

Regulatory Enforcement and Corporate Offences

In October 2018, the Commission published its Report on Regulatory Powers and Corporate Offences (LRC 119-2018) in two volumes: [Volume 1 – Regulatory Powers](#) and [Volume 2: Corporate Offences](#). This built on its 2016 [Issues Paper on Regulatory Enforcement and Corporate Offences \(LRC IP 8-2016\)](#) and formed part of its [4th Programme of Law Reform](#) (Project 1).

The Report makes over 200 recommendations for further reform on regulatory powers and corporate offences, including:

1. A statutory Corporate Crime Agency and a dedicated unit in the Office of the Director of Public Prosecutions should be established, and properly resourced.

The Commission’s Report recommends that a Corporate Crime Agency with power to investigate corporate offences should be established on a statutory basis, and should be a multidisciplinary agency similar to the Criminal Assets Bureau. The Report also recommends that there should be a dedicated Unit in the Office of the Director of Public Prosecutions, which would liaise closely with the proposed Corporate Crime Agency. The Report recommends that both the Agency and Unit should be properly resourced, but that the details of this are matters for Government and the Oireachtas to determine.

2. Economic regulators should have the power to impose significant financial sanctions and to make regulatory enforcement agreements.

The Report recommends that, to be fully effective, financial and economic Regulators should have a “core regulatory toolkit”. This core set of powers should include:

(a) the power to impose Administrative Financial Sanctions (subject to court oversight, to ensure compliance with constitutional requirements), similar to the Central Bank’s current power, with a maximum sanction for companies of €10 million and/or 10% of turnover, and maximum sanction for individuals of €1 million; and

(b) the power to enter into Regulatory Compliance Agreements (regulatory settlements), which should include financial sanctions, consumer redress schemes, and agreement to put in place compliance policies;

Note: the Central Bank already has both these powers (and has used them in, for example, the tracker mortgage case), but other regulators such as the Competition and Consumer Protection Commission do not.

3. Reforms to address egregiously reckless risk-taking

The Report recommends that, to address egregiously reckless risk taking, the Criminal Justice (Theft and Fraud Offences) Act 2001 should be amended to include an explicit reference to recklessness. This would mean, for example, that the offence of false accounting in the 2001 Act would occur not only where the accounts were fabricated “knowingly and intentionally” (the current law) but also where this was done with subjective recklessness, that is, where the defendant consciously disregarded a risk that the victim would be deceived. Because of these recommendations on the 2001 Act, the Report recommends against the enactment of an

offence of “reckless trading”, on the basis that such an offence would run the risk of having a chilling effect on legitimate, entrepreneurial, risk taking.

4. Deferred Prosecution Agreements (DPAs)

DPAs, which involve suspending a corporate prosecution subject to a company complying with strict conditions, should be introduced on a statutory basis, the Report recommends, under the control of the DPP. The Report also recommends that the DPA system should be modelled on the UK DPA system introduced in 2013, which requires court approval for any proposed DPA. The Commission’s Report rejects the US DPA system for the following reasons: it has no statutory basis, it is offered at the discretion of the relevant prosecutor, and it does not need court approval.

5. Due diligence defence for corporate body and senior managers

The Report recommends that, for most corporate offences of a regulatory type, the corporate body and its senior managers should only be convicted if they have not exercised “due diligence”, that is, where they have not set up suitable risk management policies and procedures. This is designed to encourage companies to put in place suitable risk prevention policies and procedures, and is consistent with statutory Corporate Governance Codes from regulators, and the approach in the Central Bank’s recent Behaviour and Culture Report published in July 2018.

6. Legal effect of legal advice and regulatory advice

The Report recommends that, in general, where a corporate body, in advance of taking a certain action, obtains legal advice that the action complies with the law, this should not in itself be a defence to a subsequent criminal prosecution, but that it could be taken into account as a mitigating factor in sentencing. The Report also recommends that, where a regulator clearly indicates that an act complies with the relevant law, this should either have the effect of prohibiting a prosecution or act as a defence, but that this approach should be applied only on a case-by-case setting, such as under competition law, and only where the regulatory advice appears authoritative and reasonable. These recommendations would not involve any change to how the law on these points is currently applied.

7. Regulatory Guidance Office

The Report recommends that a Regulatory Guidance Office should be established, with membership drawn from Government Departments and Regulators, 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. The functions of the Regulatory Guidance Office would be broadly comparable to the former Better Regulation Unit (BRU) in the Office of the Taoiseach.

8. Trials on indictment for most corporate offences should remain in Circuit Criminal Court.

The Report recommends retaining the current system where most corporate trials on indictment are dealt with in the Circuit Criminal Court (some competition offences are dealt with in the Central Criminal Court/High Court). The Report notes that recent experience is that the Circuit Criminal Court has been fully capable of dealing with complex corporate criminal trials.

Draft Legislation in Report

The following draft bills are contained within the report:

1. Corporate Crime Agency Bill.
2. Regulatory Powers Bill.
3. Corporate Criminal Liability Bill.
4. Criminal Justice (Theft and Fraud Offences)(Amendment) Bill.

Information on Implementation