the fact that the DPA was terminated by the court following the defendant corporate body's failure to comply with its terms, and the reasons given by the court for having taken such course. From that point, the prosecutor has discretion as to the next steps to be taken in consequence of the corporate body's failure to comply with the DPA.

5.229 It is suggested that the statutory framework would provide a non-exhaustive and indicative list of what may constitute a serious or material breach.

5.230 This list should include breaches which:

(1) result in it being within the public interest to terminate the DPA;

(2) result from the corporate body's commission of further offences;

(3) would significantly compromise the integrity of the DPA scheme, were it not to result in termination;

(4) result from the parties being unable to agree a response to, or adhere to the court's order of remedy for, an otherwise minor breach;

(5) were committed intentionally or recklessly by the corporate body;

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[223] See paragraph 7.4 of the *UK DPA Code*.

(6) amount to a pattern or sequence of minor breaches which, when assessed cumulatively indicate that the corporate body is not making sufficient efforts to satisfy the terms of the DPA;

(7) indicate that the corporate body does not appear otherwise committed to satisfy the terms of the DPA.

R 5.17 The Commission recommends that the High Court shall have jurisdiction to consider, on the application of the DPP, a suspected breach of the terms of the DPA, and this should provide for different treatment of the breach depending on whether the breach is (a) a minor breach, that is, a breach that does not amount to a serious or material breach; and (b) a serious or material breach.

R 5.18 The Commission recommends that, where the High Court determines that there has been a serious or material breach of the DPA, the Court shall order the termination of the DPA.

R 5.19 The Commission recommends that in the case of all breaches of the DPA as determined by the High Court, the DPP shall publish details of each breach.

10. Discontinuance of criminal proceedings on expiry of a DPA's period of deferral

5.231 Under the proposed model, a DPA would be concluded in one of two ways.

5.232 If the company is found to have committed a material breach of the DPA, the prosecutor will then be able to terminate the DPA and prosecution may be commenced.

5.233 If the defendant corporate body successfully completes and complies with all of its terms during the period of operation, the prosecutor should give notice to the court that the proceedings commenced during the court's initial approval of the agreement, and suspended as a result of entering into the agreement, are to be discontinued, and no fresh proceedings for the alleged offence may be brought.

5.234 Although discontinuance is essentially an automatic effect of the reaching of the expiry date, the prosecutor must conduct some review of the corporate body's effective compliance with the terms of the DPA prior to making an application to the court, if considered necessary. The prosecutor cannot make such application where there is an outstanding application to the court to consider a suspected breach of the agreement, or one has been heard but the parties have not reached a resolution on how to address it.

5.235 Having conducted the requisite enquiries, the prosecutor should notify the court as soon as is practicable after the decision is made to discontinue proceedings, stating the effective date of discontinuance, the offences to be discontinued and proving confirmation that the DPA has expired.[224] From that point, fresh proceedings against the defendant corporate body for the same offence may not be brought unless the prosecutor becomes aware that, in the course of DPA negotiations or during the period of operation of the DPA, the corporate entity provided inaccurate, misleading or incomplete information.[225]

R 5.20 The Commission recommends that upon the expiry of the DPA's period of deferral, if there is no ongoing breach application in process, the DPP shall give notice to the High Court that the DPA has concluded.

11. Use of material obtained as a result of DPA negotiations as evidence in subsequent proceedings

5.236 Subject to the exceptions outlined in the *Recommendations* below, material disclosed by the corporate body during DPA negotiations will not be disclosed (other than to relevant enforcement and investigative agencies) or used in subsequent criminal or civil proceedings where this information was created solely to facilitate, support, or record DPA negotiations. This approach is drawn from the UK scheme (see section 13, schedule 17, *Crime and Courts Act 2013*). Examples of the kinds of information that would be protected include minutes of negotiations, draft DPAs and reference documents created for DPA negotiations.

5.237 It is strongly in the public interest that individual DPAs be open and transparent. Therefore, where criminal proceedings are brought against the corporate body following a concluded DPA, the statement of facts would be admissible against it in accordance with section 22 of the *Criminal Justice Act 1984*. As part of the DPA, the corporate body undertakes not to contest these admissions or agreed facts during any subsequent proceedings. The statement would be accepted as formal admission of the facts stated, although by virtue of section 22(4) of the *Criminal Justice Act 1984*, an admission may be withdrawn "with the leave of the court".

5.238 The use of other material, for example pre-existing material provided to the prosecution by the defendant company, should not be prohibited and be admissible subject to the normal rules of evidence.

5.239 The statement of facts included in the DPA should therefore be admissible in principle in any subsequent criminal proceedings against that corporate body.

R 5.21 The Commission recommends that in any criminal proceedings brought against the corporate body which are either:

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[224] See paragraph 14.4 of the *UK DPA Code*.

[225] See paragraph 14.7 of the *UK DPA Code*,.

(1) A resumption of the previously suspended indictment, following the termination of a DPA for a serious or material breach; or

(2) Further criminal proceedings freshly instituted against the corporate body,

the statement of facts included in the DPA may be relied upon by the prosecutor in evidence, as an admission by the corporate body of its contents, as they relate to that body.

5.240 A DPA would not be a criminal conviction, nor would it be equivalent to one. That would be the case even when a signed agreement includes admissions that, if considered on the prosecution of a signatory corporate body, might tend to show an offence has been committed by that corporate body or on its behalf.

5.241 That said, such admissions could be relevant to alleged civil liability of the person making them, or of another person or individual (an affiliated corporate body or an officer of the corporate body, for example). It follows that the statement of facts of a signed DPA should be admissible in principle in civil proceedings as an express admission in the usual way. The weight to be attached to such evidence would be a matter for the court.

5.242 Although a DPA would not be a conviction, the seriousness and implications are such that in some circumstances the Commission is of the view that they should be treated as seriously as a criminal conviction. In particular, the Commission recommends that where a DPA is admitted as evidence in civil proceedings then the statement of facts should be taken to be true unless the contrary is proved.

R 5.22 The Commission recommends that in civil proceedings brought against the corporate body, by any party, the statement of facts appearing in an approved DPA may be relied upon by that party as an express admission by the corporate body of the content of the statement.

CHAPTER 6

COORDINATION BETWEEN REGULATORS

A. Introduction

6.01 In the past few decades, a common response to the increasing complexity of governance is to create new specialised agencies. In Europe and beyond, there has been a proliferation of regulatory agencies.[1] A particular feature of the closing decades of the 20th century was the creation of specialised agencies. Agencies of this kind are usually vested with specific tasks and objectives.[2] Most of these agencies have been set up on an ad hoc basis, meaning that there was little in the way of systematic reflection on the consequences for the government as a whole.[3] Such agencies are often set up to solve a specific problem with little consideration of how this problem, or the solution to it, fits into the broader network of agencies and agency objectives.

6.02 The creation of specialist bodies has clear advantages; the activities of an expert body can be more effective at achieving the objectives of the government, they may be better equipped than generalist agencies to tackle complex problems, and expert bodies can use resources more efficiently by avoiding the need to expend time and effort developing principles and approaches to solve a diverse range of issues. Specialisation also creates a need for coordination; the more specialist agencies there are, the greater the task in coordinating their activities. If there is poor coordination between agencies, efforts to tackle problems may be duplicated or, on the other hand, some issues may fail to be addressed at all, with many parties assuming it is the responsibility of another agency.[4]

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[1] See, for example, Majone, "The Rise of Statutory Regulation in Europe" in Majone, *Regulating Europe* 1st ed (Routledge 1996); Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (OUP 2003); Gilardi, *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe* (Edward Elgar 2008); Jordana, Levi-Faur and Fernández Marín, "The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion" (2011) 44 Comparative Political Studies 1343.

[2] Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Management* (Palgrave Macmillan 2010) at 4, 5.

[3] OECD, *Distributed Public Governance: Agencies, Authorities and Other Government Bodies* (OECD Publishing 2002) at 21-28.

[4] Baldwin, Cave and Lodge, *Understanding Regulation: Theory, Strategy, and Practice* 2nd ed (OUP 2012) at 78.

The need for coordination between regulators is most obvious in cases where there is an overlap of regulatory functions between agencies.[5]

6.03 The experience of the Office of the Director of Corporate Enforcement (ODCE) in Ireland demonstrates the challenge of providing for adequate coordination between specialist agencies. Through this example we can see the benefits of specialisation on the one hand, and the potential pitfalls of coordination problems on the other. The ODCE was established in 2001, when there was a poor culture of corporate compliance in Ireland.[6] The ODCE was established in order to address this problem, and it has been acknowledged that it has had considerable success in ensuring compliance with the provisions of the Companies Acts.[7] However, the ODCE, as a relatively small, specialised agency had little experience in the mechanics of managing a complex criminal prosecution. The acquittal of the defendant in the high profile trial of a former director of Anglo Irish Bank, gave rise to concerns that the ODCE was incapable of performing its functions or was under resourced or inadequately supported by other agencies.[8] In directing the jury to acquit the defendant on the basis of evidential problems, the trial judge was critical of the manner in which the ODCE had carried out its functions. First, the ODCE was said to have "coached" key prosecution witnesses, contaminating their evidence and rendering it unreliable. Second, a member of staff of the ODCE had destroyed important evidence in error.

6.04 As a result of the failure to secure a conviction in the trial, the ODCE received significant criticism, with some calls for the Office to be dissolved.[9] The ODCE acknowledged its errors in the managing of the trial, but defended its record generally.[10] Although a lack of resources was a central problem faced by ODCE in managing such a complex prosecution, there was also a lack of expertise and experience, arguably contributed to an absence of adequate coordination with other agencies. The ODCE was a small agency with very little experience of dealing with the complex issues of evidence present in this high-profile prosecution. Greater coordination with other agencies would arguably have allowed the ODCE to benefit from the skills and expertise of other larger, more experienced agencies

[5] Painter, "Central Agencies and the Coordination Principle" (1981) 40 *Australian Journal of Public Administration* 265, at 266. See also Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes" (2008) 2 *Regulation & Governance* 137, at 140; Krane and Leach, "Federalism and Intergovernmental Relations: Theories, Ideas, and Concepts" in Rabin, Hildreth and Miller, *Handbook of Public Administration* 3rd ed (CRC Press 2007) at 488.

[6] Brennan, "Don't Scapegoat the ODCE for Collapse of FitzPatrick Trial" *The Irish Times*, 26 May 2017.

[7] *Ibid*. See also, Department of Business, Enterprise and Innovation, *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework: Ireland Combatting White Collar Crime* (2017).

[8] In *DPP v FitzPatrick*, Circuit Court, 23 May 2017, the Circuit Court (Judge Aylmer) directed the acquittal of the defendant.

[9] On the other hand see, for example, Brennan, "Don't Scapegoat the ODCE for Collapse of FitzPatrick Trial" *The Irish Times*, 26 May 2017.

[10] ODCE, *ODCE Press Statement re S Fitzpatrick trial* 24 May 2017 (2017).

such as the DPP or An Garda Síochána. This would have preserved the benefits of specialised corporate enforcement, while mitigating against any coordination problems.

6.05 Lack of coordination with other regulators was not the only problem with the ODCE's handling of the prosecution of the former director of Anglo Irish Bank, however, it did contribute significantly. Errors that arose during the course of the prosecution would be less likely to occur had proper coordination measures been in place. In response to this and similar problems, in 2018, the government announced that it was conducting a trial of a "Joint Agency Task Force" because of the "variety of expertise needed for investigations into diverse areas."[11] In addition, a number of changes to the ODCE were proposed to address some of its previous shortcomings.[12]

6.06 This Chapter considers problems such as this, which can be contributed to by an absence of coordination, and proposes some recommendations to address these problems. The Chapter considers two key issues: how coordination between agencies is achieved and, following on from this, the application of this understanding to coordination problems in Ireland. 6 key economic regulators at the national level in Ireland are considered. In this Chapter, Part B explains the general theory of coordination, based on the literature. Part C analyses the current state of regulatory overlap among the 6 key economic regulators in Ireland. Part D examines 8 instruments for coordination. Part E discusses several issues in practice in relation to coordination. Part F concludes this Chapter.

B. Understanding Coordination

1. What is Coordination

6.07 Coordination in a regulatory context refers to the process of reducing redundancy, contradictions, enforcement gaps, and other inconsistencies between the actions of regulatory agencies.[13] The purpose of this Chapter is to assess how coordination can be achieved between multiple agencies. Undertaking such a task is inevitably process-oriented; the steps which can be taken to improve coordination between agencies are crucial to improving coordination between regulators generally, rather than the ultimate objective of creating a harmonious response to particular problems. The main concerns

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[11] Department of Business, Enterprise and Innovation, *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework: Ireland Combatting White Collar Crime* (2017).

[12] *Ibid*.

[13] Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Management* (Palgrave Macmillan 2010) at 16.

are mechanisms and instruments for achieving that objective.[14] However, it is also important to keep the end goal of improved coordination in mind.[15]

2. When does coordination happen?

6.08 Conceptually, it can be useful to break regulation down into 3 components, in order to assess the quality of coordination between regulators. The first such component of regulation is standard-setting; the regulator sets standards, norms, and goals for the industry or sector. Second, there is monitoring, which involves gathering information about the current status of the system. The third component is enforcement, which involves modifying behaviour in order to meet the standards, targets or goals to be achieved by the system.[16] In practice, the functions of monitoring and enforcement are often performed by the same regulator, and this is sometimes referred to jointly under the broader term "implementation." As a result, there may be some overlap in methods of coordination of monitoring and enforcement.

6.09 Coordination can take place in all of the three component processes. As some of the literature suggests, coordination is just as important in the monitoring and enforcement stage, not just at the stage of standard-setting.[17] As noted above, monitoring and enforcement are often undertaken by the same regulator. It will often be the case that methods of effectively securing coordination between regulators in the monitoring of regulated entities, will also achieve the same goals in respect of the coordination of enforcement activities. As a result, monitoring and enforcement can usefully be considered together for the purposes of coordination.

3. How to achieve coordination

6.10 It is important to distinguish two aspects of coordination. The first is the approach that a coordinating agency may seek to achieve coordination. This might depend on the way in which agencies interact and view their relationship with other actors in the industry, for example regulated entities, other regulators and the government. The second aspect of

[14] Painter, "Central Agencies and the Coordination Principle" (1981) 40 *Australian Journal of Public Administration* 265, at 276.

[15] OECD, *Governance of Regulators' Practices: Accountability, Transparency and Coordination* (OECD Publishing 2016) at 42.

[16] Hood, Rothstein and Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (OUP 2001) at 21-27; Black, "Critical Reflections on Regulation" (2002) 27 *Australian Journal of Legal Philosophy* 1.

[17] Painter, "Central Agencies and the Coordination Principle" (1981) 40 *Australian Journal of Public Administration* 265. The OECD has addressed the coordination in process of enforcement and inspection, in particular. See OECD, *OECD Best Practice Principles for Regulatory Policy: Regulatory Enforcement and Inspections* (OECD Publishing 2014).

coordination to consider is the tools that the coordinating agency uses to achieve its goals, in order to assess how compatible these tools are with regulatory coordination.

4. Approaches

6.11 The structural arrangement of a particular industry can facilitate, or as the case may be, impede, effective coordination between regulators. Examples of how the structure of the regulatory landscape affects incentives can be analysed under the following three headings: hierarchy, market, and network.[18] In practice, regulatory activity does not fall neatly into one of these three categories, but they can be useful to understand how different structures impact coordination.

6.12 Hierarchy within the network of regulators or state agencies can create incentives for coordination. A coordinating body may possess superior authority to those being coordinated, and it can influence the behaviour of the coordinated bodies accordingly.[19] For example, one parent department might coordinate the activities of several agencies within its purview. Alternatively, a coordinating unit may be established at a relatively high level, perhaps by the Cabinet. These can be effective methods of ensuring coordination between a number of agencies. However, this method may be less effective where regulators are structured loosely or complex policy areas are involved.[20] Because of the highly specialised expertise possessed by many regulators, a complex area, such as financial regulation, for example, may not be amenable to effective direction from a generalist coordinating agency. The hierarchical approach also has the disadvantage that it can reduce the autonomy of regulators.[21] Regulatory independence, which ensures the reputation of regulators as an impartial, expert agency, may be undermined by control from above.

6.13 Market forces are an effective method of coordinating a diffuse range of actors, with different aims. Arguably, these forces could be harnessed in a regulatory context to result on coordination between agencies.[22] In the public sector the government may create market-like relationships among different organisations. By setting clear performance targets or linking public funding to performance, the government can provide incentives for relevant organisations to engage in mutually beneficial arrangements to help them to

[18] See, for example, Alexander, "A Structuration Theory of Interorganizational Coordination: Cases in Environmental Management" (1998) 6 *International Journal of Organizational Analysis* 334; Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Management* (Palgrave Macmillan 2010).

[19] Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Management* (Palgrave Macmillan 2010) at 36 - 40.

[20] Peters, "Managing Horizontal Government: The Politics of Coordination" (1998) 76 *Public Administration* 295, at 299.

[21] Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Management* (Palgrave Macmillan 2010) at 40.

[22] Alexander, "A Structuration Theory of Interorganizational Coordination: Cases in Environmental Management" (1998) 6 International Journal of Organizational Analysis 334, at 337 - 339.

achieve targets, ultimately ensuring coordination.[23] But market-like processes mostly involve bargaining between 'buyers' and 'sellers'. For this to apply to regulators, they would need information, power or authority, and substantial freedom of action to bargain with each other effectively.[24] Often, however, market forces will be unworkable in a regulatory context. This is because the law often sets rigid guidelines on performing regulatory outcomes, leaving little room for regulators to 'bargain' or to exchange. Moreover, it will often be inappropriate to apply market forces to regulation, where certain values such as transparency, accountability, or legality should not be compromised or traded away.

6.14 Network-based approaches to coordination rely on negotiation, trust, and mutual recognition between regulatory agencies. In contrast to the hierarchical approach, described above, network-based approaches involve mutual exchange and co-operation between agencies on an equal footing to one another. Instruments for coordination based on networks are usually voluntary in nature (although they are sometimes directed by some higher authority). Network-based approaches allow regulators to share skills and experience to effectively address common issues that arise. This approach does, however, require constant interaction between regulators, which may use a significant amount of resources. The ability of regulators to share information is a key requirement of this process.[25]

5. Tools and instruments

6.15 In addition to approaches that regulators might take to coordination, the tools regulators use may influence their capacity to coordinate effectively with one another. The tools and instruments are specific methods regulators use to achieve coordination; often a variety of tools and instruments are used to achieve coordination.[26] Some instruments may involve changing the institutional structure of the relevant industry or market. These are termed 'structural instruments.' An example of this would be creating a specific responsibility for making collective decisions on behalf of other regulators. Such structural instruments are often compatible with the hierarchical approach described above.

6.16 'Non-structural instruments,' on the other hand, do not involve wholesale changes to the landscape of the relevant industry. Typical examples are coordination agreements between regulators or other consultation processes. These instruments are mostly based

[23] Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Management* (Palgrave Macmillan 2010) at 41 - 43.

[24] *Ibid* at 41.

[25] Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Managemen*t (Palgrave Macmillan 2010) at 24, 45.

[26] For detailed discussion, see, for example, Alexander, "Interorganizational Coordination: Theory and Practice" (1993) 7 *Journal of Planning Literature* 328; Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Management* (Palgrave Macmillan 2010).

on network approaches but may also be employed in a top-down, hierarchical approach. Non-structural instruments do not usually involve radical alteration of organisations. For this reason, they may be preferable to structural instruments. Often, structural changes require significant investment of resources, without effectively securing coordination between regulators.[27] In contrast, non-structural instruments often achieve effective coordination at a lower cost.

6.17 The OECD has proposed several coordination instruments that may be employed by regulators. Some examples include: designating a 'lead agency' or creating a coordinating council or forum to achieve coordination without resorting to the merging of regulators; providing for inter-agency agreements to encourage voluntary coordination between regulators; or requiring information-sharing, so that there is no duplication of effort or oversight on the part of one or more regulator.[28] These instruments represent a mix of different mechanisms and both structural and non-structural changes for seeking coordination.

C. Overlapping Regulatory Jurisdiction in Ireland

1. Six economic regulators

6.18 In Ireland, the process of creating regulatory agencies has accelerated since the 1970s.[29] However, this trend can be viewed as a series of self-contained responses to specific problems, rather than following a coordinated, comprehensive plan. There are several reasons for this trend. For example, in the telecommunications and energy sectors, EU requirements heavily influenced the creation of independent regulators. Sometimes, the government is influenced by other jurisdictions; the establishment of the former Competition Authority was arguably influenced by similar models in other countries. Similarly, specific objectives in a given sector may justify the establishment of an agency, for example, the government established the Commission for Aviation Regulation in the interest of consumer protection.[30]

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[27] Bardach, *Getting Agencies to Work Together: The Practices and Theory of Managerial Craftsmanship* (Brookings Institution Press 1998) at 16. See also: OECD, *OECD Best Practice Principles for Regulatory Policy: Regulatory Enforcement and Inspections* (OECD Publishing 2014) at 42.

[28] *Ibid.* Principle 6 Coordination and Consolidation.

[29] MacCarthaigh and Scott, "A Thing of Shreds and Patches: Fragmenting Accountability in a Fragmented State" UCD Geary Institute Discussion Paper Series available at: *http://www.ucd.ie/geary/static/publications/workingpapers/gearywp200915.pdf*.

[30] Brown and Scott, "Regulation in Ireland: History, Structure, Style and Reform" UCD Geary Institute Discussion Paper Series available at: *http://www.ucd.ie/geary/static/publications/workingpapers/gearywp201044.pdf*. See also Westrup, "Regulatory Governance" in Hardiman, *Irish Governance in Crisis* (Manchester University Press 2012); Economist Intelligence Unit, *Review of the Regulatory Environment in Ireland* (Commissioned by the Department of an Taoiseach 2009).

6.19 This Chapter takes the regulators from Chapter 2 as its case study. These regulators have significant overlaps in their spheres of influence, so these examples can provide some insight into the landscape of regulatory coordination in Ireland. Legislation has, in places, provided structures for coordination. However, as with the establishment of agencies themselves, coordination between these agencies is often piecemeal and incomplete.

2. Overlapping jurisdiction

6.20 In several ways, these regulators have overlapping jurisdiction and operate in related or connected industries.

6.21 First, there are situations in which the same functions are vested in multiple regulators. A typical example is consumer protection in the telecommunications industry, where both ComReg and the CCPC have responsibilities.[31] ComReg and the CCPC also have intersecting obligations concerning competition law in the same industry.[32] Similarly, in financial regulation the consumer protection functions of the CCPC and the Central Bank often overlap.[33]

6.22 Second, sometimes the functions of regulators are different, but they operate in a common sector. In such cases, the expertise of one regulator may assist another in the performance of their functions. Examples of this arise in many industries. For instance, in the telecommunications industry, where the BAI's expertise can assist ComReg in preparing an allocation plan for the frequency ranges in sound broadcasting.[34] Similarly, in preparing a broadcasting code, the BAI may need assistance from the relevant public health authorities.[35] Regarding standards and specifications relating to gas safety, the expertise of the National Standards Authority of Ireland (NSAI) may be necessary for the CRU to perform its functions.[36]

6.23 Third, there are circumstances where there is no functional overlap or requirement of expertise, but information sharing may still be beneficial. In such cases, the only common element may be that the regulators operate in the same sector. For example, if a regulator learns that a potential offence has been committed but it is not empowered to investigate the commission of such offences, it may communicate this information to the appropriate agency. Compared to the above examples, it is rare to find a legal framework for such arrangements. Among the above 6 economic regulators, the CCPC is the only one in which

[31] Sections 10(1A) to (1E) of the *Communications Regulation Act 2002*.

[32] Sections 3(1) [definition of 'competent authority'] and 4(3) of the *Competition Act 2002*.

[33] Sections 5A(4) to (8) of the *Central Bank Act 1942*.

[34] Sections 26(1)(c) and 65(1) of the *Broadcasting Act 2009*.

[35] Section 42(5) of the *Broadcasting Act 2009*.

[36] Section 9(1)(ec) of the *Electricity Regulation Act 1999*.

staff are specifically authorised to disclose evidence as to the commission of an offence to an appropriate agency.[37]

6.24 The Commission considers that in many sectors in which regulatory activity intersects, there is inadequate coordination. It is beyond the scope of this Report to assess every such intersection and recommend a framework for improved coordination between regulators. However, the Commission is of the view that, in general, the above examples of regulatory coordination are valuable and should be used more widely in order to effectively harmonise the regulatory investigation and enforcement.

R 6.01 The Commission recommends that, where the jurisdiction of different regulators overlaps, the regulators concerned should implement a Framework Agreement or Memorandum of Understanding, which may, but need not necessarily, be in statutory form, to facilitate the coordination of standard setting, monitoring, and enforcement activities between regulators.

R 6.02 The Commission recommends that, where regulators operate within the same sector, appropriate mechanisms, taking account of relevant statutory requirements including as to data protection, should be implemented to ensure the sharing of information and expertise between regulators.

3. Objectives for coordination

6.25 Because of the overlap of regulatory jurisdiction or activity, coordination can streamline the overall process of achieving regulatory goals effectively and efficiently. There is no precise definition of coordination but there are some common objectives that are served by cooperation agreements between regulators.[38] They are:

- Facilitating cooperation between regulators in performing their respective functions, through consultation and information sharing, etc.;
- Avoiding duplication of activities between these regulators;
- Ensuring consistency between decisions and other steps taken by these regulators.

6.26 Further objectives may include the facilitation of joint studies and analysis of matters that are relevant to the performance of regulators' functions.[39] Although the objectives of cooperation agreements, or those of other coordination tools, are rarely set out in law,

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[37] Section 24 of the *Communication and Consumer Protection Act 2014*.

[38] Examples of statutory powers to enter agreements include: Section 19(1) of the *Competition and Consumer Protection Act 2014*; section 47G of the *Competition Act 2002*; section 43(3) of the *Water Services (No 2) Act 2013*; section 44(3) of the *Water Services Act 2017*.

[39] See section 19(1) of the *Competition and Consumer Protection Act 2014*.

the Commission considers that it is worthwhile for regulators to set out objectives when entering into cooperation agreements.

R 6.03 The Commission recommends that regulators, when entering into cooperation agreements, should agree clear objectives for these agreements.

4. When does coordination happen?

6.27 In the above examples of overlap of regulatory activity, coordination is necessary in standard-setting, monitoring, and enforcement. Examples of the coordination of standard-setting include: the preparation of allocation plans for the frequency range dedicated to sound and television broadcasting,[40] regulatory policies concerning financial services,[41] and regulations regarding licences for premium rate services and the holders.[42] An example of coordination of monitoring would include collecting information for the purpose of verifying compliance in the domain of financial regulation.[43]

6.28 Coordination efforts between regulators may be most obvious at the standard setting stage. However, the Commission considers that coordination efforts are also valuable during the monitoring and enforcement stages of regulation.

R 6.04 The Commission recommends that the remit of the Regulatory Guidance Office recommended in Chapter 2, above, could include policy on coordination between regulators.

5. Instruments for Coordination

6.29 In Ireland, there are a number of instruments employed in order to achieve regulatory coordination. This section will identify and examine these instruments. The examination will be based on relevant legal provisions and, where possible, regulatory practice. The aim is to understand the features of each instrument and in which circumstances coordinating instruments are used.

6.30 It would be fruitless to attempt to coordinate all regulators and all activities using one single instrument. The Commission considers that different tools will be appropriate in different cases, depending on the stage at which they are sought to be employed and the nature of the overlap between regulatory activity. Before deciding the appropriate tool, policy makers should have a clear understanding of the underlying circumstances and

[40] Section 26(1)(c) of the *Broadcasting Act 2009*.

[41] Section 61E(2) of *the Central Bank Act 1942*.

[42] Section 7 of the *Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010*.

[43] See, for example, section 10(1)(c) of the *Competition and Consumer Protection Act 2014* and sections 5A(4) and (5) of the *Central Bank Act 1942*.

layout of the regulatory landscape. The Commission considers that there is no single tool for achieving coordination that is superior to all others. Policy makers should be open to using one of a number of options, as appropriate, in any given circumstance.[44]

(a) Cooperation Agreements

6.31 Cooperation agreements are perhaps the most formal method for seeking coordination between regulators employed in Ireland at the time of writing (September 2018). A cooperation agreement is an agreement between regulators to cooperate with one another under a number of headings or activities with a view to improving the coordination of their standard setting, monitoring, and enforcement activities. Cooperation agreements take many different forms; sometimes such arrangements are informal, in other cases the law has explicitly prescribed for cooperation agreements, cooperation arrangements, or memorandums of understanding.

6.32 In areas such as competition regulation and consumer protection, the CCPC may enter into cooperation agreements with several prescribed bodies.[45] The CCPC is not required to enter into such agreements, but it may do so where it considers it worthwhile. In certain areas, by contrast, the law may compel certain regulators to enter into a relevant arrangement. For example, legislation requires engagement between the CCPC and ComReg in competition regulation,[46] and between the Water Advisory Body and the CRU.[47] Similarly, legislation requires Irish Water to comply with requests from the CRU.[48]

6.33 In practice, relevant arrangements have appeared in the areas of competition, consumer protection, and financial regulation. For example the CCPC (in some cases via one of their predecessor agencies, the Competition Authority or the National Consumer Agency) has cooperation arrangements with the following agencies: ComReg, the CER (now the CRU), the BAI, the CAR, the HIA, the National Transport Authority, and the Central Bank.[49]

6.34 The Central Bank and the former Financial Regulator have several MOUs in place with: the Department of Finance, the Irish Auditing and Accounting Supervisory Authority, the

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[44] See OECD, *OECD Best Practice Principles for Regulatory Policy: Regulatory Enforcement and Inspections* (OECD Publishing 2014) at 41 - 42.

[45] Section 19(1) of the *Competition and Consumer Protection Act 2014*.

[46] Section 47G of the *Competition Act 2002*.

[47] Section 44(3) of the *Water Services Act 2017*.

[48] Section 43 of the *Water Services (No 2) Act 2013*.

[49] For a list of the CCPC's agreements, see: *https://www.ccpc.ie/business/about/co-operation/*. The agreements between the Competition Authority and National Consumer Agency will remain in force until replaced by new cooperation agreements between the CCPC and the relevant statutory bodies.

Pensions Authority, the HIA, the Financial Services Ombudsman and Pensions Ombudsman, the ODCE, and Irish Stock Exchange.[50]

6.35 As noted above, cooperation agreements are often governed by clear objectives. There are also general requirements on the provisions a cooperation agreement should contain.[51] The law may require some regulators to enter into a cooperation agreement and set out the basic rules about such an arrangement. The parties will, however, usually have discretion to determine the specific provisions of the agreement and how to cooperate. In such cases, agencies cooperate as equals, rather than receiving direction from above. In addition, cooperation agreements usually do not operate to bind the parties;[52] one party can still perform the functions that, under the terms of a cooperation agreement, would be performed by the other party to the agreement. Failure to comply with the provisions of cooperation agreements will not invalidate the exercise by the parties of any legal power.[53]

6.36 Cooperation agreements usually provide a general framework for the cooperation between 2 regulators, rather than coordination of specific decisions. In practice, parties may reach a consensus regarding, for example, sharing of information and confidentiality, facilitation of consultation, consistency of approach, refraining from taking certain actions, or other matters. Cooperation agreements may not necessarily strictly set out which party performs which function in each case, but often certain functions may be designated to a particular authority in specific cases.[54] In some cases in which the division of functions is relatively simple or there is not much complexity of division, the parties may agree which one takes the lead with exceptions.[55] Cooperation agreements are particularly useful when the same functions are concurrently vested in different regulators, such as competition regulation in the area of electronic communications and consumer protection in financial services. It applies to standard setting. It also applies to implementation.

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[50] For a list of the Central Bank's memoranda of understanding see *https://www.centralbank.ie/about/memoranda-of-understanding*.

[51] For example, section 19 of the *Competition and Consumer Protection Act 2014*; section 47G of the *Competition Act 2002*.

[52] Section 43(4) of the *Water Services (No 2) Act 2013*; section 44(3) of the *Water Services Act 2017*.

[53] See section 19(9) of the *Competition and Consumer Protection Act 2014*.

[54] See, for example, Clause 8 of the Co-operation Agreement Between the Competition and Consumer Protection Commission and the Commission for Communications Regulation (11 November 2015, as amended by the Supplemental Agreement, 19 July 2016); Clause 6 of the Co-operation Agreement Between the Competition Authority and the Commission for Communications Regulation (16 December 2002).

[55] For example, the former National Consumer Agency and the Central Bank reached an agreement in this regard and the Central Bank takes the lead usually. See Clause 6 of the Co-operation Agreement Between the National Consumer Agency and the Central Bank of Ireland (1 February 2011).

R 6.05 The Commission recommends that the Regulatory Guidance Office could provide general guidelines for regulators as to the detailed contents of cooperation agreements.

(b) Consultation

6.37 Consultation refers to the case-by-case, once-off interaction and information sharing between regulators, when compared to an established framework set out by a cooperation agreement. However, consultation processes may be incorporated into cooperation agreements.[56]

6.38 There are numerous examples where legislation provides for consultation between agencies. Sometimes consultation is optional, however, in other cases it is a compulsory requirement of the regulator taking a particular step. For example, section 65 of the *Broadcasting Act 2009* provides that, in preparing the allocation plan for the frequency range dedicated to sound broadcasting, the BAI shall liaise and consult with ComReg.[57] After consultation with ComReg, the BAI shall specify the area in relation to which applications for a sound broadcasting contract are to be invited, and direct the Contract Awards Committee to invite applications for sound broadcasting contracts. By contrast, section 42 of the 2009 Act provides that, in preparing broadcasting codes governing standards and practices to be observed by broadcasters, the BAI may consult with the relevant public health authorities on matters relevant to commercial promotion concerning the general public health of children.[58] Further examples exist in areas such as financial regulation,[59] telecommunications licensing,[60] telecommunications codes of practice,[61] and safety regulations relating to "petroleum activities."[62]

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[56] For example, section 47G(2) of the *Competition Act 2002*.

[57] Section 65(1)(2) of the *Broadcasting Act 2009*.

[58] Section 42(5) of the *Broadcasting Act 2009*.

59 Section 61E(2) of the *Central Bank Act 1942* provides that the Central Bank, the Pensions Board, the Competition Authority, the Registrar of Friendly Societies, the ODCE, the Financial Services Ombudsman, and the Pensions Ombudsman, among others "shall, whenever the occasion requires, consult with each other for the purpose of ensuring the establishment and pursuit of consistent policies regarding the regulation of financial services in the State."

[60] Section 7(4) of the *Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010* provides that ComReg "shall consult with the Broadcasting Authority of Ireland or such other regulatory bodies in the State as it considers relevant, in particular in relation to any class or type of premium rate service that comes under the definition of on-demand audio-visual media services under the Council Directive."

[61] Section 153) of the *Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010* provides that ComReg "may, following consultation with premium rate service providers, other interested persons and, as it considers relevant, other regulatory bodies in the State amend or revoke any code of practice or part of any code of practice prepared and published by it under this section."

[62] Section 13L(2)(a) of the *Electricity Regulation Act 1999* provides that the CRU may consult with a number of other agencies in preparing "safety case guidelines" for use with "designated petroleum activities."

6.39 As noted, consultation requirements may be mandatory or discretionary. In cases of making legally binding rules and decisions with significant influence on stakeholders (regulated parties, consumers, etc.), the law tends to make consultation obligatory. In other cases, regulators often have discretion over whether to consult with relevant bodies.

6.40 Consultation is also seen as an attractive method of ensuring coordination because it respects the existing network of regulators, enhancing cooperation without fundamental structural overhaul of the network of agencies. Consultation mostly relates to the standard-setting aspects of a regulator's duties and can be most effective when regulators have overlapping functions, or when the regulated economic sectors overlap, and one regulator's expertise is necessary to another.

6.41 Consultation has the advantage that, although regulators are often required to engage in consultation, they retain discretion over the exact form it takes and influence it has over their activities. Unlike cooperation agreements, there is no prescribed form that consultation should take. In this way, consultation can encourage coordination while respecting regulatory independence, affording regulators the flexibility to use their own expertise to determine the most effective way of coordinating with other agencies. This can, however, create problems associated with the accountability of regulators, if the consultation process lacks transparency. Moreover, consultation usually only takes place in specific situations prescribed by law; there is no centralised, systematic process of consultation, as a result, there may be inadequate consultation in some areas.

R 6.06 The Commission recommends that regulators should, where appropriate, both as part of cooperation agreements and in general, employ consultation as a coordinating instrument to facilitate the flow of expertise, knowledge and experience between regulators.

R 6.07 The Commission recommends that, in the interest of transparency and accountability, regulators should publish guidelines governing the consultation process with other regulators.

R 6.08 The Commission recommends that in the interest of transparency and accountability, where possible and appropriate, regulators should publish the information that they provide to other regulators during a consultation process.

6. Lead agency

6.42 A "lead agency" approach is where one agency is given the responsibility to direct the coordination of the activities of other agencies in a particular area of regulation. Lead agencies may be specified in a cooperation agreement, for example. In some cases, by contrast, the law will directly designate one regulator as the principal competent authority or lead agency. Where there is a lead agency appointed, other agencies may refrain from undertaking certain activities in this area, or inform the lead agency of their intended approach in advance.

6.43 As discussed in relation to other instruments above, there is significant overlap between the functions of the CCPC and ComReg. The *Competition Act 2002* has designated the CCPC as the default competent authority for certain purposes, save where the CCPC and ComReg have agreed otherwise, and when the Minister for Enterprise, Trade and Employment has determined otherwise.[63] The 2002 Act requires ComReg to notify the CCPC in writing of its intention to perform its functions.[64] Where there has been a suspected breach of competition rules, ComReg shall notify the CCPC. Only in cases of suspected offences against competition rules relating to the provision of an electronic communications service or network, shall the CCPC notify ComReg.[65]

6.44 Where the lead agency is designated by law, this may be considered to be part of the hierarchical approach, discussed above. Designating a lead agency does not, however, involve any structural change to the institutional arrangement. This instrument may be used in standard-setting, monitoring, and enforcement. Usually, it is only when different regulators perform overlapping functions that this instrument is invoked. Under legislation in force at the time of writing (September 2018), it is only in very rare cases that the law will directly designate a 'lead agency'.

R 6.09 The Commission recommends that regulators should, where appropriate, implement a lead agency approach to the coordination of regulatory activities.

R 6.10 The Commission recommends that, preferably, the lead agency should be determined in accordance with an agreement between the regulators on a case-by-case basis.

7. Supervisory body

6.45 Supervisory bodies are specifically established agencies whose main function is to coordinate the activities of other agencies. Supervisory bodies as an instrument for coordination exist in different forms. A supervisory body may, for example, be a unit of the Central Government. In OECD countries, it has become more common to establish a standing body that performs functions of regulatory oversight.[66] In many Western countries, the Prime Minister has a coordinating role. The Cabinet in the Westminster model is seen as a 'final coordinator'[67] and coordinating units can be established within it.[68]

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[63] Section 3(1) (definition of 'competent authority') of the *Competition Act 2002*.

[64] Section 47C of the *Competition Act 2002*.

[65] Section 47D of the *Competition Act 2002*.

[66] OECD, *OECD Regulatory Policy Outlook 2015 Country Profile: Ireland* (OECD Publishing, 2015).

[67] Painter, "Central Agencies and the Coordination Principle" (1981) 40 *Australian Journal of Public Administration* 265, at 266.

[68] Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Management* (Palgrave Macmillan 2010) at 57- 58.

6.46 In Ireland, the Taoiseach is the head of the Government and the central coordinator of the Ministers and their Departments. The Better Regulation Unit was established in the Department of an Taoiseach in 2000. This development was commended by the OECD. However, the Better Regulation Unit encountered challenges in implementing better regulation principles. Arguably, these challenges arose as a result of weak engagement with key stakeholders, such as other Government Departments, and lack of necessary resources.[69] Despite praise from international quarters,[70] as a result of these difficulties the Better Regulation Unit was dissolved. Currently, the relevant Cabinet Committees and Senior Officials' Group may play some role of coordination.

6.47 A supervisory body may also be a Minister. It may be the Minister for the common parent department of several regulators. Sometimes a Minister is prescribed by law as a supervisory body, for example, in competition regulation, when there is any dispute between the functions of the CCPC and ComReg, the Minister for the parent department of the CCPC will have the final say.[71]

6.48 Coordination via the central government or ministers is mostly targeted at policy issues, or standard setting, rather than specific steps or in the monitoring or enforcement stage. This type of coordination necessarily involves hierarchical structures of authority and top-down direction. Because of this, this instrument may be used to seek coordination between the functions of regulators across a wide range of sectors, with little other interaction. A supervisory body may be specifically established for the purpose of coordination, but this does not usually change the institutional structure of existing agencies in relation to one another.

6.49 The Commission is of the view that the establishment of a central supervisory body would assist regulators in the coordination of their standard setting, monitoring, and enforcement activities. The main responsibility of this body would be to facilitate coordination by, for example, issuing general guidelines or offering a forum where the relevant regulators can exchange information and ideas, rather than issuing instructions concerning specific regulatory decisions.

8. Advisory body

6.50 An advisory body differs from a supervisory body in that it facilitates coordination between agencies by consulting with them, where necessary, rather than directing activities from a position of authority. Coordination may be achieved through advisory bodies where several regulators share common advisory bodies. The Water Forum established by the *Water Services Act 2017* is an example of such a body. One of its

[69] *Ibid* at 58 - 59.

[70] OECD, *Better Regulation in Europe: Ireland* (OECD Publishing 2010) at 58.

[71] Section 47E of the *Competition Act 2002*.

functions is to advise the Minister, the CRU, and the Water Policy Advisory Committee, having regard to the functions of the CRU and the EPA.[72]

6.51 The establishment of advisory bodies does not involve structural changes to the existing institutional framework. Such bodies are more often employed at the stage of policy-making, rather than at the monitoring or enforcement stages. Where there is a need for shared expertise, advisory bodies may be a cost-effective method of achieving coordination between agencies.

9. Joint action

6.52 This instrument brings together people from different regulatory authorities and allows them to work jointly. It takes place in different forms. For example, one or two officers authorised by the CCPC may be requested by a member of An Garda Síochána to attend at or participate in the questioning of a detained person, who is reasonably suspected of committing or of having committed an offence relevant to anti-competitive agreements, decisions, or other converted products or abuse of dominant position.[73] Officers may also be seconded from one authority to another, from the Central Bank to the CCPC for example,[74] in order to assist the CCPC in performing certain legal functions.

6.53 Joint action takes place between two independent regulators, and is usually undertaken on a cooperative basis, rather than being imposed from above. Joint action may require an underlying legal framework, however, because it involves the employees of one regulator performing certain functions of another regulator. Under joint action, there is no structural change to the agencies themselves. In this way, joint action differs from common inspectorate, discussed below. Joint action applies to cases that involve overlapping functions or overlapping areas of competence with a need for expertise. It allows a better use of regulators' expertise. In this sense, joint action is similar to consultation. However, joint action also differs from consultation, in that it is more usually employed at the monitoring and enforcement stage, whereas consultation applies to standard setting. Furthermore, the secondment of employees may be provided for as a general power of one or both agencies, whereas consultation often happens on a case-by-case basis.

6.54 Secondment of staff can be useful in situations where a particular agency lacks the expertise that another agency possesses. However, joint action is a short-term solution and where there is a long term need for an agency to develop a specific area of expertise,

[72] Sections 26 and 27 of the *Water Services Act 2017*.

[73] Section 37(5) of the *Competition and Consumer Protection Act 2014*.

[74] Section 24G(2) of the *Consumer Protection Act 2007*; see, also, section 6 of the *Central Bank Reform Act 2010*.

this should be done through longer terms policies, such as the expanding of departments within the agency and the hiring of additional staff.

R 6.11 The Commission recommends that, where one regulator requires the use of expertise possessed by another regulator to assist in their monitoring or enforcement activities, joint action should be employed where appropriate.

10. Common inspectorates

6.55 This instrument involves delegating the functions of several regulators into one separate body. For instance, this separate body may be in charge of conducting inspections or taking enforcement steps against all companies operating in different economic sectors. One example in the UK was the Regulatory Delivery Directorate. This agency was established in early 2016, merging the Better Regulation Delivery Office and the National Measurement and Regulation Office. Among other responsibilities, the directorate provided enforcement services on behalf of government departments, including the Department for Business, Energy and Industrial Strategy (BEIS), the Department for Environment Food & Rural Affairs (Defra), and the Department for Transport. The directorate was replaced by the Office for Product and Safety Standards in January 2018.

6.56 The delegation of common regulatory functions to a single inspectorate is usually carried out in a formal manner. Unlike the previous instruments for coordination, this method involves the establishment of a new body and structural changes to the current institutions. It is not the merger of the existing regulators, rather, it only merges some functions of regulators' monitoring and enforcement powers. It may be used to coordinate the action of regulators with overlapping or closely related functions across a number of economic sectors.

6.57 The Commission is of the view that common inspectorates can be an effective method of pooling expertise between regulators. However, this step involves significant structural change. Common inspectorates have high demand for regulatory resources and expertise across a number of sectors, and should therefore be used sparingly, only where more readily implemented tools are unlikely to be ineffective.

R 6.12 The Commission recommends that regulators should employ common inspectorates only where particular expertise is required that is not readily shared or pooled between regulators and where coordination between existing regulators would be impracticable.

11. Information-sharing

6.58 Information sharing is central to any effort to coordinate regulators. The sharing of information may be specified in a cooperation agreement. It may also be achieved through consultation or other processes. In certain circumstances, it may become an independent instrument for coordination; however, it is rare that a standalone information sharing requirement is specified in legislation. An example of information sharing exists in consumer protection legislation. Section 24 of the *Competition and*

Consumer Protection Act 2014 provides that the CCPC may disclose information about the commission of offences not relevant to its functions to other competent authorities.

6.59 In and of itself, when not combined with some other instrument, information-sharing usually does not involve top-down direction from a superior authority. Information-sharing can take place within a pre-existing institutional framework and does not usually require any institutional change to the current regulators. The law may, however, put certain restrictions on the disclosure of information by one regulator to another, discussed further below. The Commission considers that information sharing is a worthwhile and efficient method of enhancing regulatory coordination, insofar as it is permissible having regard to relevant data protection legislation. The interaction between information sharing and data protection legislation is considered further, below.

R 6.13 The Commission recommends that regulators with overlapping jurisdiction but without formal cooperation agreements should avail of information sharing, where appropriate, and to the extent permitted by relevant legislation, including as to data protection.

D. Conclusions and Recommendations

6.60 Eight instruments for coordination have been discussed in this Part, 6 of which can be seen in Ireland currently, while supervisory bodies and common inspectorates are not currently employed. These instruments operate in a number of economic sectors, in particular, those activities within the jurisdiction of the CCPC, the Central Bank, and ComReg. Arguably, the reason that these regulators most often employ the instruments discussed above is due to the significant overlap between some of their functions.

6.61 In Ireland, legislation often makes general directions about coordination, leaving the precise details to regulators themselves. For example, where the law requires a regulator to consult with another, the steps to be taken on foot of this consultation are at the regulator’s discretion.

6.62 Cooperation agreements are, perhaps, the most important instrument of coordination. They often create a general relationship between parties, containing other instruments such as consultation, lead agency approach, joint action, and information-sharing. But the role of agreements is mainly the facilitation of coordination, rather than making specific directions or pronouncements. Each instrument has distinct features, and may be more or less useful depending on the circumstances. Having regard to these considerations, the following Part will address the selection of instruments.

1. Instruments

(a) Selection of instruments

6.63 Following on from the discussion of the available instruments, an issue arises as to which instruments to select. 8 specific instruments were discussed in the previous section. Each instrument differs, and their effectiveness will depend on the underlying circumstances in a particular industry or sector.

6.64 Generally, the academic literature distinguishes the instruments first, by whether they are "structural" or "non-structural" in nature and second, whether they rely on network or hierarchical approaches. The advantages and disadvantages of the instruments generally depend on which of these characteristics they contain. Although instruments will rarely fit neatly into a particular category in all situations, it can nonetheless be analytically useful to categorise instruments based on their most usual, or dominant characteristics. For example, the application of a cooperation agreement may involve both hierarchical and network-based approaches. In practice, however, cooperation agreements are mainly agreed between 2 or more regulators, rather than being imposed from above. The instruments can be categorised in the following way:

- Cooperation agreement: non-structural, network-based.
- Consultation: non-structural, network-based.
- Lead agency: non-structural, hierarchy-based
- Supervisory body: non-structural, hierarchy-based
- Advisory body: non-structural, network-based.
- Joint action: non-structural, network-based.
- Common inspectorates: structural, hierarchy-based.
- Information sharing: non-structural, network-based.

6.65 Hierarchy-based instruments may achieve results more quickly than network-based approaches because they rely on direction from above, rather than cooperation and negotiation. Although it is not the main objective of hierarchical instruments, they may provide additional scrutiny and accountability by closely supervising regulatory activities. However, hierarchy-based instruments may sacrifice important values such as regulatory independence and autonomy.[75] The regulators discussed in this Chapter all have varying degrees of regulatory independence.[76] Regulatory independence is important for a number of reasons. Independence affords the regulator legitimacy and removes any suggestion that its actions may be dependent on political considerations, rather than regulatory objectives.[77] Regulators should be fearless in pursuit of their objectives without being beholden to special interests. More fundamentally, however, regulators are expert

[75] This is also cautioned against by the OECD. See: OECD, *The Governance of Regulators: Creating a Culture of Independence: Practical Guidance Against Undue Influence* (OECD Publishing 2017) at 25.

[76] See, for example, section 11 of the *Communications Regulation Act 2002* and section 24 of the *Broadcasting Act 2009*, which provide that the respective regulators should be independent in the performance of their functions.

[77] OECD, *The Governance of Regulators: Creating a Culture of Independence: Practical Guidance Against Undue Influence* (OECD Publishing 2017) at 18. See also OECD*, The Governance of Regulators: Being an Independent Regulator* (OECD Publishing 2016).

bodies in their own particular fields and will usually be best placed to evaluate the best way to a particular objective. If coordination relies on voluntary interaction between independent regulators themselves, it is arguably easier to preserve their independence.

6.66 The Commission considers that policy-makers should strike a balance between the appropriate combination of hierarchy and network-based tools. Currently, for example, the coordination between the CCPC and ComReg is achieved via multiple instruments. Generally speaking, coordination is an obligation in certain circumstances; the law sets out a general coordinating framework, but specific coordinating techniques are left to the relevant regulators themselves. The Commission considers that this approach will often strike the correct balance between providing for effective coordination while preserving regulatory independence.

R 6.14 The Commission recommends that, in the interest of regulatory independence, network-based voluntary arrangements to achieve coordination between regulators should be preferred to top-down hierarchical approaches.

6.67 The other aspect of instruments that must be considered is whether an instrument structurally changes to the current institutional framework or network of regulators. Arguably, structural changes, such as merging functions, should be used exceptionally and where changes within the current institutional framework would not be possible. As noted above, the disadvantages of wholesale changes to the regulatory landscape often exceed the advantages.[78] The Commission considers that coordinating instruments involving structural changes to the current regulators should only be employed in exceptional cases. For example, in circumstances where coordination within existing structures is incapable of creating a satisfactory level of interdependence and cooperation.

(b) Circumstances of application of instruments

6.68 In addition to selecting which instruments are appropriate generally, a second, related question arises: when to use which instrument. The answer to this question depends on: how the jurisdiction of multiple regulators overlaps, and at which stage of regulation coordination is needed. As noted above, there are 3 ways in which overlap of regulatory jurisdiction can be categorised: functional overlap, the requirement of common expertise, and where information sharing becomes necessary. Also noted above, regulation can be divided into 3 stages, standard setting, monitoring, and enforcement. Monitoring and enforcement can be considered together for this purpose, because similar instruments are often equally applicable across both stages.

6.69 For example, cooperation agreements can be effective for standard-setting, monitoring, and enforcement stages. However, such agreements are usually only applicable where some coordinated activity is concerned, rather than simply the sharing of information and

[78] For a statistical analysis of the structural changes of agencies in Ireland, see MacCarthaigh, "Agency Termination in Ireland: Culls and Bonfires, or Life After Death?" (2014) 92 *Public Administration* 1017.

expertise (although such information sharing will often be included as part of a cooperation agreement).

6.70 By contrast to cooperation agreements, consultation is only really appropriate at the standard setting stage. In terms of jurisdictional overlap, mere consultation without some concerted action with other regulators would be largely inadequate where regulatory functions overlap. Consultation, therefore, is most appropriate as an instrument in circumstances where there is common need for expertise between regulators (but no need for concerted action) and at the standard setting stage.

6.71 Supervisory bodies are again different to the above two instruments. The establishment of a supervisory body should arguably only impact the standard setting stage of regulators under its supervision, as the regulators themselves will often have the expertise to carry out monitoring and enforcement, but require coordination at the standard setting stage in order to ensure regulatory objectives are harmonised between regulators.

2. Challenges to Coordination

6.72 Certain barriers exist that can impede the achievement of coordination or make it less effective. In addition, sometimes achieving regulatory coordination itself creates other problems that must be mitigated against; greater levels of coordination is not an unqualified benefit.

(a) Contrasting approaches to regulation

6.73 Diverse outlooks on regulation by regulators themselves can create challenges for the achievement of regulatory coordination.

6.74 An issue that may create obstacles to coordination is that different regulators may follow different enforcement strategies.[79] For example, one regulator may conduct inspections and take enforcement measures strictly based on legal provisions. Another regulator may adopt a "risk-based" approach to regulation. The Regulators' Code in the UK provides an example of how to mitigate against any coordination difficulties arising from this issue.[80] The Code provides a framework for relevant regulators to perform their regulatory functions in a consistent way. In addition, the Guidance for Regulators – Information Point (GRIP) offers a portal that may facilitate regulators in local authorities to coordinate.[81]

[79] For example, see generally: Baldwin, Cave and Lodge, *Understanding Regulation: Theory, Strategy, and Practice* 2nd ed (OUP 2012). Enforcement strategies can include "risk-based regulation," "responsive regulation" and "really responsive regulation."

[80] Office for Product Safety and Standards, Regulators Code (2014).

[81] See: *http://www.regulatorsdevelopment.info/grip/*.

(b) Regulatory flexibility

6.75 The Commission considers that the main role of legislation and high-level supervision of coordination should be to set out general guidelines. The guidelines should specify the instrument to be employed, for example, cooperation agreements or consultation. However, the steps to be taken in implementing these prescribed activities should be the responsibility of the regulators themselves. Regulators have industry-specific knowledge and expertise as to the best way to achieve the objectives set out in legislation or by the supervisory authority.

R 6.15 The Commission recommends that, where legislation includes provisions that seek to improve coordination between different regulators, it should, where appropriate, provide general guidelines concerning coordination, without prejudice to the capacity of regulators to take the appropriate steps to achieve the desired coordination.

(c) Information-sharing and restrictions

6.76 Information is central to coordination, and the sharing of information arguably underpins every instrument of coordination. There are however, obstacles to the sharing of information between regulators.

6.77 One obstacle comes from the legal provisions on data protection.[82] To a certain degree, this issue can be resolved by legally prescribing exemptions for the purpose of facilitating the performance of regulatory functions. For example, section 25(1) of the *Competition and Consumer Protection Act 2014* provides that confidential information may not be disclosed by certain persons acting in their capacity as officers of the CCPC, save in certain circumstances, for example, the legal requirement to disclose. Section 24 establishes an exception to this prohibition by providing a list of bodies to which the CCPC may disclose information relating to the commission of offences.

6.78 The obstacles to sharing information can also apply to the party requesting information as well as the party providing the information.[83] In certain cases, protections can be put in place to permit the sharing of information. For example, the requesting party may be required to submit the request in writing. Similarly, the requesting party may be prohibited from using the information, save in pursuance of its functions. Otherwise, the requesting party shall obtain prior written approval from the requested party.

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[82] For example, section 24(1) of the *Communications Regulation Act 2002*; Section 43(7) of the *Water Services (No 2) Act 2013*.

[83] Section 47G(9) of the *Competition Act 2002*; section 19(8) of the *Competition and Consumer Protection Act 2014*.

Additionally, the requesting party shall not disclose the shared information to a third party, unless with written consent of the requested party, or pursuant to law.[84]

6.79 At the time of writing (September 2018), the General Data Protection Regulation (GDPR) is has come into force.[85] The GDPR is directly applicable in Irish law and introduced a number of restrictions on the processing[86] of data of EU citizens. Article 6 of the GDPR sets out the circumstances in which processing may be considered lawful, including such public authorities acting in pursuance of their functions. Article 6 provides that processing that is "necessary for the performance of a task carried out in the public interest" is permitted, provided the basis for such processing is laid down by domestic or EU law, which must determine the basis of that processing. Article 6 also provides that the member state law may adapt the application of Article 6, including: providing conditions for the lawful processing of data, the types of data which are subject to the processing, applicable persons, the entities to, and the purposes for which, the personal data may be disclosed, storage periods; and processing operations and processing procedures. The domestic or EU law must be in the public interest and be proportionate to the aim. Recital 41 provides that "such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it, in accordance with the case-law of the Court of Justice of the European Union (the 'Court of Justice') and the European Court of Human Rights." In addition, recital 45 states that "[t]his Regulation does not require a specific law for each individual processing. A law as a basis for several processing operations based on a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority may be sufficient."

6.80 In addition to the requirements for lawfulness set out in Article 6, Article 23 sets out situations in which a member state may restrict the obligations and rights under the GDPR. A restriction is permitted provided it "respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society

[84] See, for example, Co-operation Agreement Between the Competition and Consumer Protection Commission and the Commission for Communications Regulation (11 November 2015, as amended by the Supplemental Agreement, 19 July 2016).

[85] The GDPR came into force, insofar as it had not already, on the 25 May 2018 in accordance with *Data Protection Act 2018 (Commencement) Order 2018* (SI No 174 of 2018).

[86] Article 4 of The GDPR defines processing as: "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction."

to safeguard" certain interests.[87] One such interest the member state may protect in this manner is "a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority" concerning public security, the prosecution of criminal offences, or other important public interest objectives, including economic or financial interests. In such circumstances, it is possible to restrict the application of the GDPR through the enactment of legislation.[88]

6.81 Although the impact of the GDPR on regulators generally is outside the scope of this Report, policy makers should be mindful of the relevant data protection legislation in prescribing the data sharing powers of regulators. As a result of this incoming regime, it will be necessary for information sharing powers of agencies to be specifically prescribed in law. It may also be necessary for legislation to specifically provide for the ability of certain agencies to share information for specific purposes. There are advantages to prescribing general coordination standards from above, with the detail of implementation at the regulators' discretion; this may be impossible where the sharing of data is concerned. Although the Commission considers that it is desirable that regulators can freely share information, it is only desirable to the extent that it is consistent with data protection requirements. It is, of course, important that legislation, both domestic and EU, strike a balance between providing effective information sharing on the one hand, and respecting the citizens' privacy on the other.

6.82 In the specific context of regulatory agencies, the requirements imposed by the 2018 Act and the GDPR will have to be read in light of the proposed powers to be given to certain bodies under the *Data Sharing and Governance Bill 2018*. At time of writing (September 2018) this Bill is currently in Third Stage before the Seanad.

R 6.16 The Commission recommends that legislation should, where appropriate, having regard to all other relevant legislation including concerning data protection, prescribe the circumstances and purposes for which specified regulators may share certain information with other specified regulators.

6.83 Aside from legal restrictions, the attitudes of regulators can also create barriers to the sharing of information. Some authors have suggested that regulatory agencies can be

[87] These interests include: "(c) public security; (d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security; (f) the protection of judicial independence and judicial proceedings; (g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions (h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points [(c), (d), (e)]."

[88] It is noted that under Chapter 2 of the *Data Protection Act 2018* there are a number of specifically prescribed categories of personal data that may be processed. Section 51 of the Act (which is contained in Chapter 2) provides that ministers may, through regulations, permit the processing of special categories of personal data for reasons of substantial public interest, provided certain conditions are met.

reluctant to share information out of a concern that to do so might dilute their influence in the industry, handing over their authority to another agency.[89] It is unclear the extent to which this concern arises in Ireland; the use of cooperation agreements currently suggests that regulators are happy to cooperate with one another when the appropriate instruments are available. To the extent that there may be some reluctance to share information, legislation that requires regulators to consult with one another would address this problem. For example, if the legislature was concerned that there was a reluctance to provide assistance to other regulators, they could specify that a regulator "must provide" the other regulator with the information it requires, rather than making the power optional. The Commission does not consider it necessary to make specific recommendations on this point.

3. Accountability

6.84 The accountability of regulators may be impacted by increased coordination. Clear regulatory objectives assist in accountability; it is relatively easier to hold the regulator to account when compliance with objectives is readily assessed.[90] When there is overlap between different regulatory functions, it may be difficult to assess their performance. Even where cooperation takes place, if this is done in an informal way where it is unclear where responsibility lies.

6.85 Where there is a formal arrangement, such as a cooperation agreement or a directly imposed obligation, it is also easier to hold the regulator to account. For example, in cases of cooperation agreements, the existing legal provisions usually require the parties to have them in a written form, to make them public, and to present them to the Minister[91] and sometimes the Oireachtas.[92]

6.86 In practice, there may be many informal measures for coordination, such as informal meetings or exchange of information. This can have a negative impact on transparency and accountability. The 2001 OECD report noted that informality was a feature of consultation processes in Ireland, including consultation among regulators.[93] Although this analysis primarily concerns policymaking and enforcement in specific cases, informality also appears to be present in regulatory coordination in Ireland.

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[89] Bouckaert, Peters and Verhoest, *The Coordination of Public Sector Organizations: Shifting Patterns of Public Management* (Palgrave Macmillan 2010) at 30.

[90] OECD, *Governance of Regulators' Practices: Accountability, Transparency and Coordination* (OECD Publishing 2016) at 39.

[91] Section 47G(4) of the *Competition Act 2002*; section 43(6) of the *Water Services (No 2) Act 2013*; section 19(5)(6) of the *Competition and Consumer Protection Act 2014*.

[92] Section 47G(7) of the *Competition Act 2002*.

[93] OECD, *Regulatory Reform in Ireland* (OECD Publishing 2001) at 52, 76, 136, 193 - 194.

6.87 The Commission considers that policy-makers should give clear formal directions when seeking to coordinate the activities of regulators. Legislation should not prescribe everything about coordination, but rather clearly set out basic rules or objectives. Regulators may use formal agreements or similar arrangements to supplement any directions from above.

R 6.17 The Commission recommends that, in the interests of accountability, where any instruments are employed to achieve coordination between regulators, the regulators should retain a clear record of the scope of coordination and the relative functions or responsibilities of each regulator.

CHAPTER 7

APPEALS FROM REGULATORY DECISIONS

A. Introduction

1. Overview

7.01 As with the *ad hoc* development of regulatory systems in Ireland, the process of regulatory appeals evolved in an *ad hoc* manner.[1] As a result, there is no standardised system of regulatory appeals, but rather a series of standalone processes. The decisions of some regulators carry a right of appeal to the High Court, while others can be appealed to specialist appeal panels established for individual cases. Others still attract an appeal to a standing appeals tribunal. There are also differences between the remedies available, the possibility for further onward appeal, the standards of review, the procedures followed, and the costs and time involved in progressing appeals to finality.

7.02 These differences appear to have arisen not by design, but rather as a result of the fragmented and piecemeal evolution of the individual regulators concerned.[2] There is a risk that arbitrary differences in procedure might undermine the goals of fairness and consistency, which are arguably the main justifications for providing for appeals. In particular, the wider the variety of appeals mechanisms, the more challenging the task of the appellate body or Court to apply fair procedures consistently.[3] Furthermore, the

[1] Department of the Taoiseach, *Consultation Paper on Regulatory Appeals* (2006), Hodnett and Connery, *Regulatory Law in Ireland* (Tottel Publishing 2009) at chapter 10.

[2] Hodnett and Connery, *Regulatory Law in Ireland* (Tottel Publishing 2009) at 462: "The reasons for having appeal panels as opposed to an appeal to the Courts have not been subject to much analysis."

[3] In *Fitzgibbon v Law Society* [2015] 1 IR 516, at 54, the Supreme Court (McKechnie J) stated "[i]f the results should differ as between one appeal provision and another, the approach cannot be altered simply to avoid this. If inconsistency, as to the nature and format of appeals should arise, it will do so only because of the variable statutory framework in place. This is not caused by the judicial approach but is a direct consequence of legislative terminology, which undoubtedly causes difficulties for the judiciary." He went on to say "the provision of a single type of appeal to fit all, in all circumstances, may indeed be challenging. This is not to say however that there is no room for greater clarity and consistency: quite obviously there is: in particular, in situations which broadly overlap and coincide. Therefore when the occasion arises, every opportunity should be taken to address this matter."

current regime is unlikely to provide clarity and simplicity, two of the hallmarks of quality regulation.[4]

7.03 The diversity of regulatory appeals processes has been the subject of a number of reviews.[5] This Chapter aims to identify the optimal features of a regulatory appeal. It will recommend options for simplifying and standardising existing appeal mechanisms, which may assist the design of regulatory systems in future.

2. Scope of this Chapter

7.04 The regulators under consideration for the purposes of this Chapter are the Central Bank of Ireland (CBI), the Commission for Communications Regulation (ComReg), the Commission for the Regulation of Utilities (CRU), the Competition and Consumer Protection Commission (CCPC), the Broadcasting Authority of Ireland (BAI), and the Commission for Aviation Regulation (CAR).[6] These are broadly the same regulators considered in the Department of the Taoiseach's 2006 Consultation Paper on Regulatory Appeals.[7]

7.05 Each of these regulators makes determinations that have a "high market impact". This means that the regulator's decision typically involves the grant or revocation of the licence or authorisation needed to allow an undertaking to operate lawfully in a regulated sector of the economy. Some of the regulators in question are empowered to impose

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[4] OECD, *The OECD Regulatory Policy Outlook 2015* (2015) at 23, defines regulatory quality by regulations which "1. serve clearly identified policy goals, and are effective in achieving those goals; 2. are clear, simple and practical for users; 3. have a sound legal and empirical basis; 4. are consistent with other regulations and policies."

[5] 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); Economist Intelligence Unit (Commissioned by the Department of the Taoiseach), *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).

[6] The Commission's Issues Paper in this area also considered the Health Products Regulatory Authority (HPRA) in its analysis. See Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LRC IP 8 – 2016). However, the HPRA does not currently have a statutory appeal mechanism. Rather, its own procedures provide for an internal appeal that is final, subject only to challenge by way of judicial review. The Commission did not receive any submissions that addressed the HPRAs appeal process. Furthermore, the HPRA does not possess the "high market impact" of the other regulators considered in this Chapter to the extent that, conclusions that may be made about other regulators and the appropriateness of their appeals procedures, may not be applicable to the HPRA. This Chapter will not make specific recommendations in respect of the HPRA.

[7] Note that what was previously the Commission for Energy Regulation is now part of the CRU and what was then the Competition Authority is now part of the CCPC. Furthermore, the Commission for Taxi Regulation no longer exists, having been dissolved in 2011 and its functions having been transferred to the National Transport Authority pursuant to Part 4 of the *Public Transport Regulation Act 2009*.

administrative sanctions on market participants arising from non-compliance with the regulatory framework governing the sector in question.

7.06 Accordingly, the regulators in question have the power to shut large undertakings out of lucrative markets in certain circumstances. Large undertakings have the incentive and the means to engage in costly and protracted litigation to reverse or suspend adverse regulatory decisions. Regulated entities that make tactical use of appeals and engage in 'regulatory gaming' present a challenge for legislators seeking to ensure that regulatory appeals deliver certainty and finality in a manner that is quick and cost-effective.[8]

3. Format of this Chapter

7.07 The Introductory Part to this Chapter identifies the purpose that regulatory appeals serve and discusses the different standards of review that appeal bodies can employ. Part B discusses appeal panels, which are used in the energy, aviation, and financial services sectors. Part C discusses direct appeals to the High Court, which are used principally in the communications and broadcasting sectors and for competition law and certain aviation sector appeals. Part D discusses permanent multi-disciplinary appeal tribunals, which are used for regulatory appeals in other jurisdictions, including Australia and the UK, but have not been used to date in Ireland. Part E concludes the discussion and considers which of these different appeal mechanisms presents the optimum approach for Ireland to adopt.

4. Purpose of Regulatory Appeals

7.08 There are several reasons for providing for the independent review of first instance decisions of regulators. From a constitutional point of view, regulatory decisions represent an exercise of statutory power and must be exercised lawfully. This is classically the function of judicial review and can be broken down into the prevention of illegality, irrationality, and procedural impropriety in administrative decision-making.[9]

7.09 Judicial review is narrow and legalistic in scope, whereas an appeal typically involves a review on broader grounds.[10] In particular, appeals offer the opportunity to correct erroneous decisions, thereby improving the quality of first instance regulatory decision-

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

[9] *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, at 410.

[10] *Fitzgibbon v Law Society* [2015] 1 IR 516 at paragraph 130: "Given that judicial review lies in respect of all public law decisions affecting rights and obligations, it must be assumed that, by conferring a right of appeal, the Oireachtas intended that some greater degree of review is permitted than that which would have applied, in the context of judicial review..."

making,[11] and ensuring that the same rules are applied in a consistent fashion to different cases. From the point of view of the regulated party, appeals provide a mechanism to challenge regulators who they believe have reached the wrong decision or acted outside the confines of their legal powers.[12] Apart from these functional justifications for appeals, Ireland also has a legal obligation to provide a right of appeal where certain regulatory decisions engage matters of European Union law.[13]

B. Types of Appeals and the Scope of Review

7.10 Appeals vary in nature depending on the scope of the review undertaken and the remedies that the appellate body can grant. In *Fitzgibbon v Law Society*,[14] the Supreme Court (Clarke J) identified four types of appeal in addition to the remedy of judicial review, namely:

(1) *De novo* appeals;

(2) Appeals on the record;

(3) Appeals against error; and

(4) Appeals on a point of law;

7.11 In principle, judicial review is available in respect of all decisions of public bodies. Judicial review is, however, limited to enquiries into the legality, rather than the substantive correctness of the decision under review. For that reason, judicial review alone can make only a limited contribution to quality regulation, as it does not offer a method of correcting erroneous regulatory decisions.

7.12 A *de novo* appeal is a full re-hearing of the question in issue; *de novo* meaning anew or from the beginning. Under such an appeal, an appeal body does not take into consideration the decision of the first-instance decision-maker and instead reaches its own independent conclusion having considered all the relevant evidence (including by hearing directly from witnesses). *De novo* appeals are rare in the regulatory context, as they require appellate bodies to make binding determinations independently of the regulator for the sector in question. This requires the appellate body to have as much

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[11] Economist Intelligence Unit, *Review of the Regulatory Environment in Ireland* (2009) at 55: "The fact that decisions may be appealed against and re-examined increases the incentive for the regulatory body to ensure that its decisions are robust and well argued."

[12] Hodnett and Connery, *Regulatory Law in Ireland* (Tottel Publishing 2009) at 461.

[13] For example, for the regulation of electronic communications, article 4 of *Directive 2002/EC/21* (the Framework Directive) provides that "Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved."

[14] [2015] 1 IR 516.

expertise as the regulator, which is often an unattainable standard. *De novo* appeals could also be said to go further than is necessary to achieve the objectives of a regulatory appeals process as identified above.[15]

7.13 An appeal on the record is similar to a *de novo* appeal in the sense that the appellate body comes to its own conclusions. However, instead of re-hearing evidence, the appellate body considers the record of the first instance decision and the evidence on which it was founded. Again, the need to make an independent determination requires the appellate body to have as much expertise as the regulator, so this standard typically goes beyond what is suitable for regulatory appeals.

7.14 On an appeal against error, the appellate body is not seeking to form its own conclusion as to what is the correct determination, but rather is only seeking to determine whether the first instance decision was incorrect. It does this by asking whether the evidence before the first instance decision-maker supports the conclusions reached. As regulatory appeals typically fall into the category of appeals against error, the scope of this type of appeal will be considered in more detail below.

7.15 Finally, there are appeals on a point of law. Such appeals consider the record of the first instance decision but also accept the primary findings of fact made at first instance, unless there is no evidence to support those findings. This type of appeal is confined to assessing whether the first instance decision-maker applied the relevant legal principles correctly, having regard to the findings of fact that he or she made. Appeals on a point of law are sometimes available in a regulatory context, especially for a second level appeal, but may be considered inadequate where correcting incorrect conclusions on the facts forms part of the function of a particular appeal.

C. Appeal Panels

1. Overview

7.16 *Ad hoc* and permanent appeal panels are discussed in this Part. Together with appeals to the High Court (see Part C), *ad hoc* and permanent appeal panels are the main forum for regulatory appeals currently used in Ireland. Among the regulators under consideration, *ad hoc* appeal panels are used for appeals of decisions of the Commission for the Regulation of Utilities (CRU) and for some but not all decisions of the Commission for Aviation Regulation (CAR).[16] The Irish Financial Services Appeals Tribunal (IFSAT) shares some of the characteristics of an appeal panel but differs in one aspect, in that it is a

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[15] See Lord May's discussion on the arguments for *de novo* appeals in *Dupont de Nemours v Dupont* [2006] 1 WLR 2793 at paragraphs 94-98.

[16] Under section 9(2) of the *Transport (Tour Operators and Travel Agents) Act 1982*, a person may appeal to the High Court, by way of special summons, a refusal by CAR to grant a travel agent or tour operator licence. This is considered in more detail below.

permanent standing body, rather than being specifically established for the purpose of hearing an individual appeal.

7.17 Legislation providing for appeal panels in respect of CAR and CRU decisions appears to have been favoured during a relatively brief period in the late 1990s and early 2000s, when regulators entertained the hope that such panels would bring greater speed, cost effectiveness, and expertise to bear on regulatory appeals than hearings in the regular courts. It is notable that this view seems to have had its heyday prior to the establishment in the High Court of the commercial list in 2004 and the competition List in 2005.

7.18 In theory at least, appeal panels allow for the recruitment of panel members with a greater degree of expertise than High Court judges, in terms of both specialist technical knowledge and a deep familiarity with the regulatory legal framework in question. In practice, however, the process of selecting and empanelling members to hear an appeal may slow the process considerably. If panels sit only infrequently and with different members on each occasion, they will have little opportunity to develop a greater familiarity with the regulatory regime than a High Court judge

2. Electronic Communications

7.19 Between 2003 and 2007, appeals from decisions of the Commission for Communications Regulation (ComReg) were to be heard by an Electronic Communications Appeal Panel (ECAP). The legislative basis for ECAP lay in the 2003 Framework Regulations,[17] which implemented the European Framework Directive.[18] There could be no appeal against a decision of ComReg other than under the regulations.[19] Appeals involved a broad review of the impugned decision. Parties were entitled to plead that a decision was vitiated by errors of fact (including inferences of fact) and/or errors of law (including issues of jurisdiction and procedure).

7.20 Article 4 provided that ECAP would not be a permanent standing appeal panel, but rather that it would be established and disestablished as necessary from time to time. The Minister was entitled to refer an appeal to a panel already in existence but was also entitled to refuse to establish a panel or to refer an appeal to a panel, if court proceedings concerning the same subject matter had been commenced. Panels were to consist of 3 persons. At least one member had to be a practising barrister or solicitor with at least

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[17] *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[18] Directive 2002/EC/21.

[19] Regulation 3(2) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

seven years' experience, the others were to have such commercial technical, economic, regulatory, or financial experience as the Minister considered appropriate.[20]

7.21 Each appeal panel was to determine its own procedure,[21] which, in theory at least, created the possibility that different incarnations of ECAP might have adopted different procedures. Appeal panels were not bound by the strict rules of evidence and could inquire into and inform themselves on any matter in such manner as they thought fit, subject to the rules of natural justice.[22] The panels were further required to act with as little formality as the circumstances of the case permitted and according to natural justice and the substantive merits of the case, without regard to technicalities or legal forms.[23]

7.22 Appeal panels were entitled to receive both evidence and argument either orally or in writing.[24] Panels were required to deal with appeals as quickly as was practical[25] and, insofar as it was possible, to determine appeals within 4 months of the establishment of the panel or the referral of an appeal to the panel.[26] An appeal panel was entitled to either confirm or annul a decision of ComReg in whole or in part;[27] although, if the panel considered that the issue could be resolved by fixing a technical defect in the appealed decision, it could direct ComReg to amend its decision.[28] ECAP, therefore, was not empowered to substitute its own decision for that of ComReg, nor, except in the narrow circumstances of the technical error, could it remit a matter for reconsideration.

7.23 During its short existence between 2004 and 2007, 11 appeals were referred to ECAP. Only one of these, in the case of *Hutchison 3G v ComReg,*[29] proceeded to final determination following a full hearing. The appeal panel took just over one year from the date of its establishment to issue its judgment. The panel considered that, while it had

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[20] Regulation 5(1) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[21] Regulation 8(3) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[22] Regulation 8(6) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[23] Regulation 8(7) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[24] Regulation 8(10)(a) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[25] Regulation 8(9) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[26] Regulation 12(1) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[27] Regulation 12(3) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[28] Regulation 9(3) of the *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003).

[29] See: The Commission for Communication Regulation, *Comreg Response to 'Regulatory Enforcement and Corporate Offences' Issues Paper From the Law Reform Commission* (2016).

appropriate expertise, it was not the same type of expertise which ComReg itself possessed. The panel did not conduct a *de novo* hearing, but rather adopted a procedure closer to an appeal on the record, albeit with a greater willingness to substitute its own judgment for that of the regulator than had typically been shown by the High Court in court appeals of regulatory decisions.[30] In *Hutchison*, ECAP annulled a previous decision of ComReg that the company's subsidiary had significant market power in Ireland.

7.24 In 2007, the right of appeal against ComReg to ECAP was abolished and replaced with a right of appeal to the High Court (discussed further below).[31] The Commission understands from ComReg's submission, which ComReg published on its website, that ComReg considers that the High Court appeals process is working well and is vastly preferable to the pre-2007 regime.[32] ComReg stated that ECAP was unsatisfactory and resulted in a delay of years for resolution of cases. By contrast, telecommunication industry regulatory appeals are often resolved in under 6 months in the High Court. Such a slow-moving appeals process was not suitable for the fast-moving telecommunications industry where appellants may have an incentive to tactically delay.

3. Aviation

7.25 Appeal panels are used for appeals from decisions of the Commission for Aviation Regulation (CAR) in respect of determinations relating to air charges or air terminal services charges.[33] The Minister for Transport must establish an *ad hoc* appeal panel within 3 months of receiving a request in writing to do so from a party aggrieved by a determination of CAR.[34] Such a panel should consist of between 3 and 5 members, one of whom should be designated by the Minister to act as chairperson.

7.26 Aviation appeal panels are required to determine their own procedure. They are further required to consider the determination under appeal within 3 months of establishment of the appeal panel.[35] A significant difference between aviation appeal panels and ECAP is that the former do not have the power to annul decisions of CAR. Instead, the panel must remit the decision under appeal to CAR for review, if satisfied there are sufficient grounds to do so.

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[30] This is discussed further below. See also for example *M&J Gleeson v Competition Authority* [1999] 1 ILRM 401; *Orange Communications Ltd v Director of Telecommunications Regulation* [2000] 4 IR 159; *Carrigdale Hotel v Comptroller of Patents* [2004] 3 IR 410.

[31] Regulation 4 of the *European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007* (SI No 271 of 2007).

[32] Comreg, *Comreg Response to "Regulatory Enforcement and Corporate Offences" Issues Paper from the Law Reform Commission* (2016).

[33] Such determinations are made pursuant to sections 32(2) and 35(2), respectively, of the *Aviation Regulation Act 2001*.

[34] Section 40(5) of the *Aviation Regulation Act 2001,* as amended by section 5(1)(d)(i) of the *Aviation Act 2006*.

[35] Section 40 of the *Aviation Regulation Act 2001*.

7.27 In a decision dated 16 November 2012, relating to air terminal service charges,[36] the appeal panel decided that there were two scenarios in which it would remit a matter back to the CAR for reconsideration. The first such scenario was where it was not satisfied that CAR had due regard to all of the issues set out in section 36 of the *Aviation Regulation Act 2001.* The second such scenario was where the appeal panel was satisfied that CAR had regard to the appropriate issues but manifestly erred in its consideration. In all other scenarios, the panel would confirm the determination.

7.28 A previous appeal panel, in January 2002, decided that where it refers a determination back to CAR, it does not substitute its judgment for that of CAR. In such cases, the panel merely decides that there are sufficient grounds for CAR to review its decision. When a decision is referred back to CAR, it had to decide whether to affirm or vary the original decision. An anomaly could arise if the CAR participated in the process before the panel and argued against the existence of "sufficient grounds" and urged on the panel that its decision should be affirmed. If this contention were rejected by the panel, the CAR would then ultimately have to adjudicate on its own argument. This is arguably undesirable; this could be seen as the CAR being a judge in its own cause. The panel also took account of this feature of the process, noting that, in general, a statutory decision-making body is usually not a party to an appeal. Where there are exceptions to this, for example, where a planning authority in the context of appeals from An Bord Pleanála, such appeals are full and qualified appeals involving a substitution of the decision of the appellate body for that of the decision maker.

7.29 In *Aer Rianta v Commission for Aviation Regulation*,[37] the High Court (Kelly J) was critical of the absence of specified procedures for an appeal panel established under the *Aviation Regulation Act 2001*. As a result, the Court allowed Aer Rianta to proceed with a judicial review of the decision of CAR, even though an appeal to the appeal panel was pending. The High Court noted 3 areas not covered by any statutory guidelines. The first such area was whether there was supposed to be an appeal on the merits or just a review of the original decision. Second, whether there was supposed to be an oral hearing or the use of written submissions. Third, on what grounds CAR could decide to stand by its original decision. The Court described this as a "witch's brew of questions."

7.30 Section 38 of the *Aviation Regulation Act 2001* provides for judicial review applications in respect of determinations made by CAR to be brought within 2 months of the original decision. The High Court may grant leave to bring such an application only where there are substantial grounds for contending that the determination is invalid or ought to be quashed. In *Ryanair Ltd v Commission for Aviation Regulation*,[38] the High Court (Kelly J)

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[36] Available at: *https://www.aviationreg.ie/_fileupload/Appeal%20Panel%20decision.pdf*.

[37] Unreported, High Court, Kelly J 13 November 2001 (this judgment does not appear to have been circulated but is quoted in Hodnett and Connery, *Regulatory Law in Ireland* (Tottel Publishing 2009) at paragraph 10.013.

[38] [2010] IEHC 220.

commented that the Act should be amended "so as to ensure that people cannot ride two horses at the one time" where two separate timetables are fixed by the same legislation allowing a judicial review to be heard much more quickly than the appeal.

7.31 In that case, the High Court refused Ryanair's application for leave to apply for judicial review, given that Ryanair had itself sought the establishment of an appeal panel. Ryanair had stated in correspondence that it saw the appeal panel as a cost efficient, quick, and satisfactory forum for addressing the grievance it had with CAR's determination. It added that the appeal panel was Ryanair's preferred forum on the basis that, if successful, it would obviate the need for lengthy litigation.

7.32 Several aviation appeal panels have been established since 2001 and appear to have worked reasonably efficiently.[39] However, it is also the case that several CAR determinations have been the subject of judicial review applications, and this mode of challenge is specifically envisaged in the *Aviation Regulation Act 2001*. While judicial review allows only narrow scope for review, an appeal panel is better equipped to review the merits of the CAR's decision, although it cannot direct CAR to alter its decision.

7.33 Despite the relative speed with which appeal panels have operated, they do not appear to have replaced judicial review entirely as a method of challenging CAR's determinations. Furthermore, the appeal panel mechanism is open to criticism on the basis that its procedures and method of review are ill-defined and the benefit of referring a decision back to the CAR for further consideration represents a weak standard of independent scrutiny. The Commission considers that the possibility of parallel appeal methods, the appeal panel and judicial review, is undesirable. This potentially presents the CAR, the Minister, regulated parties, and the High Court with the difficult decision as to which method is best suited to different types of challenge. As noted above, this problem has already been highlighted in the case law, above.

4. Energy

7.34 Part 4 of the *Electricity Regulation Act 1999*[40] provides that the Minister for Communications may establish *ad hoc* appeal panels to hear challenges by parties who have been refused a licence to generate or supply electricity by the Commission for Regulation of Utilities (CRU).[41] This process was extended to gas regulation by section 16(12) of *the Gas (Interim)(Regulation) Act 2002*.

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[39] Appeal panels were established in 2001, 2002, 2006, 2008, 2010 and 2012. The panels in 2008 and 2010 each heard four appeals by different parties relating to the same determination. The panels worked reasonably quickly, e.g. a panel was established in August 2012 that had completed its work by November 2012. In light of a referral from the panel, CAR issued a decision in January 2013.

[40] As amended by the *European Communities (Internal Market in Electricity) Regulations 2006* (SI No 524 of 2006).

[41] Previously the Commission for Electricity Regulation and later, once gas licensing came under its remit, pursuant to the *Gas (Interim)(Regulation) Act 2002*, the Commission for Energy Regulation.

7.35 The Minister for Communications established an appeal panel under the *Electricity Act 1999* to hear an appeal from a decision of the CRU concerning modifications to electricity generation licences and supply licences.[42] The 3 members nominated to sit on the panel and the three substitute members are all junior counsel. It therefore appears that this panel will not have the same degree of technical expertise as the CRU itself and is therefore likely to adopt a reasonably high standard of deference towards the regulator. While the panel undoubtedly has adequate legal expertise, it is not the same degree of expertise as the High Court and the possibility of a judicial review remains if the appellant is disappointed by the outcome.

7.36 The lack of specialist expertise is perhaps somewhat surprising given that, unlike aviation appeal panels, energy appeal panels are empowered to substitute their own view for that of the regulator.[43]

5. Conclusion in respect of *ad hoc* appeal panels

7.37 Leading authors in this area provide the following overview of the development of Irish appeal panels:

> "From an Irish perspective, it is clear there is no particular set of principles or doctrine that has been uniformly applied in the design of various appeal panels…"[44]

7.38 The authors go on to state that the appeal panels that are envisaged are transitory groups with various powers, some limited, some not. The procedures by which they operate are not uniform. This flexibility is perceived as a benefit by some but not by others. The lack of clarity over the scope of review and standard of review further complicates proceedings and can lead to further delay until these issues are resolved.

7.39 The authors note that there is strong criticism of such appeal panels, which can inadvertently facilitate strategic appeals to delay the application of regulation. Regarding the gas and electricity markets, the loss, variation, or grant of the appropriate licence is of such significance to the undertaking and its competitors as to make recourse to the courts almost inevitable. In addition, the speed of resolution of the matters and the cost involved varies little with full appeals to the High Court and, in light of the speed of resolution of

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[42] *Electricity Regulation Act 1999 (Establishment of Appeal Panel) Order 2017* (SI No 495 of 2017).

[43] Section 30(6) of the *Electricity Regulation Act 1999* provides that "[a]n Appeal Panel may confirm the refusal to grant a licence or an authorisation or may direct the Commission to grant a licence or an authorisation with or without conditions laid down by the Appeal Panel and where such a direction is made the Commission shall, in accordance with the decision of the Appeal Panel, grant the licence or authorisation, subject to such conditions as may be specified by the Commission which are not inconsistent with the decision of the Appeal Panel."

[44] Hodnett and Connery, *Regulatory Law in Ireland* (Tottel Publishing 2009) at paragraph 10.071.

matters before the Commercial Court, an appeal panel may indeed prove to be slower than the High Court.

7.40 A number of additional observations can be made, based on a review of how appeal panels have operated in practice. In the aviation section, CAR determinations appear to be appealed almost as a matter of course, whereas in the energy sector, the right of appeal has been invoked only very infrequently in respect of CRU decisions. There are significant differences between the powers and procedures of the appeal panels for telecommunications, aviation, and energy. However, none of the panels reviewed seem to boast a level of expertise sufficient to match that of the regulator under appeal. Furthermore, as the membership of the panels has varied over time and with the establishment of new panels, it is unlikely that *ad hoc* appeal panels allow the development of institutional memory or a deep understanding of the sector in question. For these reasons, it is not clear that ad hoc appeal panels allow greater expertise to be brought to bear than having regulatory appeals heard in the High Court.

7.41 The Irish Financial Services Appeals Tribunal (IFSAT) was established to hear appeals from decisions of the Central Bank.[45] Numerous decisions provided for under the *Central Bank Act 1942* are designated as appealable decisions. IFSAT differs from the appeal panels discussed above in that it is a permanent standing body. IFSAT has the power to determine its own procedures, but guidance in this regard is set out in section 57V of the 1942 Act.[46] IFSAT's procedures have been publicly promulgated in the form of a statutory instrument.[47] Because there is legislative guidance, there is greater clarity and predictability in respect of IFSAT's procedures than as compared to *ad hoc* appeal panels. It is also likely to enhance the internal consistency of IFSAT's procedural decision-making.

7.42 A further significant difference between IFSAT and other appeal panels is that its composition is defined by law. The tribunal must consist of a chairperson, deputy chairperson, and up to 5 "lay" members. The chairperson and deputy chairperson must be either a former High Court, Court of Appeal or Supreme Court judge, or a solicitor or barrister of at least seven years standing. At the time of writing (July 2018), the chair is a retired High Court judge (who regularly heard commercial and competition cases and regulatory appeals during his career). At the time of writing (July 2018), the deputy chair is a senior counsel. The lay members must have special knowledge or skill in relation to the provision of financial services.[48] Appeals are heard by panels of three members, one of

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[45] IFSAT was established under Part VIIA of the *Central Bank Act 1942,* as inserted by section 28 of the *Central Bank and Financial Services Authority of Ireland Act 2003*.

[46] The legislative formula used here is very similar to that used in *European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003* (SI No 307 of 2003) that set up the Electronic Communications Appeal Panel. Under section 57R, the tribunal can hear applications to stay the decision of the Central Bank pending the outcome of the appeal.

[47] *Irish Financial Services Appeals Tribunal Rules 2008* (SI No 224 of 2008).

[48] Section 57E(2) of the *Central Bank Act 1942*.

whom must be either the chair or deputy chair.[49] The statutory requirement that IFSAT possess a certain minimum level of expertise aids its credibility as a "specialist" appellate body.

7.43 IFSAT published decisions in 19 cases between 2007 and 2017. In 2016, it received 4 appeals and disposed of 2 of them by the end of the year. Its combination of legal and specialist financial expertise has enabled it to conduct merits-based reviews of Central Bank decisions.

7.44 IFSAT has the power to affirm the decision of the Central Bank or to remit the matter back to the Central Bank for reconsideration, together with any recommendation or direction as to what aspects of the matter should be reconsidered. In the case of appeals under Part IIIC of the 1942 Act, which concern the imposition of administrative sanctions by the Central Bank, IFSAT can vary the decision of the Bank, or substitute its own decision for that of the Bank, or set aside the decision of the Bank.

7.45 When hearing an appeal, IFSAT may, on its own initiative or at the request of a party, refer a question of law arising in the appeal to the High Court for the opinion of the Court.[50] There is an unrestricted right of appeal to the High Court against decisions of IFSAT.[51] On hearing such an appeal, the High Court can affirm or set aside the decision of IFSAT or remit the case back to IFSAT with directions as to how it is to be reconsidered.[52] The determination of the High Court on the hearing of such an appeal is final, except that a party to the appeal may apply to the Supreme Court to review the determination on a question of law (but only with the leave of either of those Courts).[53]

7.46 While specialist appeals tribunals such as this are relatively cheaper than court appeals, the possibility of onward appeal to the High Court can facilitate multiple, tactical appeals.

7.47 In practice, the absence of written decisions of the Superior Courts relating to IFSAT suggests that there have not been many, or perhaps, any, appeals of IFSAT decisions. At present, it is theoretically possible that a single decision of the Central Bank could be

[49] Section 57H(2) of the *Central Bank Act 1942*.

[50] Section 57AJ of the *Central Bank Act 1942*.

[51] Section 57AK of the *Central Bank Act 1942*.

[52] Section 57AL of the *Central Bank Act 1942*.

[53] Section 57AL(3) of the *Central Bank Act 1942*.

subject to 4 appeals.[54] This number of appeals is likely to be so costly and time-consuming as to be contrary to the interests of justice. Given that an appeal to IFSAT involves a review for error, arguably a second review for error by the High Court adds little value. A statutory body such as IFSAT will always remain subject to the supervisory jurisdiction of the High Court in the form of judicial review. However, if a statutory appeal to the High Court is available, this will largely replace judicial review as it provides a broader range of remedies.

7.48 A perceived benefit of a multi-disciplinary appeal tribunal along the lines of the UK's Competition Appeals Tribunal (CAT) (discussed further below), is that it provides a single appeal against error to a body of similar standing to the High Court with only a narrow onward appeal with leave on a point of law. Rather than having an appeal against error to the High Court and a subsequent appeal on a point of law to the Court of Appeal or Supreme Court, the Commission considers that it would be preferable for decisions of IFSAT to be appealable to the High Court on a point of law only. Article 34.4.1° permits the Oireachtas to make certain decisions of the High Court final and it is appropriate to do so where it is itself exercising an appellate jurisdiction. It would, however be appropriate to provide that, if necessary, the High Court could state a case to the Court of Appeal to enable any conflicting decisions of the High Court to be reconciled.

7.49 It is worth noting that, whereas appellants before the sectoral appeal panels in the energy and aviation sectors are often very large commercial entities, such as airlines or utility companies, appellants before IFSAT are often either individuals or small firms. Whereas other sectoral regulators preside over markets with a small number of participants, the Central Bank regulates thousands of firms of varying sizes. Accordingly, the relatively low cost of bringing an appeal before IFSAT ensures it is readily accessible to individuals and small firms for whom a direct appeal to the High Court might be prohibitively expensive.

D. Appeals to Court

7.50 A direct statutory appeal to the High Court is available in respect of decisions of certain regulators. These include: ComReg, the CCPC, the BAI, and some but not all decisions of the CAR. A second appeal to the High Court is available from decisions of IFSAT. All

[54] To IFSAT, the High Court, the Court of Appeal ,and the Supreme Court. Such an improbable scenario occurred in a different regulatory context in *Nowak v Data Protection Commissioner* [2016] IESC 18. A decision of the Data Protection Commissioner was appealed to the Circuit Court with a further statutory appeal to the High Court. In the absence of any provision to the contrary, the High Court decision was appealable to the Court of Appeal whose decision was appealable to the Supreme Court. The Supreme Court (O'Donnell J) commented at paragraph 10 that "[w]hether it is wise or desirable to have such an elongated appeal process is something which might be reviewed as a matter of policy. The undoubted benefit of having an appeal to a court, and the desirability of having the possibility of an appeal to a level in the system which can resolve conflicting decisions, might be achieved by a more streamlined process." The Supreme Court in that case referred a question to the Court of Justice of the EU thus adding a sixth layer to that litigation.

appeals to the High Court currently carry a further right of appeal to the Court of Appeal, albeit sometimes only on a point of law.

1. The scope of review

7.51 As discussed above, there are different types of appeal ranging from *de novo* full re-hearings to narrow appeals on a point of law. The courts determine which type of appeal the Oireachtas intended to provide in a given circumstance by interpreting the wording of the statutory provision establishing the appeal.[55]

7.52 For the most part, where appeals against error are concerned, the courts have applied a standard of review developed by the Supreme Court in *Orange Ltd v Director of Telecoms (No. 2)*.[56] In that case, the plaintiff was disappointed by the defendant's refusal to award it a mobile phone licence and exercised the statutory right of appeal under section 111(2B)(i) of the *Postal and Telecommunications Act 1983*. In considering the appropriate standard, the Supreme Court (Keane CJ) cited the Canadian Supreme Court decision in *Canada (Director of Investigation and Research) v Southam Inc*[57] and the decision of the High Court (Kearns J) in *M & J Gleeson v Competition Authority*.[58] The Court held that the standard of review on this type of statutory appeal was not a full re-hearing of the merits, but was also not confined to the narrow scope of judicial review.

7.53 The Court formulated the scope of the appeal by stating that an appellant would succeed if they established as a matter of probability that, taking the adjudicative process as a whole, the decision under appeal was vitiated by a serious and significant error or a series of such errors. The Court added that, in arriving at a conclusion on that issue, the High Court should have regard to the degree of expertise and specialised knowledge available to the regulator in question. A similar formulation was adopted by the High Court in the subsequent case of *Carrigdale Hotel v. Comptroller of Patents*.[59]

7.54 In the subsequent case of *Fitzgibbon v Law Society*,[60] the Supreme Court (McKechnie J) held that the scope of review to be conducted by the Court depended, not just on the type of appeal envisaged, but also on the degree of deference to be afforded by the Court to the first instance decision-maker:

> "… the greater the level of expertise and specialised knowledge which a particular tribunal has, the greater the reluctance there

[55] *Fitzgibbon v Law Society* [2015] 1 IR 516, at 542.

[56] [2000] 4 IR 159.

[57] [1997] 1 SCR 748.

[58] [1999] 1 ILRM 401.

[59] [2004] 3 IR 410.

[60] [2015] 1 IR 516.

> should be on the part of the court to substitute its own view for that of the authority."[61]

7.55 The courts have noted that the scope of the review they are required to conduct depends on two factors. These are, first, the wording of the legislation providing the right of appeal and, second, the degree of specialist expertise of the body whose decision is under appeal.

7.56 Furthermore, in *Fitzgibbon*, the Supreme Court declined to confirm that the *Orange* test was applicable to all statutory appeals. The Supreme Court distinguished the facts in that case from *Orange* and the High Court decision in *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman*[62] on the basis that it related to "disciplinary matters which potentially could impact on an individual's constitutional rights, such as the right to earn a livelihood and the right to one's good name and professional reputation." The fact that IFSAT appeals on administrative sanctions are akin to *de novo* hearings may be a reflection of this principle; where the consequence for the individual is more serious, a higher standard of review is required.

7.57 Both McKechnie and Clarke JJ agreed in their concurring judgments in *Fitzgibbon* that appeals against error were founded on the principle of "curial deference." This is the principle that the courts defer to specialist decision-makers; they should not be overly eager to overrule them. The Court (Clarke J) cited the earlier Supreme Court decision in *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare*[63] where the Court held that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal, such conclusions must be corrected. However, it should not otherwise be necessary for courts to review decisions of tribunals which have been given statutory tasks to perform with a high degree of expertise and which provide coherent and balanced judgments on the evidence and arguments heard by them.[64]

7.58 In *Fitzgibbon*, both Clarke and McKechnie JJ acknowledged that there was a spectrum of different standards within the concept of appeal against error. Clarke J stated that in the absence of any specific rules, the default position would be that an appeal body should not interfere with findings of fact at first instance, unless there was no sustainable basis for the finding in question or where the finding was clearly in error. Likewise, in the absence of a specific rule defining the nature of the appeal, an appellate body should be free to exercise its own judgment as to whether other findings of the first instance body are in error. In the absence of express rules qualifying the extent to which the appellate body should come to its own independent view on such matters, there may well be cases

[61] [2015] 1 IR 516, at 545.

[62] [2006] IEHC 323.

[63] [1998 1 IR 34.

[64] [1998] 1 IR 34, at 37 and 38.

where a limitation can properly be implied because of the nature of the issues to be determined and the expertise of the respective first instance and appellate bodies.[65]

7.59 The Court (Clarke J) also noted that in principle, it was possible for a court hearing an appeal against error to hear evidence itself. He noted that if this were to be permitted, it would be preferable if the applicable rules made express reference to such a possibility by specifying that the appellate body could hear oral evidence in order to be able to come to an independent judgment on questions of contested fact. He noted that at the level of principle, either the appellate body must be bound by any sustainable finding of fact at first instance or the appellate body must have the facility to hear evidence itself.[66]

2. Aviation appeals to the High Court

7.60 Under section 9 of the *Transport (Tour Operators and Travel Agents) Act 1982*, persons may appeal to the High Court against a refusal of CAR to grant a tour operator's or travel agent's licence or against a decision to revoke such a licence. Section 9(3) specifies the scope of the appeal:

> "… the High Court may either confirm the refusal or decision or may allow the appeal and, where an appeal is allowed, the [Commission] shall grant the licence or shall not revoke, or vary the terms and conditions of the licence as the case may be."

In *Balkan Tours v Minister for Communications*,[67] the Minister revoked the plaintiff's tour operator licence because its published brochures did not conform to the conditions of the licence. It transpired that this was due to a printer's error, a fact that had not been apparent prior to the Minister's decision to revoke the licence. The High Court (Lynch J) stated that "[i]t seems to me that subsection (4) envisages that the High Court is to ascertain all the relevant facts of the case whether they were before the Minister or not and is to give effect to them." The Court allowed the appeal on the basis that, although the plaintiff had been careless, the loss of the licence was disproportionate. This is an example of an appeal against error where the court ascertained the facts for itself to determine if the first instance decision-maker's ruling was correct.

7.61 Separately, in the aviation regulation context, where ground handlers are refused approval to operate in an airport, a right of appeal to the High Court on a point of law is provided.[68] Consequently, the High Court's remedies are restricted - it can either confirm

[65] *Fitzgibbon v. Law Society* [2015] 1 IR 516, at 556.

[66] *Fitzgibbon v Law Society* [2015] 1 IR 516, at 557.

[67] [1988] ILRM 101.

[68] Regulation 17 of the *European Communities (Access To The Ground Handling Market At Community Airports) Regulations 1998* (SI No 505 of 1998).

CAR's decision or allow the appeal. If it allows the appeal, CAR must either reverse or vary its decision.

3. Electronic Communications Appeals

7.62 As discussed above, whereas between 2003 and 2007, decisions of ComReg could be appealed to an *ad hoc* appeal panel, since 2007, aggrieved parties had a right of appeal to the High Court.[69] A useful guide to the scope of such an appeal was given by the commercial division High Court (Cooke J) in *Vodafone v ComReg*.[70] The Court noted that the European Framework Directive required member states to provide for an appeal on the merits against the decision of the regulator. Such an appeal body was required to have the appropriate expertise to fully examine all technical, economic, financial, and other factors to the extent that they might be put in issue by an appellant. The Court stated that the remedy of appeal was clearly wider than judicial review. It noted that the wide scope of telecommunications appeals was evident from the following points in the 2007 Framework Regulations:

(1) The Court is to hear and determine the appeal and make "such orders as it considers appropriate";

(2) These may include setting aside a decision in whole or in part;

(3) It is entitled (but not obliged) to remit a decision to ComReg for reconsideration with or without directions as to how that reconsideration is to be conducted; and

(4) Pending determination of the appeal, the Court may stay the operation or implementation of a decision either in part or in its entirety.

7.63 The High Court held that it was clearly inherent in these provisions that the Court should undertake an examination of the substantive merits of ComReg's decision when material factors of that kind are put in issue by the grounds of appeal. It follows that in appropriate appeals, the Court is entitled, both to hear new evidence and to retain its own expertise for the purpose of examining the merits. It is also noteworthy that the Court referred to retaining its own expertise. This is presumably a reference to the facility for the Court to appoint an expert assessor, although it is not clear whether the Court did so in the *Vodafone* case.[71]

7.64 The High Court (Cooke J) summarised the scope of the appeal by paraphrasing the words quoted in an earlier decision of the Court in *Dunne v Minister for Fisheries*[72] from *Wade's*

[69] *European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007* (SI No 271 of 2007).

[70] [2013] IEHC 382.

[71] Cooke J. himself has considerable expertise in European regulatory and competition law matters having served for 12 years on the Court of First Instance of the European Communities.

[72] [1984] IR 230 at 237.

Administrative Law.[73] The Court characterised the scope of the appeal as follows: the appellant is entitled to raise both the question "is it lawful or unlawful?" and the question "is it right or wrong?" in seeking to set aside an appealed decision.[74]

7.65 Having analysed the Irish and UK standards of review for telecommunications appeals, the High Court concluded that the court hearing should allow an appeal against a decision of ComReg if the decision is vitiated by a material error of law. This could include a significant failure to comply with a mandatory requirement of the Regulations or a misinterpretation or misapplication of the Regulations.

7.66 Furthermore, an appeal should be allowed if the decision is vitiated by a serious and significant error or series of errors of the kind described by the Supreme Court in *Orange Limited*. Having regard to the apparent purpose of the appeal in requiring the merits to be taken into account, the Court is also obliged to consider whether the decision is "wrong". To be wrong in that sense, however, the Court must be satisfied that there has been a serious, significant, and material mistake such that the operation or implementation of the decision as it stands would be manifestly unreasonable, disproportionate, or incompatible with the outcome sought to be achieved by the exercise of the regulatory remedies which ComReg is entitled to impose.

7.67 In considering whether a decision of ComReg was "wrong," the High Court drew a distinction in respect of technical and policy decisions by the Regulator in choosing a solution to the problem it was seeking to address. So long as the analysis conducted and the expertise relied upon is free of serious defect and the reasons for choosing the particular solution are adequately and cogently explained, a decision ought not be set aside upon the sole ground that the appellant and its experts contend that a better solution was available or that a different choice should have been made.[75]

7.68 The decision of the High Court in *Vodafone v ComReg* is an example of the willingness on the part of a judge of the Commercial Court to engage with the technical and specialist matters raised on a telecommunications appeal. The Commission considers that this capability of the High Court to review the merits of complex regulatory decisions, using the facilities of specialist lists and court assessors described in more detail below, is a welcome development.

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[73] Wade, *Administrative Law* 5th ed (OUP 1982) at 34.

[74] [2013] IEHC 382, at paragraphs 15-17.

[75] [2013] IEHC 382, at paragraph 32. The High Court (Cooke J) cited the decision of the UK's Competition Appeals Tribunal (CAT) in *T-Mobile (UK) Limited v Office of Communications* [2008] CAT 12, which noted at paragraph 82 that: "… there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single 'right answer' to the dispute. To that extent, the Tribunal may, whilst conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause."

4. Broadcasting

7.69 The *Broadcasting Act 2009* empowers the BAI to award contracts to broadcasters, e.g. authorising broadcast service providers to provide radio or television broadcasting services. Section 51 of the Act entitles the BAI to suspend or terminate a broadcasting contract if the contract was awarded based on false or misleading information, or if the terms of the award of the contract have been breached. There is a right of appeal to the High Court against such a decision of the BAI. The Act provides no guidance as to the scope of review or the reliefs that the High Court can grant and there do not appear to be any written judgments of the High Court on this question to date.

7.70 However, one can assume that reviewing the provision of false or misleading information or compliance with the terms of an award of a licence are tasks for which the High Court is well equipped, being analogous to ordinary contractual disputes. For the appeal to be worthwhile, it must be the case that the High Court is empowered to reverse the BAI's decision to suspend or terminate a contract with the possibility of the Court imposing some conditions of its own. In this regard, the decision in the aviation context of the High Court (Lynch J) in *Balkan Tours v Minister for Communications*[76] (discussed above) may be instructive.

7.71 It is notable that no statutory appeal is provided in respect of the refusal of the BAI to award a contract under Part 6 of the *Broadcasting Act 2009*. This leaves judicial review as the only remedy for the disappointed applicant. The difficulty of challenging such a decision in the broadcasting context was demonstrated in *Scrollside Ltd v Broadcasting Commission of Ireland*[77] where a majority of the Supreme Court, refusing an application for judicial review of a refusal to grant a sound broadcasting contract, stated it would be slow to overturn a decision of a specialist decision maker and the burden of proof was high.

7.72 The absence of an appeal on the merits against a decision by the BAI to refuse to grant a broadcasting contract appears anomalous. Judicial review provides a means of correcting procedural errors but it affords no relief to a party complaining that the contract awards committee of the BAI simply made the wrong decision. For example, a review against error could encompass an enquiry as to whether the factors set out in section 66 of the *Broadcasting Act 2009* in awarding contracts were correctly applied. It is not clear why no appeal mechanism is provided in these circumstances. In principle, the benefits of providing a regulatory appeal, as described in the introduction to this chapter, seem equally relevant to the field of broadcasting as to other regulatory fields under consideration.

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[76] [1988] ILRM 101.

[77] [2007] 1 IR 166.

7.73 Part 5, Chapter 2 of the *Broadcasting Act 2009* empowers the BAI to recommend to the High Court that financial sanctions of up to €250,000 be imposed on broadcasters that fail to comply with the Act or codes made under it. The BAI may also impose such a sanction itself. In the latter case, section 55(5) provides that a broadcaster may appeal to the High Court against a finding made by the BAI and/or a decision to impose a sanction. While there have not been any reserved decisions to date in respect of such appeals,[78] one would expect the Court to engage in a review of the merits including, if necessary, by hearing evidence afresh, given that the imposition of a punitive sanction is involved.

7.74 In the absence of written decisions of the High Court dealing with appeals under the *Broadcasting Act 2009*, it is difficult to assess whether these procedures would work well in practice. However, as discussed above, in cases concerning other regulatory codes, the courts have in general been critical of failures to provide adequate legislative guidance as to the form an appeal should take. Broadcasting appeals could be susceptible to that criticism. It would be desirable for the Oireachtas to specify in greater detail both the form of procedure to be adopted and the nature of the reliefs available in this context.

5. Competition Law

7.75 The *Competition Act 2002* provides two separate routes of appeal to the High Court. Under section 15, any undertaking or association of undertakings concerned, or any other person aggrieved by the making of the particular declaration by the CCPC that in its opinion a specified category of agreements, decisions, or concerted practices are exempt from the general prohibition against such agreements (i.e. a bloc exemption), may appeal to the High Court against the making of such a declaration. Such an appeal must be brought within 28 days.[79] The High Court may confirm, amend or annul the declaration.[80]

7.76 Separately, under section 24 of the 2002 Act, there is a right of appeal against a determination of the CCPC either that a merger may not be put into effect or that it may be put into effect subject to conditions.[81] Such an appeal must be brought within 40 working days after the undertaking has been informed of the determination.[82]

7.77 Any issue of fact or law concerning the determination of the CCPC, whether to allow a merger or acquisition and on what terms, may be the subject of a section 24 appeal. With

[78] In 2011, the BAI imposed a financial sanction of €200,000 under section 54 of the 2009 Act. This was not appealed. See further discussion in Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016) at paragraph 2.04.

[79] Section 15(2) of the *Competition Act 2002*.

[80] Section 15(3) of the *Competition Act 2002*.

[81] There is no right of appeal against a decision to allow a merger to proceed *simpliciter* - such a determination would have to be challenged by way of judicial review.

[82] Section 24(3)(b) of the *Competition Act 2002,* as amended by section 60 of the *Competition and Consumer Protection Act 2014*. Section 24(8) allows the High Court to extend this period if the circumstances so warrant.

respect to an issue of fact, the High Court hearing such an appeal, may not receive evidence and must presume that any findings of fact by the CCPC were correct. However, if the High Court considers that it was unreasonable for the CCPC to make certain findings of fact, it may hear testimony from witnesses.[83]

7.78 On hearing a section 24 appeal, the High Court may:

(1) annul the determination concerned;

(2) confirm the determination concerned;

(3) confirm the determination concerned, subject to such modifications of it as the court determines and specifies in its decision; or

(4) remit the matter to the CCPC with a direction to make a determination taking into account the findings of the High Court, and with any other directions that the High Court considers appropriate.[84]

7.79 The High Court is required, insofar as is practicable, to hear and determine appeals within two months from the date the appeal is initiated. In practice, this time frame is highly unrealistic. The High Court appeal in the case of *Rye Investments Ltd v Competition Authority*[85] took a little under 6 months, which is considerably faster than a typical judicial review application. Commenting on the challenge of achieving the two-month target, the High Court (Cooke J) noted that the CCPC's investigation in that case took five months. The CCPC's determination comprised more than 150 pages and covered five product markets. The appeal papers comprised more than 20 lever arch files and the High Court hearing lasted eight days.[86]

7.80 A decision of the High Court on an appeal under section 24 may be appealed to the Court of Appeal or the Supreme Court only on a point of law.[87] As discussed above, an appeal on a point of law is narrower than a review for error. There is no restriction on the right of a disappointed party to initiate an appeal to the Court of Appeal, although appeals to the Supreme Court are restricted by Article 34.5.3˚ of the Constitution. Appeals to the Court of

[83] Sections 24(4) and 24(5) of the *Competition Act 2002*.

[84] Section 24(7) of the *Competition Act 2002*.

[85] [2009] IEHC 140.

[86] In *Rye*, the appeal to the High Court was lodged on 26 September 2008 and was heard in February 2009, with judgment being given on 19 March 2009. Cooke J. allowed the appeal and his decision was appealed by the Competition Authority to the Supreme Court. The appeal was eventually withdrawn in April 2016, shortly before it was due to be heard (*Competition watchdog drops challenge to Kerry takeover of Breeo*, The Irish Times, 21 April 2016), although the merger had already gone ahead in the wake of the High Court ruling as it was not stayed pending appeal (*Rye Investments Ltd v Competition Authority* [2012] IESC 52).

[87] Section 24(9) of *Competition Act 2002,* as amended by section 60 of the *Competition and Consumer Protection Act 2014*.

Appeal do not automatically prevent the decision of the High Court taking effect but appellants can apply to either court for a stay pending appeal.[88]

7.81 In *Rye Investments Ltd v Competition Authority*,[89] the High Court (Cooke J) analysed the scope and standard of review to be applied under section 24 of the 2002 Act. The Court noted that, while a section 24 appeal was wider in scope than a judicial review as to legality, it was narrower than a section 15 appeal. This was because, under section 15, the factual findings of the CCPC did not enjoy the presumption of correctness provided for in section 24(4). Under section 24, the Court can only re-open material findings of fact and substitute its own findings, having heard evidence in that regard, if it is first satisfied that an error has occurred. The Court must be satisfied, on the basis of the content of the determination and in the light of the evidential material available to the CCPC as of the date of making of the determination, that it was unreasonable for the CCPC to have found or accepted one or more specific facts which are material to the validity of its assessment.

7.82 The High Court further held that the standard of review to be applied was that set down by the Supreme Court in *Orange*,[90] importing as it does a degree of curial deference. He further highlighted the need for consistency in regulatory regimes, stating that:

> "Subject to giving correct effect to the precise terms in which the statutory appeal in each case is expressed, it is obviously desirable as a matter of policy to ensure that the criteria upon which an appeal is based remain consistent with other closely analogous statutory appeals under domestic legislation and also, in the area of competition law, with the Authority's obligation to ensure that its decisions are consistent with Community law where they have a Community dimension."

7.83 Some submissions in response to the Issues Paper supported the retention of the statutory right of appeal to the High Court in competition cases. The scope of review and the court's powers are clearly defined in the *Competition Act 2002*, which assists in a achieving the consistency that the High Court identified as being important in *Rye Investments*. Furthermore, as will be discussed below, competition appeals have benefitted from the provision of specialised resources within the High Court. This, too, has contributed to the satisfactory way in which competition appeals are now processed.

6. The Commercial Court

7.84 In contrast to the situation at the start of the 21st century, when a number of regulatory appeal panels were established, the High Court has developed a number of specialist procedures that better equip it to deal with regulatory appeals. Chief amongst these was

[88] Order 86A, Rule 5(1) of the *Rules of the Superior Courts*.

[89] [2009] IEHC 140.

[90] *Orange Communications Ltd v Director of Telecommunications Regulation* [2000] 4 IR 159.

the addition in 2004 of Order 63A to the Rules of the Superior Court. This provides for a commercial division of the High Court, commonly known as the "Commercial Court". Cases are admitted into this list, typically shortly after the commencement of proceedings, at the discretion of the judge in charge of the commercial list.

7.85 Cases are then actively managed through one or more "directions hearings", at which strict timetables are laid down for the exchange of pleadings, affidavits, discovery, interrogatories, witness statements, and legal submissions. The aim is to ensure that cases are ready for hearing as expeditiously as possible with minimal scope for parties to create delays for tactical advantage. Cases are typically assigned a trial judge in advance of the hearing and are more or less guaranteed to go ahead on their assigned trial date.[91]

7.86 The key criterion for entry is that the proceedings are "commercial proceedings",[92] which most commonly means they relate to a business document, business contract, or business dispute where the value of the claim or counterclaim is not less than €1,000,000.[93] Appeals of decisions of statutory bodies that have some commercial aspect fall within the definition of "commercial proceedings".[94] In principle, the type of appeals considered in this Chapter will often by eligible to be admitted into the commercial list. However, admission is not automatically available as of right, but rather is at the discretion of the list judge. Consequently, at present, some regulatory appeals are likely to be dealt with in the ordinary High Court lists.

7.87 One author has noted, "[t]he Commercial Court has been very successful in achieving its aim of facilitating the efficient and speedy resolution of commercial disputes."[95] In 2011, it boasted an average time of 22 weeks to dispose of proceedings commenced before it.[96] The advent of the Commercial Court has partially addressed a concern that previously existed that challenging regulatory decisions by way of appeal to the High Court would invariably lead to lengthy delays, often of a year or more, before a case would be heard and determined.

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[91] In contrast to the non-jury and chancery lists of the High Court where, typically, the number of matters listed for hearing on a given day is greater than the number of judges assigned to that list creating a risk that one or more cases in the list may have to be adjourned to a later date.

[92] Order 63A, Rule 1 of the *Rules of the Superior Courts*.

[93] Dowling, *The Commercial Court* 2nd Ed (Round Hall 2012) at paragraph 3.45.

[94] Order 63A, Rule 1(g).

[95] Dowling, *The Commercial Court* 2nd Ed (Round Hall 2012) at paragraph 1.20. However, the author also cautions that "appeals from the Commercial Court are not afforded any particular priority. Therefore, whilst a speedy hearing may be guaranteed at first instance, the pressures on the Supreme Court List mean that the process can still be delayed on appeal." This problem has been somewhat alleviated by the establishment, in 2014, of the Court of Appeal, although delays can still arise at appellate stage.

7. The Competition Court

7.88 Following the successful launch of the Commercial Court in 2004, the formula was copied in 2005 with the launch of the Competition Court. This provides for "competition proceedings" to be admitted into the competition list of the High Court and case-managed in a similar fashion to the Commercial Court. "Competition proceedings" include appeals under sections 15 and 24 of the *Competition Act 2002*.[97] The volume of cases in the competition list is lower than in the commercial list and, accordingly, one judge of the High Court is typically assigned to hear competition cases from time to time.

7.89 The Competition Court has been subject to some criticism. In a 2010 article in the *Bar Review*,[98] it was noted that, in four major competition cases since the early 2000s, the Competition Authority (as it then was) opposed the verdict. While the substantive competition law criticisms are beyond the scope of this review, the author also stated that:

> "Not only is significant delay and uncertainty now a feature of the system. The legal costs associated with litigating in that environment are, it is fair to say, truly enormous. The Competition Authority's costs in ILCU alone — reportedly representing two-thirds of the total costs in the case — were reported to be €1.7 million."

7.90 Some of these concerns may be misplaced. The first of the four cases cited by the author were determined before the competition list was established and all four cases were the subject of appeals to the Supreme Court that contributed significantly to the cost and delay. The submissions in response to the Issues Paper supported the retention and use of the Competition Court on the basis that it is vital to ensure that merger appeals are conducted by a judge with sufficient knowledge and experience of competition law.

8. Court-appointed assessors

7.91 The Competition Court rules make specific provision for the appointment by the Court of an independent expert assessor to assist the court in understanding complex competition law issues. The Court may, either of its own motion or on the application of a party, appoint an expert to assist the court in understanding or clarifying a matter, or evidence in relation to a matter, in which they have a particular skill and experience. In such a case, the court will set terms for the payment of the expert's fees by the parties. The expert will attend some or all of the hearing, as necessary and where they provide advice or information to the Court, the parties will be informed and offered the opportunity to make submissions.[99]

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[97] "Competition proceedings" is defined in Order 63B, Rule 1 of the *Rules of the Superior Courts*.

[98] Andrews, "Post Modernisation Judgments of Ireland's Competition Court: A Review" (2010) 15(5) *Bar Review* 99.

[99] Order 63B, Rule 23 of the *Rules of the Superior Courts 1986*.

7.92 Although a discretionary power for the Court to appoint assessors has long existed,[100] a recent rule change has expanded the provisions for appointing assessors in any civil trials.[101] This must have been a conscious effort on the part of the Superior Courts Rules Committee to encourage the greater use of this facility in complex cases where the advice of an expert would assist trial courts to confidently tackle complex disputes. Assessors have been used in competition cases, for example, in *Competition Authority v O'Regan*.[102]

7.93 When appeal panels were in fashion in the early 2000s, the courts were perceived to have two major shortcomings affecting their ability to deal with regulatory appeals. First, they were perceived to lack the specialist expertise needed to authoritatively determine appeals from complex decisions made by specialist regulators. The responses have been to ensure that the same judges are regularly assigned to the Commercial and Competition lists so that they gain experience by regularly dealing with similar disputes and to enhance the scope for courts to use assessors to supplement the expertise.

7.94 Second, courts were perceived to be chronically slow at progressing regulatory appeals to final determination. The responses have been to introduce specialist lists that prioritise commercial and competition proceedings and use regimented case management to shepherd cases to trial expeditiously. The significant reform in 2014 of the regime for onward appeals to the Court of Appeal and Supreme Court has also contributed to the reduction of waiting times where High Court decisions are appealed.

7.95 As matters stand at the time of writing (July 2018), only competition appeals are automatically entitled to be admitted into these lists. While many appeals from other regulated sectors would qualify for admission to the Commercial Court, some, especially in smaller cases, may still have taken the slower route through the as yet unreformed non-jury list of the High Court.

E. Appeal Tribunals

7.96 Australia has developed an "Administrative Appeals Tribunal" with wide-ranging powers to determine appeals from an extensive list of administrative and regulatory agencies. The UK similarly established the Upper Tribunal in 2007 to hear appeals in administrative matters. Separately, and of more relevance for present purposes, in 2002, the UK established the Competition Appeal Tribunal (CAT) as a standing body to hear appeals from decisions of a number of different regulators.

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[100] Section 59 of the *Supreme Court of Judicature Act (Ireland) 1877*. Order 64, Rule 43 of the *Rules of the Superior Courts* also made specific provision for the appointment of assessors in admiralty (shipping) matters.

[101] Order 36, Rule 41 of the *Rules of the Superior Courts 1986*, as amended by the *Rules of the Superior Courts (Conduct of Trials) 2016* (SI No 254 of 2016).

[102] [2004] IEHC 330 (Kearns J).

7.97 The CAT hears appeals from a variety of market regulators similar to those that constitute the subject of the present Chapter, for example, in the fields of competition, communications, gas and electricity, civil aviation, and financial services. Cases before the CAT are heard by panels of three, comprising a chairman (drawn from a group of fifteen High Court judges and three Queen's Counsel) and two ordinary members who are mostly not lawyers but typically experts in the fields within the CAT's remit (there are currently 26 such experts on the CAT's roll).[103] Unusually, in addition to its role as an appeal court for regulatory appeals, CAT is also tasked with hearing judicial reviews of certain regulatory decisions, for example under the UK's *Competition Act 1998* and *Enterprise Act 2002*.[104] Decisions of the CAT may be appealed to the Court of Appeal on a point of law (or, where sanctions are imposed, against the sanction). Appeals on a point of law require the leave of either CAT or the Court of Appeal.

7.98 In some respects, the CAT has faced the same challenges as Irish courts and appeal panels. For example, as some commentators noted:

> "… the various different appeal and review mechanisms created by statute are unnecessarily complicated, and lead to increased costs and delay; and the appropriate standard of scrutiny to be applied by CAT, particularly on a merits appeal, is not entirely clear."[105]

7.99 Completing appeals expeditiously is equally as challenging in the UK as Ireland. CAT's website states that:

> "Cases before the Tribunal often raise complicated issues and may involve a significant number of parties so it may be difficult to know at the outset how long a particular case will last. However the Tribunal does seek to manage the cases tightly and, in general aims, to complete "straightforward" cases in less than nine months."[106]

7.100 In its financial year 2016/2017, CAT issued 32 judgments and received 29 new cases, 27 of which were carried over into the following year.[107]

7.101 Amongst the submissions in response to the Issues Paper, there was some support for exploring the possibility of developing a permanent specialist appeals tribunal along the lines of CAT to hear appeals from some or all of the regulators considered in this chapter.

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[103] See: *www.catribunal.org.uk.*

[104] Lewis and Kennelly, "Judicial Review and the Competition Appeal Tribunal" (paper presented by Blackstone Chambers in association with Liberty "Focus on Public Law and Human Rights," 18 November 2005.

[105] Rose and Richards, "Appeal and Review in the Competition Appeal Tribunal and High Court" (2010) 15(3) JR 201.

[106] *www.catribunal.org.uk*.

[107] Competition Appeal Tribunal *Annual Report and Accounts* 2016/2017 (2017) at 10.

7.102 Several submissions noted that the CAT operates at an equivalent level to the High Court in the UK and therefore removes a potential level of appeal. A parallel can be drawn with IFSAT, discussed above. A determination by the Central Bank can be appealed to IFSAT, whose decision can in turn be appealed to the High Court, with the possibility of a further appeal on a point of law with leave to the Court of Appeal. A further advantage is that standing tribunals such as the CAT allow for the development of expertise. They also create transparency about procedural rules, ensure consistency in rulings, and are administratively efficient.

7.103 However, other parties were not in favour of such a change. One submission argued that, while a single uniform body may appear to have merits, it would not be feasible for a number of reasons. Arguably, such a body would require a standing panel of full time, dedicated, specialist lawyers, economists, financial professionals, and other experts in order to operate effectively. Having such a standing panel would likely be prohibitively expensive. It would also be difficult, if not impossible, to source a sufficient number of these professionals with expertise across all the very diverse regulatory spheres, without conflicts of interest, and who were available to sit permanently on such a panel.

7.104 Interested parties also submitted that a single appeal panel would be likely to struggle to respond to the differing dynamics across a variety of regulatory fields. While a valid concern, there is no reason to believe Ireland could not meet this challenge in a similar fashion to the UK's CAT (for example, through regular, specialised training).

7.105 There was also a concern that trying to achieve consistency across different legislative appeals provisions would be difficult. This is certainly a problem that CAT has faced in the UK,[108] but equally, as this Chapter has highlighted, it is a problem Ireland faces anyway, for which the solution is likely to be legislative drafting that is more consistent.

F. Conclusions and Recommendations

7.106 Whereas the Irish experience of appeal panels to date has been suboptimal, regulators whose decisions are subject to a statutory appeal to the High Court are reasonably satisfied with the effectiveness of that mechanism. There is, therefore, a case to make the facility of the Commercial Court or the Competition Court available for other regulatory appeals as of right. The Commission also considers that there is room for improvement in the simplicity and consistency of appeals to the High Court by standardising the legislative provisions that describe the right of appeal. Litigious parties could, potentially, take advantage of the uncertain scope of appeals against error and the variable degree of deference to be afforded to regulator's decisions on the merits. In such a case, a party minded to engage in regulatory gaming, would have ample scope for argument.

[108] Rose and Richards, "Appeal and Review in the Competition Appeal Tribunal and High Court" (2010) 15(3) JR 201.

1. Standing appeals tribunals

7.107 IFSAT, which hears appeals from decisions of the Central Bank, is in a category of its own. It is more like a tribunal than an appeal panel, although the scope of its work is much narrower than the UK Competition Appeals Tribunal. It appears to have dealt very effectively with its relatively light caseload over the last decade. Two factors arguably justify the restriction of the IFSAT model to the financial services sector only. First, whereas IFSAT hears appeals from a wide variety of Central Bank decisions, most other appeals only concern a narrower range of first instance decisions. Second, while IFSAT's caseload is small (3-4 cases a year), regulatory appeals in other sectors are even rarer (one ever several years).

7.108 Replacing IFSAT with a right of appeal to the High Court would most likely be prohibitively expensive for the type of litigants that have made up the majority of appellants from Central Bank determinations to date. Whereas the High Court is an affordable venue for the parties to merger, telecommunications or utility appeals, many of the parties before IFSAT have more limited means and for them IFSAT is relatively accessible from a costs perspective.

7.109 While it is not clear if concerns about the potential number of layers of appeal has actually materialised, the Commission nonetheless considers that the existing possibility for two further appeals from IFSAT seems unnecessary. The Commission therefore considers that IFSAT be retained in its current form with a right of appeal to the High Court on a point of law only, save in cases where a sanction is imposed where the sanction chosen should be open to review.

7.110 The Commission notes that IFSAT is working well in its current form and that replacing the right of appeal from decisions of the Central Bank to IFSAT with a direct appeal to the High Court would most likely be prohibitively costly for typical appellants.

R 7.01 The Commission recommends that the Irish Financial Services Appeals Tribunal (IFSAT) be retained in its current form.

7.111 It is in the interests of justice that regulatory decisions attain finality in a timely and cost efficient manner and, therefore, the Commission considers that the right of subsequent appeals from IFSAT should be limited.

R 7.02 The Commission recommends that the right of appeal to the High Court from a decision of IFSAT be limited to an appeal on a point of law only, and that the decision of the High Court on such appeal should be final, subject to the High Court giving leave to state a case to the Court of Appeal.

7.112 The Commission considers, however, that the successes of IFSAT are unlikely to be replicated by the establishment of a broader, general panel with responsibility to review the decisions of a number of bodies. Although the CAT provides a successful example of such a body in England, there are obstacles to replicating the CAT in Ireland. The

Commission considers that the difficulties of establishing a standing appeals tribunal would outweigh the potential benefits.

7.113 First, a particular problem, which would undermine the advantage of a specialist appeal tribunal, is that it would not be immune to further appeal. In Ireland, such a tribunal could not have the same standing as the High Court under Article 34 of the Constitution and would, therefore, in theory at least, be amenable to judicial review. In fact, this is also true in the UK and is addressed by the availability of an appeal on a point of law to the Court of Appeal.[109]

7.114 Second, the number of regulatory appeals arising in Ireland each year is very low. The most numerous are appeals from the Central Bank to IFSAT, but even then, there are only about 4 per year. Appeals in gas and electricity and broadcasting matters seem to be rarer still. To date, there has only been one appeal of a merger determination. Compared to CAT's diary of 30+ cases a year, it would be difficult to justify the expense of maintaining a permanent standing tribunal for so few appeals in Ireland. As noted above, such a panel would require the employment of a large number of experts from diverse fields, whose expertise might rarely be called upon. The low volume would also make it difficult for such a tribunal to achieve a greater level of expertise than the High Court (and indeed this seems to be borne out by the experience with appeal panels). Ireland's small population and consequently low numbers of relevant experts would also make it difficult to match the deep pool of impartial talent available amongst the ordinary members of CAT.

R 7.03 The Commission recommends that a standing appeals tribunal to hear appeals from market-affecting decisions of the regulators encompassed by this Report should not be established.

2. Appeals to Court

7.115 The Commission notes that the High Court, with the benefit of specially assigned judges, court-appointed assessors, and "fast track" lists such as the commercial and competition lists, is well equipped to deal with regulatory appeals faster and more cost effectively than appeal panels. Furthermore, direct appeals to the High Court are not susceptible to judicial review so the scope for regulated entities to engage in tactical challenges to an appeal decision is reduced.

R 7.04 The Commission recommends that the provisions concerning appeals to appeal panels from market-affecting decisions of the Commission for Aviation Regulation (CAR) and the Commission for the Regulation of Utilities (CRU) should be repealed, and that legislation should instead be enacted in respect of the regulators encompassed by this

[109] *R (Cart) v Upper Tribunal* [2012] AC 663 - where such an appeal was not available in respect of certain decisions, the Upper Tribunal, which is very similar to CAT but deals with administrative matters, was subject to judicial review.

Report providing for a right of appeal to the High Court from market-affecting decisions of those regulators.

7.116 The Commission notes that the judges and lay members who sit on the UK's CAT benefit from regular specialised training to maintain their expertise in respect of the regulated sectors concerned. Having recommended above that the High Court is the appropriate venue for many regulatory appeals, the Commission considers that this would also be a worthwhile exercise for High Court Judges in Ireland.

R 7.05 The Commission recommends that there should be allocated to the establishment of the High Court Regulatory Appeals List such additional resources as will allow the List to operate efficiently and effectively and that, subject to the powers of the President of the High Court as to assignment of judges, a panel of judges should be assigned to the List.

7.117 When the High Court hears appeals from the Circuit Court, its decision is final, subject to the Court's right to state a case to the Court of Appeal. This ensures that the same first instance decision is not the subject of multiple appeals but it also provides a mechanism for reconciling conflicting High Court decisions resulting from different appeals. It is in the interests of justice that regulatory decisions attain finality in a timely and cost-efficient manner and, therefore, it is desirable that the decision of the High Court on appeal should be final, subject to a facility to state a case to the Court of Appeal for clarification.

R 7.06 The Commission recommends that the determination of the High Court (Regulatory Appeals List) should be final, subject to the High Court giving leave to state a case to the Court of Appeal.

7.118 The Commission notes that appeals from decisions of the CCPC are entitled to be entered into the Competition List of the High Court. Similarly, other regulatory appeals may be considered "commercial proceedings" for the purpose of an application for entry to the Commercial List of the High Court. It would aid the consistent treatment of regulatory appeals and the fast and cost-effective disposal of such cases, if appeals from all of the regulators the subject of this chapter were heard in the same division of the High Court.

R 7.07 The Commission recommends that the *Rules of the Superior Courts 1986* should be amended to provide for the establishment in the High Court of a Regulatory Appeals List to hear market-affecting decisions of the regulators encompassed by this Report, which should include provisions for admission to the list and for its management comparable to those in Order 63A (Commercial Court List) and Order 63B (Competition Court List) of the 1986 Rules.

7.119 Confusion and ambiguity as to the intended scope of a statutory right and the procedures to be adopted during such an appeal have tended to result from differences in the wording of the legislation providing a right of appeal. The Commission considers that legislation providing for a statutory right of appeal should state as clearly as possible the scope of the review to be conducted and the remedies that the appeal body should grant.

R 7.08 The Commission recommends that, bearing in mind that some appeals from market affecting decisions to the High Court must, as a matter of law (including EU law), involve a full re-hearing, whereas other appeals could be restricted to an appeal on a point of law, it should be made clear in the formula of words used whether the Court is entitled or required to review the factual determinations made by the regulator and to substitute its own conclusion for that of the regulator (a full re-hearing) or whether the Court is limited to determining the appeal on the basis of points of law.