LAW REFORM COMMISSION ISSUES PAPER

REGULATORY ENFORCEMENT AND CORPORATE OFFENCES

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RESPONSES OF UCD BUSINESS LAW AND REGULATION GROUP

GENERAL COMMENTS

Culture, Law and Enforcement

This is a valuable, wide-ranging Issues Paper that seeks to examine the state of the law concerning corporate wrongdoing along two thematic lines of analysis. These two themes relate to (1) the adequacy of the supervisory and enforcement powers of the State's main financial and economic regulators and (2) gaps in the criminal law that do not fully address corporate wrongdoing. This response is confined to the first strand of this inquiry only. Prior to engaging in the substantive and procedural matters raised by the paper, largely relating to beefing up regulatory powers, streamlining enforcement, and boosting compliance, it is hoped to offer some general comments which might assist in shaping the thinking on corporate compliance and enforcement in Ireland.[1]

In particular, it is submitted that the broad-ranging reforms will only have traction where they are accompanied by the maintenance of a cultural context which welcomes greater enforcement in the national economic interest. This culture is most likely to support corporate compliance and enforcement where it is recognized that failures in this regard threaten the State's reputation as an attractive place in which to do business. This is most likely to be facilitated where the enforcement of effective regulatory controls is not perceived as red tape that inhibits risk taking and entrepreneurship but operates to protect legitimate businesses that comply with the law from those that operate to defraud the market, to protect the public from fraud, and to protect the interests of employees, traders and suppliers that need Irish businesses to remain viable. The paragraphs, below, offer a reflection on history of corporate enforcement in

[1] See further: J. McGrath, *Corporate and White Collar Crime in Ireland* (Manchester: Manchester University Press, 2015).

Ireland, which demonstrates that stringent laws (like those discussed in this paper), without broader cultural support for enforcement, will be ineffective. This reflection is valuable because Ireland must learn from the mistakes of the past or be condemned to repeat them.

On paper, at least, it is arguable that Ireland traditionally had a strong system of enforcing corporate obligations. There were, for example, 280 separate and distinct criminal offences in the Companies Acts 1963-1990 which were often enforced by the ordinary policing and prosecutorial bodies that addressed ordinary crime.[2] Nevertheless, despite addressing corporate wrongdoing with its strongest form of censure, the criminal law, the law was rarely enforced. Already in 1958, the Company Law Reform Committee concluded that some Irish companies exhibit "a complete disregard of the requirements of the Companies Acts".[3] It stated that there "is undoubtedly a tendency, especially in the case of private companies, to disregard or to be careless about the obligations which the law imposes as to the making of annual returns or even as to the books of account." It noted that "such breaches were not taken as seriously as they should have been because "in most cases in which prosecutions for offences under the Companies Acts are brought, there is a tendency to regard the offences as being trivial or technical".[4] Forty years after the publication of the Cox Report, the Working Group on Company Law Compliance and Enforcement was established due to the emergence of strong indications of abuses of company law.[5] The Group echoed the Cox Report, albeit in a sterner and firmer tone. It stated that Ireland was "characterised by a culture of non-compliance ... Those who are tempted to make serious breaches of company law have little reason to fear detection or prosecution. As far as enforcement is concerned, the sound of the enforcers' footsteps on the beat is never heard".[6] It concluded that "the great majority of the hundreds of summary offences have never been the subject of any criminal proceedings, and there have only

[2] J. McGrath, "The Prosecution of White-Collar Crime in a Developing Economy: A Case Study of Ireland in the 20th Century" in Judith van Erp *et al*, eds. *Handbook on White-Collar Crime in Europe* (Oxford: Routledge, 2015), 399

[3] *Report of the Company Law Reform Committee* (Dublin: Stationery Office, 1958), p. 53.

[4] *Ibid*. at 20.

[5] *Report of the Working Group on Company Law Compliance and Enforcement* (Dublin: Stationery Office, 1998), para. 1.2.

[6] *Ibid* at para. 2.4-2.5.

been a handful of occasions on which the indictable offences have been prosecuted."[7]

Though corporate wrongdoing has been increasingly criminalised since the 1990s, with approximately 400 offences currently in the Companies Act 2014, for example, and while specialist dedicated regulatory agencies with enhanced powers have been established to address corporate wrongdoing, there has been a continued reluctance to enforce corporate obligations through the criminal courts.[8] Indeed, the Honohan and Regling Reports of 2010 mirror the McDowell Report of 1998 and the Cox Report of 1958, all of which detail widespread non-compliance with the law, the deferential approach of regulators to respectable corporate officers and managers, and the chronic reluctance to prosecute corporate wrongdoers who broke the law.[9] The natural question arises, therefore, as to why white-collar crimes were so rarely prosecuted throughout this period? Why were white-collar crimes not considered threats or risks which the State had to address?

Mary Douglas explains that the ability to perceive risk is culturally contingent.[10] The risks we identify, and do not identify, reveal as much about society at a given time as they do about hazards in our environment. The socio-economic context in Ireland in the decades following independence was one which had idealised rural living, frugality and isolationism, which had resisted foreign investment and industrialisation as an assertion of sovereignty. Understandably, in this context, white-collar criminality did not animate a State that was largely agrarian in orientation and had low levels of corporate activity. Subsequently, when the state advanced policies which were pro-competition, pro-industry, and pro-European integration, increased corporate activity was often associated with purely positive concepts such as wealth creation, employment, and as a way to escape economic depression. Getting tough on white-

[7] *Ibid*. at para. 2.10.
[8] J. McGrath, "Confronting our continuing failure to prosecute respectable wrongdoers" *First Law Criminal Law*, December/January 2010/2011, 112.
[9] P. Honohan, *The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008* (Dublin, Central Bank, 2010) and K. Regling & M. Watson, *A Preliminary Report on the Sources of Ireland's Banking Crisis* (Dublin: Stationery Office, 2010).
[10] M. Douglas, *Risk and Blame: Essays in Cultural Theory* (London: Routledge, 1992). Douglas suggests that social harms must be perceived by individuals to be recognised as such by the community more generally. Harm must be perceived and understood or it will not become politicised in such a way as to mobilise the community to combat it.

collar crimes was clearly not a strategic governance issue when the State was actively courting foreign investment on the basis of its light-touch regulatory regime.[11] Instead, increased employment and increased prosperity were the chief concerns. Indeed, in an examination of opinion polls run by Irish newspapers leading up to general elections in the 1980s and early 1990s, Kilcommins *et al* found that "… the problem of crime was a low priority for voters. The over-riding concern was unemployment, usually followed closely by anxiety about how to get by in difficult economic circumstances."[12] As such, the public was more concerned that jobs were created, not whether and how corporate wrongdoing was being addressed.

Within the financial services sector, a compliance-orientated, principles-based approach was adopted, underpinned by some specific technical rules. This approach 'encourage[d] adherence to the spirit of sound regulatory standards, without being overly bureaucratic'.[13] The rules-based approach, by contrast, was criticised by the CEO of the Financial Regulator as being 'a very legalistic approach' which was costly, inflexible, and slow to react to changed circumstances.[14] In general, 'threats of action by the [Financial Regulator] in the absence of compliance were not typically part of the process. … It was considered much better to resolve regulatory issues through voluntary compliance and discussion'.[15] Summarising this approach, the Chief Executive at the Financial Regulator stated, 'there is a need for letting business do business and letting us interfere as little as possible'.[16]

This way of thinking may also have supported the routine marginalisation of corporate accountability within the legal system. Friedman stated, "a law which goes against the grain, culturally speaking, will be hard to enforce and probably ineffective".[17] The criminalisation of the commercial community, bringing jobs and prosperity, went

[11] J. McGrath, *Corporate and White Collar Crime in Ireland* (Manchester: Manchester University Press, 2015).
[12] S. Kilcommins, I. O'Donnell, E. O'Sullivan & B. Vaughan, *Crime, Punishment and the Search for Order in Ireland* (Dublin: Institute of Public Education, 2004), p. 136.
[13] Financial Regulator, *Strategic Plan 2006* (Dublin: Financial Regulator, 2006), p. 12.
[14] L. O'Reilly "The Future of Financial Regulation: Principles or Rules Issues for the Irish Financial Services Sector" (Finance Dublin Conference, Dublin Castle, 6 April 2005) p. 4-5.
[15] P. Honohan, *The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008* (Dublin, Central Bank, 2010), p. 55.
[16] N. Webb, "Taming the wild west" *Sunday Independent* (13 November 2005), 3.
[17] L.M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russel Sage: 1975), p. 108.

'against the grain' and had little social or political support in practice. Consequently, corporate enforcement was not resourced or supported and Ireland over-looked the prosecution of corporate criminal offences in a way it would never have done with more 'conventional' crime. Ireland exhibited a classic characteristic in the breakdown of the rule of law, identified by Fuller, "a failure of congruence between the rules as announced and their actual administration".[18]

In some ways, the modern context is profoundly different since the banking crisis in 2008. Due to the absence of effective regulatory oversight, corporate and financial wrongdoing in the banking sector severely damaged the economy and required the banks to be rescued. People lost their jobs, their homes were devalued, they became more indebted, their taxes increased, and their economic security was jeopardised. If corporate wrongdoing was not pursued in the past because there was no public demand for 'respectable' company officers to be criminally prosecuted like 'ordinary' criminals, then this had changed. It was understood that corporate wrongdoing could damage the security of the State in ways that are at least as harmful as 'street crime'.[19] People wanted accountability and corporate and financial crime became politicised. Politicians stated that white-collar criminals were guilty of economic treason and should be treated like terrorists. The State pledged to be tough on white-collar crime and has already introduced tougher new laws involving the increased use of strict liability, stronger investigative powers, more stringent accounting rules, increased powers of supervision, greater regulatory accountability, the fragmentation and extension of detention periods, independent verification of legal privilege, confirmation of inroads into the right to silence, and the expanded use of information reporters who must report their suspicions that criminal offences have been committed.[20]

There is also more evidence of a more stringent approach to prosecuting corporate and white-collar crime. Former directors at Anglo Irish Bank have been convicted on indictment for breaking company law and other stands of this investigation are

[18] L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), p. 39.
[19] J. McGrath and D. Doyle, "Attributing Criminal Responsibility for Workplace Fatalities and Deaths in Custody: Corporate Manslaughter in Britain and Ireland" in Kate Fitz-Gibbon and Sandra Walklate, eds. *Homicide, Gender and Responsibility: International Perspectives* (Oxford: Routledge, 2016), 148.
[20] J. McGrath, *Corporate and White Collar Crime in Ireland* (Manchester: Manchester University Press, 2015).

continuing. The Central Bank has more regularly drawn on its administrative sanctions regime to deal with financial services providers and individuals for non-compliance with the law and its policy of avoiding criminal prosecutions is apparently being revisited. There are also some early indications from the judiciary that sentencing rules are being reformulated so that white-collar criminals were more likely to receive custodial offences for serious white-collar crimes. Judges now seem more willing to focus on the potential harm caused by the offence rather than the personal background of the offender, a development which is less likely to privilege corporate wrongdoers.[21]

These measures suggest that there is an increased willingness to invoke a more stringent approach to corporate and financial wrongdoing, though it may be too early to tell if this approach will be sustained. However, a long-term analysis of trends in corporate regulation suggest that regulatory reforms tend to be cyclical such that an economic crash precipitates a greater interest in regulatory intervention.[22] This interest fades as time passes and economic circumstances improve, precipitating another deregulatory or light-touch approach which in turn facilitates corporate irresponsibility and another economic crash. In the current context where Ireland now appears to be exhibiting the early signs of an economic recovery, it is conceivable that the previous philosophy that 'facilitative' or 'light touch' regulation is good for business, may once again dominate political and social thought, so that the funding and other capacities of regulatory agencies are reduced. Accordingly, measures must be taken to ensure that the rationales for effective regulatory enforcement and good governance persist in the general consciousness long after memories of the adverse impacts of economic crimes on the security of the State fade.

The Capacities of Regulators and the Character of Sanctions

The issues paper is correct to emphasise both the behaviour of regulators and the behaviour of firms in considering the causes and effects of the financial crisis of 2008. As regards regulators, in the face of concerns about the efficiency and effectiveness of regulation there is an opportunity to establish a reasonably common template for

[21] "Sentencing White-Collar Criminals: Making the Punishment fit the White-collar Crime" (2012) 22(3) *Irish Criminal Law Journal*, 73.
[22] J. Minkes & L. Minkes, ed.s, *Corporate and White Collar Crime* (London: Sage, 2008), p. 40.

enforcing regulation across all economic and social activities. Given the commonality of issues involving enforcement facing financial and economic regulators (such as those concerned with competition, banking, energy, transport and aspects of communications) and those experienced by other regulators (for example concerned with issues of environmental and consumer protection, occupational health and safety, education and health) there is an opportunity to develop a common template for monitoring and enforcement across regulation of all social and economic activity. Such a general standardization would have considerable advantages in promoting the understanding by both regulators and firms of regulatory powers, enhance opportunities for mutual learning and training across regulatory fields generally, and promote certainty in regulatory monitoring and enforcement.

The issues paper suggests that a core weakness of financial regulation lay in practices of enforcement and possibly, also, structures of enforcement powers which left the Financial Regulator without credible threats to escalate sanctions. This factor reduced the ability of the Financial Regulator to persuade banks to adopt its interpretation of regulatory obligations and to comply with them. It is at least implicit that the weakness lay not in the character of the regulatory rules but rather structure of the relationships for promoting compliance and enforcing the obligations. Thus it may be incorrect to think, as some have suggested, that a core problem of regulation was its dependence on a principles-based regulation (PBR) approach. However, it is necessary to recognise that a principles-based approach requires firms to engage seriously with interpreting and implementing their obligations. It requires also that regulators have strong and credible capacity to learn about what is happening, to interpret actions and outcomes, and to escalate sanctions where breaches of obligations are detected. This is at the core of the enforcement challenges in the issues paper. More might have been made more of the capacity requirements of regulators, if they are to avoid a substantial 'epistemic dependence' on firms, such that firms can determine what is thinkable and doable within any regulatory regime. Establishing a degree of epistemic independence requires regulators to be able to take on staff with a high degree of expertise and commitment.

As to the character of sanctions, the issues paper notes that the UK has a strong policy move away from the use of criminal penalties for regulatory breaches towards the greater use of civil and administrative sanctions. In the UK, as in Ireland, there has

historically been a high dependence on criminal law underpinning regulatory rules involving both firms and individuals (for example in respect of motoring offences). It is important to recognise, at the outset that the deployment of criminal law and strict liability offences is of immense importance in implementing economic and social regulation in Ireland and that any move away from this would require enhanced provision of civil and administrative penalties. The centrality of criminal law to regulatory sanctions demonstrates that the deployment of criminal law for regulatory matters is not inimical to the character of criminal law. Furthermore, many regulatory offences are ones of utmost seriousness because of the risk of harm to physical and/or economic well being. Offences in respect of occupational health and safety legislation, for example, may put large numbers of employees and others in harm's way and similarly with breaches of food legislation. Breaches of financial, competition and consumer legislation may cause significant economic damage and give substantial financial gains to perpetrators. That many regulatory offences involve strict liability is to facilitate enforcement by negating the need to prove intent even though moral blame may frequently attach to their commission. The LRC claims that criminal law should only be deployed for the most serious forms of wrongdoing. It should be recognised that the majority of criminal law in Ireland is regulatory in character and that the matters addressed are of sufficient seriousness to require criminal legislation or some alternative instrumentation, such as administrative sanctions, where the weight of penalties is sufficient to underpin the promotion of compliance and effective regulatory enforcement. Any change should not serve to delegitimate the use of criminal law in respect of significant regulatory matters and could only happen with a significant enhancement in the range and scope of civil and administrative penalties.

ISSUE 1

STANDARDISING REGULATORY POWERS

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

There is a strong case for articulating in legislation a reasonably standardised set of regulatory powers, recognising that it will not be appropriate to give all regulators identical powers. There are two distinct dimensions to what may be referred to as

implementation powers. The first relates to powers to collect information so that regulators may discover the current state of behaviour amongst regulated firms. These essential monitoring powers range between rights to require reports, to audit papers, to visit premises, to inspect activities, to make test purchases and so on. It would not be appropriate to give all regulators identical monitoring powers, but it would be valuable to set down a standard suite of monitoring powers and then draw on these to identify which powers any particular regulator should have in legislation. This would add credibility and legitimacy to monitoring and, as the Issues Paper notes, enable the establishment of precedents around the deployment of such standardised powers. Attention should be paid to all the mechanisms through which breaches are detected, and which include complaints by consumers, employees, unions, and competitors. Protections for whistleblowers thus also forms part of the suite of provisions relating to monitoring.

The second dimension of powers relates to the powers to correct, or apply sanctions to, behaviours which breach regulatory requirements. The case for a reasonable degree of standardization in enforcement is underlined by the analysis of the enforcement pyramid. It should be noted that the take-up of a pyramidal approach to enforcement in Ireland predates the UK Macrory report, the analysis having been developed in Ayres and Braithwaite's seminal *Responsive Regulation.*[23] The case for reasonable standardization has a number of dimensions. First, Ayres and Braithwaite suggest that the stance of regulated firms to compliance is variable. Firms which are oriented towards complying with regulatory requirements are likely to modify their behaviour when addressed at the base of the pyramid with education and advice from regulators. A second category of firms, sometimes referred to as 'amoral calculators' comply only when this path best supports the interests of the firm (often defined financially). The pyramidal approach with such firms requires regulators to be able to escalate to more punitive sanctions such as civil fines, criminal penalties and, at the apex of the pyramid, license revocation. The approach to the deployment of such powers is derived from game theory and advocates that regulators should escalate where there is non-compliance, but should be contingently forgiving and return to lower level sanctions where there is evidence of reasonable attempts to comply. Ayres and Braithwaite

[23] Oxford, OUP 1992.

invoke US President Theodore Roosevelt's foreign policy dictum to explain this strategy 'Speak softly and carry a big stick'. For this approach to enforcement to work with the 'amoral calculators' it is essential that there is a credible capacity to escalate sanctions up the pyramid. A number of threats to this credibility exist. First, there may be such a gap between the stringency of the low level sanctions and the high level sanctions that it is not credible that a regulator will escalate to the high level for a range of common breaches. Such a situation existed in the broadcasting regime in Ireland prior to the reforms introduced in the Broadcasting Act 2009.[24] The main formal sanction was revocation of the broadcasting license and the regulator lacked credibility in advising and warning broadcasters about breaches which significant but not so serious as to warrant putting them out of business. The 2009 Act introduced financial sanctions and permits the Broadcasting Authority of Ireland to escalate for advice and warnings, through the restriction on advertising minutes (which reduces revenue for broadcasters), and financial penalties to licence revocation. [25] A second threat is that though higher level sanctions may be formally available, the practice of the regulator suggests that they will never be used. This is the situation which arose in financial regulation following the introduction of administrative fines in 2003. The powers were not used by the Financial Regulator and so did not support lower level education, advice and warnings. Following the financial crisis of 2008 the Financial Regulator sought to develops its enforcement credibility by issuing a number of large fines and by indicating through public statements that it would deploy the full range of sanctions available to it. Thus it moved from speaking softly (and arguably ineffectively), to demonstrating that such soft speech was supported by a big stick. A third type of firm within the pyramidal approach is the incompetent organisation which could not comply even if it tried to because it lacks the knowledge and/or resources. For this type of organisation the correct enforcement approach does not necessarily involve an escalation through the pyramid, but rather may require the use of high level sanctions such as licence revocation at an early stage, as for example with a restaurant premises where its continued operation may pose a threat to human health and there is no evidence of capacity to comply with applicable health rules.

[24] Broadcasting Act 2009 ss52-56.

[25] C Brown and C Scott, Regulatory Capacity and Networked Governance (2010), UCD Geary Institute Working Paper.

A well understood set of reasonably standardised sanctions would assist regulators in constructing and presenting to regulated firms credible and usable enforcement pyramids. In this respect the patterns of sanctions set down in the Consumer Protection Act 2007 sets down a model for those regimes where licenses are not issued, and so the top level sanction is criminal fines and/or imprisonment. In this regime the sanctions include administrative fines, undertakings of compliance, prohibition orders, and compliance notices on the route up to criminal fines and imprisonment. The enforcement pyramid in this case is not entirely controlled by the regulator since consumers of rights to pursue damages for breaches of the legislative requirements. In other regimes licence revocation may be the top of the pyramid.

Measures to enhance commitments of firms to comply with regulatory requirements and the capacity of regulators to enforce those requirements responsively raise two distinct sets of challenges for constitutional values generally and measures of law reform in particular.[26] The first is that whereas the legal system, including structures for law reform, are oriented generally towards the maintenance and vindication of legal values, frequently through adjudication, regulatory regimes have a wider set of rationales which are instrumental in character, concerned with setting down objectives and maximising the commitment to and achievement of those objectives, frequently through bargaining.[27] The application of regulatory sanctions, both criminal and administrative, represents a significant point of tension between the two world views. The second challenge is that the legal rules provide only part of the enforcement environment.

In respect of criminal law there is a way of thinking within the legal system which tends to privilege offences against person and against property and with a strong orientation towards procedural protections of those accused of crimes and a need to prove intention as a core element of the wrong.[28] This is so notwithstanding the fact that the

[26] K Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' (33) Legal Studies 312

[27] K Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' (33) Legal Studies 312

[28] C Scott, 'Regulatory Crime: History,Functions, Problems, Solutions' in U Kilkelly and S Kilcommins (eds) Regulatory Crime in Ireland (First Law, Dublin 2010)

use of criminal law for regulatory purposes is so extensive that it constitutes much the larger part of the statutory criminal law, and the fact that most regulatory regimes are dependent on criminal legislation in which offences do not involve a mental element. For such regulatory offences criminal law is deployed with the objective of maximising compliance and not the identification and punishment of wrongdoing in a traditional criminal law sense. This instrumental use of criminal law, frequently free from requirements to show intention is fundamental not only to most regulatory regimes, but also to road traffic legislation. The strict liability character of many road traffic offences is accepted as a necessary and legitimate use of criminal law aimed at promoting compliance, for example with parking regulations, rather than identifying and punishing the morally blameworthy motorist. Strict liability makes it easier for regulators to discharge evidential burdens and, more significantly, for criminal law to form a credible part of a pyramid of sanctions which may be escalated. Critically, most regulatory offences are not prosecuted, but rather are subject to actions further down the base of the regulatory pyramid. The provision of due diligence defences further supports the instrumental character of regulatory law by encouraging and rewarding firms which put in place appropriate and effective systems for ensuring compliance, as with self-regulation of compliance with food safety requirements.[29] Moreover, many regulatory offences, even where liability is strict, may involve significant risks of harm to person (for example in the case of occupational health and safety and food safety) or substantial economic harm (for example with financial regulation and consumer protection) not to mention significant harm to other aspects of the good society, such as the environment. The challenge is while the legal system thinks about criminal law mainly or exclusively as involving intention and moral blameworthiness, it is likely to be difficult for regulators both to carry out and to threaten prosecutions as part of the process of responsively promoting compliance. Criminal law thinking is prone to be opposed to convicting and applying large penalties for breach of strict liability offences, and also to by regulatory approaches which apply sanctions differentially, as is anticipated by the enforcement pyramid.

With respect to administrative sanctions, there is a strong appeal within instrumental regulatory thinking to permit regulators to apply financial sanctions directly, without

[29] C Scott, 'Continuity and Change in British Food Law' 53 (6. Nov 1990) The Modern Law Review 785

the intermediation of a court. Such measures can be exercised quickly and provide a real incentive to compliance with education, advice and warnings at a lower point in the enforcement pyramid.[30] The constitutional challenge around giving state agencies such as regulators the powers to apply substantial administrative sanctions has been partially overcome in respect of financial regulation, but by reference to an exception to the normal constitutional principle that the application of substantial penalties should be reserved to a court.[31] This issue is discussed more fully in the response to Issue 2 below.

The central issue is that a process of standardization of regulatory powers over monitoring and sanctioning needs to include credible and usable high level sanctions to ensure the pyramid is not broken and that regulators have credible threats to escalate in order to promote compliance at the lower levels of the pyramid. Both the criminal and administrative sanctions options are very workable, but, whichever is deployed, separately or together, they involve challenges for the ways of thinking within the legal system.

Addressing the second challenge, the legal rules provide only part of the enforcement environment. The arraying of sanctions in enforcement pyramids gives wide discretion to regulators which should be exercised in pursuit of instrumental concerns to maximise compliance. From the perspective of the legal system, this may be interpreted as the uneven or discriminatory application of the law, and challenging traditional ideologies concerning the rule of law. The variable application of sanctions is essential to responsive regulatory enforcement. However, the discretion involved can be structured by reference to general regulatory norms, such as proportionality and transparency.[32] The proactive structuring of regulatory enforcement would benefit

[30] K Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' (33) Legal Studies 312

[31] M McDowell, 'Non-Criminal Penalties and Criminal Sanctions in Irish Regulatory Law' in U Kilkelly and S Kilcommins (eds) Regulatory Crime in Ireland (First Law, Dublin 2010)

[32] Department of the Taoiseach, Regulating Better: A Government White Paper Setting out the Six Principles of Better Regulation (Department of the Taoiseach, Dublin 2004). The six principles of better regulation are Necessity, Transparency, Consistency, Proportionality, Accountability, and Effectiveness. Similar principles have been set down in guidance of the OECD, the European Commission and national governments within the EU and beyond.

from the establishment of cross-departmental unit on better regulation which could foster learning and training about regulatory enforcement and set down guidance either as a soft law instrument or in the form of a statutory code.[33] The case for a better regulation unit is set out more fully in the response to Issue 1(c) below.

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

The approach of the Issues Paper to take an expansive approach to indexing the key monitoring and sanctioning powers would be extremely valuable in enhancing the credibility, effectiveness and legitimacy of regulation in Ireland. In principle this would involve developing a standardised version of all powers currently held by any regulator so that all such powers would be available in principle to draw down for the legislation for any particular regime. For any particular regime it will be important to consider the overall design so that capacity for monitoring is appropriate and effective and that there is a credible enforcement pyramid available to each regulator.

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

Issues of regulatory monitoring and enforcement are not simply about the design and allocation of powers, but are also dependent for their effects and effectiveness on the wider regulatory environment. The approaches taken both in Australia and the UK to developing standardised sanctions (and in the case of Australia also standardised monitoring powers) within general regulatory legislation are valuable, though noting that the take up of the opportunities presented by such legislation is dependent then on the commitment of sponsoring departments to developing new legislation and the availability of parliamentary time. A further factor is the existence in government of a champion for effective regulation such as the Office of Best Practice Regulation in Australia and the Better Regulation Executive and Better Regulation Delivery Office in the UK. The conditions for such standardization may prove rather stronger in Australia where a federal regime gives more time for legislative amendments and where there is

[33] In the UK both soft law (the Enforcement Concordat, 1998) and a statutory code issued under the Legislative and Regulatory Reform Act 2006, most recently in 2014 have been used.

a very strong commitment to general enhancement of regulatory practice. In the UK, shortage of parliamentary time and rather weaker championing of regulatory effectiveness have led to a somewhat slower take up of standardised powers than might have been expected. The conditions in Ireland may be less propitious even than the UK since parliamentary time to amend regulatory legislation is scarce and, since 2011, there has been no cross-government champion for better regulation to promote enhancements to regulatory regimes. The re-establishment of a better regulation unit within government, to champion and monitor general regulatory reforms should be a core recommendation to support wider reforms to regulatory powers.

Core functions of a better regulation unit include keeping both new regulatory rules and regimes under review, monitoring of regulatory rules, encouraging take up of internationally agreed norms relating to such matters as regulatory impact assessment, development of alternatives to public regulation (such as self-regulation and behavioural measures) responsiveness in enforcement and so on that are designed to seek maximal compliance while also ensuring that measures are proportionate and transparent. This is a proactive and prospective aspect of developing a good environment for legitimate and effective regulatory enforcement generally and enables significant learning to occur between regulatory regimes within the jurisdiction, and also from successful practices developed elsewhere, for example through networks established within the OECD and the EU.

There is also considerable value in evaluating regulatory implementation and enforcement *ex post*. In the UK the value for money jurisdiction of the National Audit Office has been deployed to develop practices of regulatory audit which evaluate the effectiveness and efficiency of regulatory implementation and also promote learning between experiences in different regimes.[34] The powers for value for money audit held by the Comptroller and Auditor General in Ireland have been used only sporadically for the review of regulatory implementation.

ISSUE 2

[34] E Humpherson, 'Auditing Regulatory Reform' in D Oliver, T Prosser and R Rawlings (eds) The Regulatory State: Constitutional Implications (Oxford University Press, Oxford 2010)

CIVIL FINANCIAL SANCTIONS

2(a) What do you think are the strengths and weaknesses of civil financial sanctions? Do they help ensure regulatory compliance? Should existing civil financial sanctions under Irish Law be modified in any particular way to better serve the purpose of regulation in the financial services or any other sector.

Civil sanctions are often championed on the basis that they are the best shot at achieving corporate accountability, especially when contrasted against cases where criminal convictions may be difficult to secure.[35] The Issues Paper (2.02) also states that civil financial sanctions can be an "effective means of responding to conduct that involves a breach of legislation but for which criminal prosecution would be too harsh a response." Indeed, civil financial sanctions can also be an effective response where the complexity of the economic evidence and/or the difficulty of the legal concepts are likely to diminish the chances of successful prosecution. This point is well illustrated by competition law where, in practice, criminal prosecutions are initiated only against so-called 'hard core' infringements. [36] As such, administrative orders are welcomed as highly efficient sanctions that hold corporate wrongdoers to high standards of accountability without the need to institute costly legal proceedings.[37]

Nevertheless, without giving hostages to fortune on a matter before the Irish judiciary at present, there is, at the least, a view that they also pose particular constitutional difficulties in Ireland. Article 34.1 requires that '[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.' Article 37.1 provides that '[n]othing in this Constitution shall

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[35] R. Macrory, R. *Regulatory Justice, Making Sanctions Effective* (London: Better Regulation Executive, 2006); I. Lynch Fannon, 'Controlling Risk Taking: whose job is it anyway?' in Shane Kilcommins, and Ursula Kilkelly, eds, *Regulatory Crime in Ireland*, Dublin: First Law, 2010), p. 113.

[36] *Submission to the Law Reform Commission Proposed New Programme of Law Reform* 2012 by Competition Authority and other institution states that criminal offences are not the most effective or efficient means of securing compliance because the "evidentiary requirements, the complex economic analysis involved in many cases and the criminal standard of proof are such that criminal prosecution is neither practical nor appropriate in most cases." Para 7 available http://www.tca.ie/images/uploaded/documents/S-12-007%20-%20Submission%20to%20Law%20Reform%20Commission.pdf

[37] T. Courtney, *The Law of Private Companies* (London: Butterworths, 2002), p. 666.

operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.' Taken cumulatively, these provisions have been interpreted by a former DPP, James Hamilton, to require that 'anything which may be categorised as a power or function in relation to a criminal matter must be exercised by a judge or court, no matter how limited the power or function may be'.[38] Administrative sanctions have survived so far on the assumption that they are civil fines but their status is still uncertain because they share certain characteristics with criminal sanctions.[39] Nevertheless, Hamilton (28) has suggested that there is a 'substantial risk' that these sanctions could be found to be unconstitutional in contexts outside of enforcing revenue law.[40] McDowell suggests that the system of licensing, whereby financial and corporate operators agree to regulatory laws, legitimises administrative sanctions, though they could be unconstitutional if used in other contexts.[41]

The Issues Paper states "Although concerns have been raised in relation to their adequacy, effectiveness and constitutionality, it would appear possible to design a civil sanction regime that is sufficiently strong to deter non-compliance while respecting the constitutional requirements" (26). While correct on its own terms, it is too early to assert that the administrative sanctions regime, as employed by the Central Bank of Ireland, is probably constitutional, based on a long line of precedents defining crime since *Melling*, as much of this jurisprudence was forged in a 'real crime' context and may of limited instruction on administrative corporate regulatory matters.[42] There is, however, jurisprudence from the European Court of Human Rights, which suggests that the more severe a sanction is, the more likely it is to be of a criminal nature. It

[38] Hamilton, "Do we need a system of administrative sanctions in Ireland" in Shane Kilcommins and Ursula Kilkelly, eds, *Regulatory Crime in Ireland* (Dublin, First Law 2010), p. 24.
[39] J. McGrath"The traditional court of crime approach to the definition of a crime" in Shane Kilcommins and Ursula Kilkelly, *Regulatory Crime in Ireland* (Dublin: Lonsdale, 2010), p. 29.
[40] *Ibid* at 28.
[41] M. McDowell, "Non-Criminal Penalties and Criminal Sanctions in Irish Regulatory Law" in Shane Kilcommins & Ursula Kilkelly, *Regulatory Crime in Ireland* (Dublin: First Law, 2010), 129 at 138, 141.
[42] "The traditional court of crime approach to the definition of a crime" in Shane Kilcommins and Ursula Kilkelly, *Regulatory Crime in Ireland* (Dublin: Lonsdale, 2010), 29.

determined that while a relatively low penalty cannot divest a regulatory offence of its criminal character,[43] it also clarified that the imposition of a substantial fines was a strong indicator the penalty was criminal in nature.[44] This is likely to have some resonance for the administrative sanctions regime in the Financial Service Sector, through which penalties up to 10 million euro or 500,000 euro may be imposed on entities and individuals respectively, sanctions which the Central Bank itself notes are more punitive than those available through the criminal courts:

"In light of the limited penalties available pursuant to summary criminal prosecutions, as a matter of general policy, the Financial Regulator has decided to pursue prescribed conventions pursuant to the Administrative Sanctions Procedure instead of bringing a summary prosecution. Only in exceptional circumstances will the Financial Regulator pursue a prescribed contravention via the criminal courts."[45]

The purpose of this section is not to argue that this regime is unconstitutional but rather that its constitutionality is not a foregone conclusion. Crucially, however, should this regime be found unconstitutional, the Central Bank of Ireland, in the absence of any other sanctioning capacity, will be forced to rely on its criminal law powers to enforce its provisions, powers it has never drawn on in its history. As such, its regulatory pyramid will be left without its coercive middle arsenal, perhaps further necessitating the use of negotiated compliance agreements and deferred prosecution agreements, detailed in the next two sections of this submission.

2(b) Do you think that legislation that does not already provide for civil financial sanctions should be amended to include them? Are there any areas of regulation that do not currently have civil financial sanctions where they would be appropriate? Are there circumstances in the regulation of financial services in which civil financial sanctions would not be appropriate?

[43] *Ozturk v. Germany* (1984) 6 EHRR 409.
[44] *Bendenoun v. France* (1994) 18 EHRR 54.
[45] Financial Regulator, *Outline of Administrative Sanctions Procedure* (Dublin: IFSRA, 2005), at para. 2.2.5.

The Issues Paper (2.08) notes that the failure of Irish law to provide for civil financial sanctions for competition law infringements puts Ireland "out of step with its European counterparts" and that this lack of competence has been criticised by the European Commission in its Communication to the European Parliament *Ten Years of Anti-trust Enforcement under Regulation 1/2003 : Achievements and Future Perspectives*"[46] The Communication emphasises the need to enhance enforcement by national competition authorities (NCAs) in three specified areas which include ensuring NCAs have competence to impose effective and proportionate fines.[47] The Communication expresses the staunch view that "[W]hatever sanctions a jurisdiction applies, it is generally recognized that antitrust enforcement cannot be effective if it is not possible to impose deterrent civil/administrative sanctions on undertakings."[48] The Communication draws attention to the absence of deterrent civil/administrative fines in an unnamed Member State.[49] That this is a reference to the Irish situation is clear from the Staff Working Paper "*Enhancing Competition Enforcement by the Member States' Competition Authorities; Institutional and Procedural Issues"* which accompanies the Communication.[50] The Working Paper offers a detailed factual review of national competition authorities' operations and observes that " … in Ireland, the NCA does not have the ability to seek the imposition of civil/administrative fines for the breach of either EU or national competition rules. It can do so solely in the criminal proceedings, involving trial by jury which in practice means that prosecutions are brought only against hard-core cartels."[51] Without any doubt, this state of affairs is perceived by the European Commission to be a significant deficit in the enforcement toolkit of the NCA in Ireland. It is important to emphasise that, unlike many other Members States, the NCA in Ireland comprises the courts and an administrative body (now the Competition and Consumer Protection Commission)

In recent years, attempts to secure fining powers for the NCA in Ireland have not succeeded. For example, the Competition Authority (with other institutions) made

[46] COM (2014) 453

[47] Para 46. The other two areas are, firstly, to further guarantee NCA's independence and the sufficiency of their resources and, secondly, to ensure that the NCAs "have a complete set of effective investigative and decision making powers at their disposal".

[48] Para 35

[49] Para 37

[50] SWD (2014) 230

[51] Para 66

submissions to the Law Reform Commission. A more unconventional attempt entailed the inclusion of provisions (which were reframed over time) in the *Memoranda of Understanding of Specific Economic Policy Conditionality to Benefit from Financial Assistance*.

Recently, the European Commission launched a Public Consultation entitled "*Empowering the National Competition Authorities to be More Effective Enforcers"* in the form of a detailed online questionnaire inviting "citizens and stakeholder to provide feedback on their experience/knowledge of issues that binational competition authorities may face which impact on their ability to effectively enforce the EU competition rules and what action, if any, should be taken in this regard."[52] The information received may be used in an Impact Assessment to assess which measures, if any, should be taken to ensure that NCAs are empowered to be effective enforcers.[53] There is no doubt as to the desire at EU level in achieving enhanced decentralised enforcement powers which would (ideally) include NCA competence to impose civil/administrative fines. As regards the Irish position, there is no doubting the need for effective public enforcement of competition law in Ireland in light of the paucity of civil cases initiated by consumers.[54]

An important question (not raised directly in the Issues Paper) is whether the incapacity of the Irish NCA to impose civil/administrative fines violates Ireland's duty (under Art 35 of Reg. 1/2003) to ensure that EU competition law is applied *effectively*? It can be argued that the EU obligation is not satisfied where a NCA can never impose civil/administrative fines.[55] In *VEBIC*, the CJ agreed with the Commission's observation that the effectiveness of EU competition law would be hindered if the NCA "almost as a matter of course" did not enter an appearance to court cases.[56] The CJ accepted that it is for the NCA to

[52] P 3.emphasis added. Submission date February 2016.
[53] P 3.
[54] Judgments on substantive (as opposed to interim or procedural) matters in cases reported were delivered in only a handful of cases in Ireland from 1999-2012. See further M. C. Lucey, Report on Ireland in *Comparative Private Enforcement & Consumer Redress in EU* project available at http://www.clcpecreu.co.uk/
[55] M.C. Lucey, "The new Irish Competition and Consumer Protection Commission: Is this 'Powerful Watchdog with Real Teeth' Powerful Enough?"(2015) 6 Journal European Competition Law and Practice 185
[56] C-439/08 *VEBIC* [2010] ECR I-2471. Para 61. The duty of effectiveness, according to the CJ, did not require that an appearance be entered to every case.

> "gauge the extent to which their intervention is necessary and useful having regard to the effective application of EU competition law. However, if the national competition authority consistently fails to enter an appearance in such judicial proceedings the effectiveness of arts 101 TFEU and 102 TFEU is jeopardised."[57]

According to Frese the judgment is significant because it cast the obligation on Member States under Art 35 unlike Advocate –General Mengozzi[58] whose similar conclusion was based on the rights of the NCA under other articles in Reg. 1/20003. [59] Frese argues that the Court's readiness to infer from the general language in Art 35 Reg. 1/2003, in effect, opens the door to scrutinising various provisions on national enforcement including the provision for sanctioning competences.[60] The same judgment, according to van Cleynenbreughel, is noteworthy for its imposition of *positive* procedural obligations on Member States' legal order as the EU standard requires national procedural rules to be modified or even transformed.[61] This judgment offers a "particularly striking indication of the infinity inherent in the concept of effectiveness."[62] The CJ's judgment in *Schenker* is also interesting for its dicta on NCAs and the duty of the effectiveness.[63] Here, the issue was whether a NCA is permitted to determine that an infringement of EU competition law occurred without imposing a fine (due to participation in a leniency programme). After the CJ noted that this power was neither expressly provided for nor excluded from Reg. 1/2003, it immediately stated that "[H]owever, in order to ensure that Art 101 TFEU is applied effectively in the general interest (see *VEBIC*) the national competition authorities must proceed by way of exception only not to impose a fine where an undertaking has infringed that provisions…"[64] The sequence of the Court's reasoning suggests that the silence in Reg. 1/2003 (on competence to impose

[57] Para 64
[58] Advocate General Mengozzi Opinion para 92, 94
[59] M. Frese, 'Case Note Case C-439/08 *VEBIC*' (2011) 48 CMLRev 893
[60] 899. Also see N Petit, 'The Judgment of the ECJ in *VEBIC*: Filling a Gap in Regulation 1/2003' (2011) 2 (4) JECLAP 340
[61] P. Van Cleynenenbreugel, 'Judge-Made Standards of National Procedure in the Post-Lisbon Constitutional Framework' (2012) ELRev 90, 94
[62] G. Monti, 'Competences in Competition Law' in L. Azouki (ed) ,*The Question of Competences in the European Union* (OUP, 2014) 112
[63] C-681/11 *Schenker (The Austrian Freight Forwarding Service Cartel* [2013] 5 CMLR 25
[64] Para 46

civil/administrative fines) might be augmented by the duty of effectiveness.[65] CJ judgments support the argument that that the obligation to effectively apply EU competition law might not be fulfilled where a NCA cannot, **in any circumstances**, impose a deterrent civil/administrative fine.

As for the constitutional issues, there has been discussion in the literature .[66] Particular proposals as to overcoming the difficulties in competition law enforcement have been advanced, for example by Mackey [67] and Mc Fadden and FitzGerald. [68] The latter proposed that courts should have competence to impose fines in civil cases brought by the CCPC for non-hardcore violations of the Competition Act and that the fines would be enforced by civil modes (and would not carry the risk of imprisonment for default). This seems to be a sensible and modest proposed change.

However, it is hard to avoid the conclusions of the EU Commission that enforcement is more effective where the administrative body itself has power to impose deterrent civil fines.Thus, the ideal way forward is for the constitutional questions to be addressed either by demonstrating that the allocation of powers to regulatory bodies is constitutional or by seeking amendment to the Constitution. The former seems preferable.

2(c) Do you have any other observations on the appropriateness of civil financial sanctions or the purposes for which they might be used?

Any move towards the greater use of administrative sanctions might usefully be accompanied by a rethinking of regulatory appeals, discussed further below in response to Issue 6.

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[65] M.C. Lucey, "The new Irish Competition and Consumer Protection Commission: Is this 'Powerful Watchdog with Real Teeth' Powerful Enough?"(2015) 6 Journal European Competition Law and Practice 185

[66] M.C. Lucey, 'Application of EC Competition Law- Some Implications of Bunreacht na hEireann' in M. C. Lucey and C. Keville (eds), *Irish Perspectives on EC Law* (Thomsons, 2003)

[67] N Mackey, 'Expanding Civil Penalties Constitutionally: Punishment without Crime? A Reflection on the Constitutional Issues Surrounding the Concept of Civil Crimes' available at http://www.tca.ie/images/uploaded/documents/2006-09-28%20Competition%20Press%20Conferance.pdf ;

[68] G. FizGerald and D. McFadden "Filling a Gap in Irish Competition Law Enforcement:The Need fro Civil Fines Sanaction" June 2011 available on www.ccpc.ie

ISSUE THREE

NEGOTIATED COMPLIANCE AGREEMENTS

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

The Issues Paper (3.04) describes in general terms the procedure under Section 14B of the Competition Act 2002. Essentially, the amendment to Act allows the Competition and Consumer Protection Commission (CCPC) to apply for an Order from the High Court that embodies the terms of a settlement type agreement concluded between the CCPC and the undertakings (usually businesses).

However, the Paper does not spell out the multiple stages in the process and a fuller knowledge of the process is needed in order to properly assess its usefulness and efficacy. Firstly, an agreement must be reached with the undertaking(s) under investigation to either take or refrain from taking specified conduct in return for the CCPC agreeing not to initiate court proceedings. Then, the CCPC may apply for a High Court Order containing the terms of the agreement. Notably, the Court may make the Order only if it is satisfied that several prescribed steps have been taken. These detailed requirements include: the undertaking having obtained prior legal advice and the CCPC, at least 14 days before making the application, publishing

i) the terms of the agreement on the CCPC's website and
ii) publishing (in at least two daily newspapers) a notice detailing its intention to make the application on a specified date in relation to an agreement published on its website.

Moreover, the Act stipulates that an Order cannot have effect until 45 days after it is made or, until the final determination is made if an application is made by a third party to vary or annul the Order. The variation or annulment Order can be made if the Court decides that the original Order would either i) effect a breach of contract between the undertaking and the applicant third party or ii) render a term in such

contract with the applicant incapable of performance. If the CCPC wishes to annul or vary the second Order, it may make an application to the Court only if

a) the other party (i.e. other than the applicant) consents;

b) the original Order contains a material error;

c) there has been material change in circumstance that justified varying the order and

d) the Court is satisfied in the interest of justice that the order be varied/annulled.

An Order may be made for a maximum of seven years subject to an extension of three years being granted to the CCPC. The efficacy in practice and effectiveness of whole process has been questioned on the basis the effort and the lengthy time line it entails.[69]

A interesting development occurred recently whch casts doubt on the usefulness of the s 14B procedure in practice. In September 2015 the CCPC reached an agreement with booking.com which the Press Release described as five year commitments. Notably, s.14B of Competition Act 2002 was not cited in either the Press Release or, more significantly, in the published terms of the arrangement. This suggests that the S.14B procedure was not deployed and if so raises a question as to why not. The likely explanation is that the CCPC's lack of competence to impose fines reduces significantly the incentive for undertakings to engage in the demanding S.14 B process. In other words, negotiated compliance agreements operate best when the regulator has a credible basis for negotiating (eg can promise a reduced fine in exchange for compliance)

3(b) For which offence or regulatory requirements would settlement agreements be most appropriate?

ISSUE 4 DEFERRED PROSECUTION AGREEMENTS

[69] M.C. Lucey "The new Irish Competition and Consumer Protection Commission: Is this 'Powerful Watchdog with Real Teeth' Powerful Enough?"(2015) 6 Journal European Competition Law and Practice 185

4(a) Do you think that deferred prosecution agreements are appropriate in the context of corporate criminal liability in Ireland? Would either of the models adopted in the United States or the United Kingdom be appropriate models to follow? Would Irish law require any significant modifications or limitations?

In seeking advice on the useful deployment of deferred prosecution agreements (DPAs) within the regulatory pyramid, this part of the issues paper seems concerned to boost enforcement capacities which fall short of pursuing criminal prosecutions and convictions. Nevertheless, Braithwaite posits that this approach works best when regulators are 'benign big guns' who 'speak softly but carry big sticks' (and a variety of lesser sticks).[70] This means that regulators need to possess very severe sanctions which they are often, but not always, disinclined to use. They must also possess a variety of 'smaller sticks' which are politically possible to use because they address wrongdoing proportionately. The idea is that most regulatory activity is concentrated in promoting compliance and the more severe the sanction, the less likely it is to be employed. Crucially, however, enforcers must be willing to invoke these sanctions when necessary and 'fire the big gun'. This is especially important in cases they know they will win, thereby appearing invincible. It is thought that the willingness to criminally prosecute gives regulatory agencies credibility and makes the use of lesser sanctions and compliance-orientated strategies possible.

Hawkins, for example, notes that the compliance-orientated approach only really works when the sanctioning approach sits in the background as a threat. He states: '… it is the device that makes all other law enforcement possible by granting credibility to more private and informal practices and thereby, in the great majority of cases, foreclosing the possibility of costly prosecution and trial.'[71] The idea is ultimately to make corporate actors realise that compliance is in their interests because they avoid the regulator's 'stick'. As stated by Ayres and Braithwaite (1992: 50), the goal is to make

[70] J. Braithwaite, "Convergence in Models of Regulatory Strategy" (1990-1991) 59 Current Issues Crim. Just. 59

[71] K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (New York: Oxford University Press, 2002), p. 13.

corporate actors internalise governance norms because '[e]ffective regulation is about finesse in manipulating the salience of sanctions and the attribution of responsibility so that regulatory goals are maximally internalized, and so that deterrence and incapacitation works when internalization fails.'[72]

The proposals raised on DPAs in the Issues Paper relate to beefing up strategies within the 'coercive middle' of the enforcement pyramid. They may be considered effective and efficient ways of reforming corporate culture and deterring wrongdoing, without resorting to criminal punishment. In return for an agreement that the corporation will not be prosecuted, the corporation is often required to make an admission of liability, pay a fine, and reform its internal operating procedures to create a culture of compliance, perhaps overseen by a corporate monitor. If the programme of reform is completed and no further breaches are detected, the prosecution is withdrawn. However, if another breach is detected, the prosecution is commenced and the admission of liability is used as a form of 'confession' in the prosecution to help secure a conviction. It is a mechanism that is considered mutually beneficial for both the State and the offender. Prosecutors can champion their 'tough on crime' credentials, announcing the fine they have imposed, and respondents avoid the potential criminal conviction and its attendant adverse consequences.

In the US, where there is longer history of these mechanisms operating, they are considered valuable but flawed mechanisms for securing accountability. Garett, in a recent extended empirical analysis of every recorded DPA in the USA at the time of writing, notes that they three quarters of DPAs do not result in the installation of a monitor to oversee compliance, resulting in self-regulation and self-enforcement of the compliance order.[73] Unsurprisingly, perhaps, prosecutions for breaching the DPA are almost non-existent. The sums of money surrendered in a DPA can also be substantial, sometimes over a billion dollars, so there is a monetary incentive for the State to settle

[72] I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992), p. 50.
[73] B, Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Cambridge: Harvard University Press, 2014).

rather than prosecute wrongdoing. Moreover, once the corporation agrees to the DPA, there is, as Garrett has noted, very rarely any recourse to prosecuting the individual executives that run the corporation. He notes: "In about two-thirds of the cases involving deferred prosecution or non-prosecution agreements and public corporations, the company was punished but no employees were prosecuted." It is possible that this produces a bizarre set of incentives whereby the State is paid not to prosecute crimes orchestrated by managers who are incentivised to spend shareholder's money to enter DPAs and avoid liability. The limited exercise of judicial scrutiny in the USA in relation to DPAs has compounded this problem. Accordingly, the recommendation in the Issues Paper that it would follow a model closer to that employed in the UK, requiring judicial oversight in concluding DPAs, brings a welcome transparency in their administration.

From an Irish perspective, considering the rationales of the responsive regulatory model, detailed above, the DPA may be welcomed as a necessary mid-level stick which addresses wrongdoing in cases where full criminal enforcement may be considered undesirable. As such they should be considered a useful and effective method of tooling up the 'coercive middle' of the enforcement pyramid, because they stop short of seeking convictions for corporate and white collar criminality, fitting within the 'prosecution as a last resort' strategy. Nevertheless, it must also be remembered that compliance orientated approaches and moderately sanctioning approaches really only work well where prosecutors have a big gun to fire, winning cases and appearing invincible. Indeed, if there is a lesson to be learned from the history of corporate enforcement in Ireland, it is that there has long since been an inability, if not an unwillingness, to escalate up the enforcement pyramid to criminally prosecute offenders and that this has undermined the effectiveness and credibility of corporate enforcement in the State. Accordingly, mechanisms must be put in place to ensure that appropriate escalation mechanisms are put in place to ensure that should the DPA be met with non-compliance, it will be met with certain escalation in the form of a successful prosecution and conviction.

Accordingly, while DPAs are to be welcomed in this jurisdiction, the model proposed in this Issues Paper appears to suggest that "the process does not usually involve an admission of liability". In US experience, where an admission of liability is a part of the deferral agreement in accordance with section 713 of the US Dept of Justice Criminal Resource Manual (1997), such admissions are not always required or supplied. However, this arguably does not fit within the best understanding of an effective responsive regulatory model because the absence of a confession will reduce the inevitability of criminal conviction should a breach of the DPA occur, reducing the apparent invincibility of the enforcer, undermining compliance orientated approaches, and thereby diminishing the potential for the internalisation of good governance norms. Accordingly, there is good reason to consider that an admission of liability may be considered an essential condition of the DPA, should such mechanisms be adopted in Ireland. This must, however, be balanced against the consideration that wrongdoers may be less likely to enter into DPAs where they are required to admit liability, particularly where it would leave them open to civil suits from private parties.

4(b) For which crimes do you think DPAs would be appropriate? If they were to apply to both summary offences and indictable offences, do you think it would be appropriate for a regulator to negotiate a DPA, or should this be reserved exclusively to the DPP?

Tracing the evolution of DPAs in the USA, Griffin notes that DPA seem to have evolved to address more serious criminal wrongdoing since they were first introduced.[74] She notes, "DPAs developed as a mechanism for resolving relatively minor cases without expending significant prosecutorial and judicial resources. They imposed a sanction less formal than probation on offenders who might benefit from supervision but did not merit prosecution. In current practice, by contrast, DPAs are used to settle significant cases of widespread harm, without judicial oversight of the terms of the agreements."[75] While providing the descriptive evolution of DPAs, the normative question as to which

[74] L.K. Griffin, "Compelled cooperation and the new corporate criminal procedure." *NYUL Rev.* 82 (2007): 311.
[75] *Ibid* at 329.

crimes DPAs would best address may again be answered by reference to the best understanding of responsive regulation.

The regulatory pyramid requires that both compliance and sanctioning approaches are necessary for effective enforcement because corporate actors are motivated by a variety of objectives.[76] Sometimes they want to obey the law because it is the right thing to do or because they identify as law-abiding persons. Other times, they are willing to break the law if it maximises their profits. Analysing this through the lens of Holmes' 'good and bad' man, the sanctioning model is necessary because it speaks to the 'bad man' who wants to break the law.[77] It deters rational corporate actors who want to avoid sanctions and incapacitates irrational actors (through imprisonment, for example) who refuse to obey the law. The compliance-orientated model, by contrast, is orientated to guide the behaviour of the 'good man' who wants to obey the law. If he is always punished by the sanctioning model, it might undermine his good will to comply with the law. It could, for example, make him hostile to legal regulation and make him want to challenge it in court. This is undesirable for under-resourced regulators who wish to avoid costly legal proceedings. For these reasons, both compliance and sanctioning models of enforcement are important and compliance-orientated approaches are attempted first.

Accordingly, it may be be the case that it should be the character of the regulatees, not whether the crime is serious or non-serious, summary or indictable, that determines whether a DPA is most appropriate response in the circumstances. More specifically, the DPA may best address wrongdoers which exhibit 'good man' characteristics (unintentional wrongdoing, willingness to obey the law, and the capacity for rehabilitation, etc) but criminal sanctions may best suit wrongdoers which exhibit 'bad man' characteristics, where rehabilitation is less possible. Given that the DPA is often accompanied by conditions requiring business reforms, restructuring of operations, the completion of ethics training for staff, and the installation of monitors for periods of

[76] I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992), p. 19.
[77] O.W. Holmes, "The Path of the Law" 110 (1996-1997) Harv. L. Rev 991.

years to oversee this change, it seems most appropriate in cases where the company is a suitable candidate for rehabilitation than for those of a more incorrigible nature. The difficulty with this approach, however, is that it may require regulators and prosecutors to restyle companies, and their internal lines of operations and accountability, when they may lack expertise in matters of corporate governance, though staff within regulatory agencies may at least have the necessary specialised knowledge to fashion appropriate regulatory goals and processes which prosecutors, by virtue of the more adversarial nature of their activities, may not.[78]

4(c) What conditions or limitations do you think should be imposed on the terms of DPAs?

In the USA, where there is a longer history of DPAs, it became more common over time for prosecutors to require companies to waive attorney client privilege , to install corporate monitors to oversee the implementation of internal corporate reforms, and to demand changes in the business practices and operations.[79] This has precipitated some criticism that "negotiation and implementation of these provisions allows the government to exercise a measure of control over personnel and business decisions",[80] allowing prosecutors to indulge in "corporate-wide behaviour modification"[81]. Notwithstanding concerns about the the lack of prosecutorial expertise in matters of corporate governance, it is the practice of requiring companies to waive privilege that many find most worrying. The failure to waive privilege may result in a company being found uncooperative and therefore a more suitable candidate for prosecution. If however, the privilege is waived, it may impede the ability of corporate counsel to question employees and conduct internal investigations when these matters are not confidential.[82] Griffin observes that forcing companies to waive their right to assert legal

[78] J.R. O'Sullivan, "The federal criminal" code" is a disgrace: obstruction statutes as case study." *The Journal of Criminal Law and Criminology* (96) 2 (2006): 643.
[79] L.D. Finder and R.D. McConnell. "Devolution of Authority: The Department of Justice's Corporate Charging Policies" *Louis ULJ* 51 (2006): 1; B, Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Cambridge: Harvard University Press, 2014).
[80] L.K. Griffin, "Compelled cooperation and the new corporate criminal procedure." *NYUL Rev.* 82 (2007): 112.
[81] J.S. Baker, "Reforming Corporations through Threats of Federal Prosecution." *Cornell L. Rev.* 89 (2003): 310.
[82] L.K. Griffin, "Compelled cooperation and the new corporate criminal procedure." *NYUL Rev.* 82 (2007): 112.

privilege is "fundamentally at odds with the purpose of the privilege, which is to allow clients to receive the most competent legal advice from fully informed counsel, and to encourage full and frank communication with counsel".[83] Though commenting in light of US law, these observations might well be borne in mind in light of the irish constitutional right to silence, access to a lawyer, and due process generally.

ISSUE 5 COORDINATION OF REGULATORS

There is a strong case for promoting coordination between regulators in Ireland, not simply through designation of lead agencies, either through legislation or through agreement between agencies, but also to ensure cooperation to permit sharing of information and of expertise and mutual learning about effective approaches to such issues as monitoring and enforcement. Such coordination can be achieved through a mixture of legislative provision, agreement, the further development of regulatory networks both nationally and at supranational level and some rationalization of agency structures.

ISSUE 6 APPEALS

The Issues Paper sets out very well the challenges around regulatory appeals. A first point to make is that the need for a system of appeals is tightly linked to the powers held by regulatory bodies. The review of enforcement powers, and in particular any extension of enforcement powers held by regulatory bodies directly, is likely to be accompanied by a concern to ensure an effective and reliable system of appeals. The current somewhat diverse systems of statutory appeals to tribunals or the High Court and, in the absence of rights of statutory appeal, judicial review is characterised largely by a deference to the expertise of regulatory bodies. There is strong appeal to developing more expert capacity through the establishment of one or more expert tribunals, which might include not only legal expertise, but also economic and regulatory expertise. However, any move to more specialised and expert appeals bodies is likely to be accompanied by a move towards less deference and away from a

[83] *Ibid* at 348.

procedural to a more merits-based orientation in appeals. Such a move risks weakening regulatory capacity and slowing down regulatory decision making. Such a trend should be seen as affecting the capacity for escalation up the regulatory pyramid to the extent that it increases uncertainty around such matters as the imposition of administrative sanctions or the issuing or revocation of licenses. On the other hand, the ability to demonstrate a robust system of appeals is a key source of legitimacy for regulatory decision making and addresses anxieties about non-majoritarian decision making, somewhat removed from elected government, as occurs in regulatory agencies. Overall, the system of administrative appeals in Australia, extending well beyond regulation to, in principle, all administrative decision making, has boosted the legitimacy of administrative actions in Australia, and managed to develop key elements for efficiency both of expertise and speed.