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**AN BILLE FÁN OIFIG UM IONCHÚISEAMH FIOSCACH, 2015**  
**OFFICE OF FISCAL PROSECUTION BILL 2015**

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**EXPLANATORY MEMORANDUM**

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**Introduction:**

In 1985 *the Committee of Inquiry into the Penal System* (the Whitaker Committee) estimated that the losses incurred through white-collar crime in 1984 were more than ten times the value of all stolen property recorded by the Gardaí.

The total value of property stolen in burglaries, larcenies and robberies in 2002 was €97 million. In the same year, seven times as much money was collected as a result of investigations into just three waves of illegal activity involving some of Ireland's most influential citizens the DIRT and bogus non-resident account investigation (over €600 million); unauthorised offshore investments sold by National Irish Bank, €43 million; and the Ansbacher deposits, €21 million<sup>1</sup>.

The previous Director of Public Prosecutions, James Hamilton, has argued for the increased use of administrative sanctions<sup>2</sup>. Moreover, the current level of criminal penalties, particularly fines, do not adequately reflect the benefit to the wrongdoer, and therefore do not adequately deter. Finally, he recalled that running complex regulatory issues before lay juries is a difficult exercise<sup>3</sup>.

Professor Irene Lynch Fannon makes a similar point<sup>4</sup>. She suggests that burden of proof in criminal cases makes it difficult to obtain prosecutions. Secondly, if criminal prosecutions are pursued, it will inevitably mean more litigation given that the individuals involved will have the resources to test every legal argument<sup>5</sup>. There would also be an increased number of constitutional challenges. Finally, she notes that there does not seem to be any great enthusiasm for incarceration as a means of dealing with white collar criminals<sup>6</sup>. She goes on to suggest that the possibility of imposing a more effective civil sanction which meets and regulates the behaviour at stake, instead of worrying about a less than effective criminal sanction following an expensive criminal trial is compelling<sup>7</sup>.

<sup>1</sup>S Kilcommins et al, *Crime, Punishment and the Search for Order in Ireland* Dublin, IPA, 2004, at p. 131.

<sup>3</sup>*Ibid* at 21.

<sup>4</sup>I Lynch Fannon, 'Controlling Risk Taking: whose job is it anyway?' in Kilcommins and Kilkelly, eds, *Regulatory Crime in Ireland*, Dublin: First Law, 2010, 113-127

<sup>5</sup>*Ibid* at 115.

<sup>6</sup>*Ibid* at 116.

<sup>7</sup>*Ibid* at 127.

Any civil sanction regime must comply with Article 38 of the Constitution, which provides:

1. No person shall be tried on any criminal charge save in due course of law
2. Minor offences may be tried by courts of summary jurisdiction.
3. 1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.
- ... .
5. Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.

In *Melling v. O Mathghamhna*<sup>8</sup> the Supreme Court held that the imposition of a penalty in the form of a fine for the smuggling of butter amounted to a criminal charge for the purposes of Article 38.1 of the Constitution. In the judgment of Kingsmill Moore J., the presence of the following factors were held to be indicative of a criminal charge<sup>9</sup>:

- (i) They are offences against the community at large and not against an individual. Blackstone defines a crime as “a violation of the public rights and duties due to the whole community, considered as a community”: 4 Bl. Comm. 5.
- (ii) The sanction is punitive, and not merely a matter of fiscal reparation, for the penalty is £100 or three times the duty-paid value of the goods; and failure to pay, even where the offender has not the means, involves imprisonment.
- (iii) They require *mens rea* for the act must be done “knowingly” and “with intent to evade the prohibition or restriction”... .”

Following the High Court judgment in the case of *McCann*<sup>10</sup> in 2009, the Enforcement of Court Orders (Amendment) Act 2009 inserted a series of amendments designed to protect debtors from imprisonment in cases where they could not pay, as opposed to those where they would but pay.

In its National Integrity Systems Ireland Country Study Addendum of 2012, Transparency International Ireland found: “The financial crisis has demonstrated a clear link between the economic welfare of the State and the need to enforce well designed laws and regulations.” It pointed out that there have not been any successful prosecutions to date for market manipulation or insider trading.”

“Full analysis of trends is impeded by an absence of clear and consolidated statistics on investigations or prosecutions for corruption-related offences by law enforcement agencies and the various regulatory bodies. For example, the ODCE’s statistics on convictions under the Companies Acts are at odds with those supplied by the Central Statistics Office, which takes its data mostly from the Garda Síochána record management,” it found.

<sup>8</sup>[1962] IR 1

<sup>9</sup>[1962] IR 1 at 25

<sup>10</sup>*McCann v Monaghan District Court & Ors* [2009] 4 IR 200

The report recorded that the criminal enforcement activities of the Office of the Director of Corporate Enforcement (ODCE) declined in recent years. This is largely due to the fact that most of its resources over this period were spent investigating Anglo Irish Bank.”

Recent statistics suggest that little has changed during the lifetime of this Dáil.

	2011	2012	2013
New Cases Brought Before the High Court by CAB	6	15	8
Office of Corporate Enforcement referrals to other bodies *	n/a	105	60
Theft and related offenses (as reported by Gardaí/CSO)	76,975	76,405	n/a
Fraud, deception and related offenses (as reported by Gardaí/CSO)	5,370	5,792	n/a

In 2012 the Office of Corporate Enforcement (Central Bank) referred 105 cases to the Gardaí. In that same year just 15 new Proceeds of Crime Legislation cases were brought before the High Court by the Criminal Assets Bureau (none of them were reported to relate to what might be considered White Collar Crime). Meanwhile during the same 12 months 76,405 theft offences were recorded by the Gardaí relating to everything from shoplifting to car theft. The recorded fraud and related offenses for that year was just 5,792.

The following year, 2013, the Office of Corporate Enforcement (Central Bank) referrals to the Gardaí/CAB fell to 60 and the number of new cases brought before the High Court by CAB fell to just 8 (13.3% of the cases reported).

According to the 2013 CAB Report, the significant drop in new cases reflects on the nature of the cases brought by the Bureau and the underlying complexity relating to the types of assets targeted in 2013.”

The Bill sets out to change the law in the following way:

*Section 1* provides for the short title of the Bill and its commencement.

*Section 2* defines terms used in the Bill.

*Section 3* provides for “relevant offences” for the purposes of this Bill. Relevant offences means an arrestable offence as specified in the Schedule to the Bill. An arrestable offence is an offence punishable by imprisonment for a period of 5 years or more. Aiding, abetting, counselling, procuring, conspiracy and incitement of these offences are also included in the definition. The offences relate to banking, investment of funds and other financial activities, company law, money laundering and financing terrorism, theft and fraud, bribery and corruption, competition and consumer protection, and crime relating to the raising and collection of taxes and duties.

*Section 4* provides that persons convicted, whether on indictment (i.e. in the Circuit Court) or summarily (i.e. in the District Court) shall receive a sentence of imprisonment unless the Court considers there are exceptional and specific circumstances relating to the commission of the offence or an early guilty or co-operation in the investigation of the offence to require otherwise.

*Section 5* provides for an Establishment day when the Office of Fiscal Prosecution, headed by the Director of Fiscal Prosecution, will be established. The Bill also provides for the establishment of a European Public Prosecutor, an independent Union body with the authority to investigate and prosecute EU-fraud and other crimes affecting the Union's financial interests. Its investigations will in principle be carried out by European Delegated Prosecutors located in each Member State and in Ireland these functions will be carried out by the Director of Fiscal Prosecution.

*Section 6* provides for an independent appointment process for the Director of Fiscal Prosecution similar to that which currently exists for the Director of Public Prosecutions and the qualifications required to be appointed are similar to those for appointment to the Superior Courts.

*Section 7* provides that the Director may perform all the functions capable of being performed in relation to criminal matters in respect of relevant offences described in Section 3 by the Director of Public Prosecutions and any such prosecution may be carried out in conjunction either with an Garda Síochána or with any other person who is, in the opinion of the Director, a proper person to be concerned in it.

*Section 8* provides for a notice of transfer of a prosecution to the Director.

*Section 9* sets out the objectives of the Office of Fiscal Prosecutions.

*Section 10* provides that it shall be an offence to assault an officer.

*Section 11* sets out the relevant offences may be tried in the Special Criminal Court where the circumstances required by Article 38.3.1° of the Constitution are met.

*Section 12* provides that the Director shall report and provided information to the Minister for Justice, in a similar manner to that currently carried out by the DPP.

*Section 13* provides that the expenses of the office shall be met by the Exchequer.

*Section 14* provides that certain information be provided to juries.

*Section 15* provides that certain documents shall be admissible in evidence in any civil enforcement proceedings.

*Section 16* provides that statements contained in certain documents shall be admissible in evidence.

*Section 17* provides that expert evidence shall be admissible in evidence in any civil enforcement proceedings.

*Section 18* provides for a civil enforcement procedure where there is suspected non-compliance with statutory duties. No new legal

obligations are created. The enforcement of existing legal obligations is made more expeditious. Upon completion of civil proceedings a person who has failed to comply with a statutory duty may be ordered to pay a sum to third parties affected by the non-compliance or to otherwise remedy the non-compliance. The standard of proof is the civil standard of 'the balance of probabilities' rather than the criminal standard of 'beyond reasonable doubt', with all of the Constitutional safeguards that a criminal prosecution entails. In order to comply with Constitutional requirements, as elaborated in *Melling*, the Court may make Orders providing for remedies and/or restitution but not punishment or penalties.

*Section 19* provides that a person may be made liable for the debts of a company upon the application of the Director in certain circumstances and the Court in making a determination on the application is required to look at the person's behaviour and the extent to which it contributed to the company being unable to pay its debts. Again, the purpose of this section is to provide for remedies and/or restitution but not punishment or penalties.

*Section 20* provides that a person, having been tried with a relevant offence, may not subsequently be subjected to civil enforcement proceedings.

*Section 21* provides that rights of action by third parties are not affected.

*Section 22* provides that members of the Garda Síochána, officers of the Revenue Commissioners and officers under enactments regulating banking and financial services, insurance services and stock exchanges may be appointed to work in the Office of the Fiscal Prosecutor and when appointed they shall retain all of their pre-existing legal powers of investigation etc.

*Section 23* provides that the staff of the Office shall include a chief legal officer and sets out the appointment procedure for such a position.

*Section 24* provides for a public consultation on merger with the Office of the Director of Corporate Enforcement.