LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

TO: Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

FROM: Law Reform Commission

DATE: 21st February 2019

SUBJECT: **Opening Statement to Committee on the Commission's *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018)**

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1. Introduction

Chair and members of the Committee. The Commission would like to begin by thanking the Joint Committee for the invitation to attend today's meeting to discuss our *Report on Regulatory Powers and Corporate Offences*, which we published last October, and which we hope may assist your discussion of Accountability in Banking.

We are very happy to discuss this Committee's interest in legislative changes in this area. As is our usual practice when we make recommendations for reform, our Report included draft legislative proposals. Our Reports often contain a single draft Bill intended to implement the recommendations for reform. You will be aware that, because of the wide-ranging nature of the 200 plus recommendations in this Report, the Commission included 4 draft Schemes or Heads of Bills in it.

We intend our draft Bills to be helpful guides to policy makers, and law makers such as the Committee members, when deciding whether to implement the recommendations we make in our Reports. We appreciate that further examination and scrutiny of such draft Bills will usually be required before they can be enacted, but we hope they are nonetheless useful.

2. Our consultation process on regulatory powers and corporate offences

Our current 4th Programme of Law Reform contains 11 projects, one of which was the project on regulatory powers and corporate offences. The 4th Programme was prepared after an extensive public consultation exercise. Many of the submissions we received mentioned the need for a review both of the regulatory powers of financial and economic regulators, not confined to the powers of the Central Bank but also including other regulators such as the Competition and Consumer Protection Commission (the CCPC) and the Commission for Communications Regulation (ComReg). The submissions also referred to the related question of corporate criminal liability, sometimes referred to as "white collar" crime". The Commission was also conscious that this area had already been the subject of considerable policy analysis

and proposals, including in the 2013 Policy Statement on Sectoral Economic Regulation, *Regulating for a Better Future*.

We consult as widely as possible when we carry out our work, and this includes publishing on our website a preliminary Issues Paper where we set out the current law in Ireland, any problems that have been identified in the law, and a review of the law in other countries. The Paper also seeks the views of interested parties on a series of what we hope are helpful questions. This consultative process is a vital part of our research work: the assistance we get from a wide range of organisations and individuals, public sector, private sector, Government Departments and Offices, professional bodies and NGOs greatly assists our analysis and proposals for reform in our Reports.

We published our Issues Paper on the regulatory powers and corporate offences project in 2016, and we received a wide range of extremely helpful submissions as a result. We also held a public consultative conference on the project in October 2016, attended by over 100 delegates. We heard contributions from national and international speakers with expertise in financial and economic regulation and in corporate offences. We then held further discussions in 2017 and early 2018, which included meeting with representatives from regulators, legal practitioners and academics with specialist interests in this area. These consultative processes greatly assisted us in reaching our final conclusions and recommendations in the Report.

3. Our role, and the role of the Oireachtas and Government

Our reform proposals are significantly influenced by our consultative process. We also look at solutions that have been suggested or applied in other countries, subject to those being ones that we think would work in Ireland.

We also realise that our proposals often involve making choices from a range of possible options: that was the case with the project on regulatory powers and corporate offences.

We are very happy that our work in this area has been included in this Committee's deliberations; and we are also aware that a number of Departments are reviewing our Report and that this may lead to them bringing forward proposals.

4. Report takes account of banking crisis, but proposes more wide-ranging reforms

The banking and financial crisis that emerged a decade ago was undoubtedly a major factor that led to the inclusion of this project in the Commission's 4th Programme of Law Reform. But, as the 2013 Policy Statement *Regulating for a Better Future* suggests, the need to examine the adequacy of the powers of other sectoral economic regulators is well-recognised. The banking crisis brought home the need to ensure that not only the Central Bank but also other economic regulators have at their disposal sufficiently robust and comprehensive powers to discharge their functions effectively. It also illustrated the need to ensure that the law governing corporate criminal liability should reflect the reality of modern-day corporate decision-making; and that this body of law should be adequate to respond to what the former Governor of the Central Bank, Patrick Honohan, described in 2015 as "egregiously reckless risk-taking."

This Report acknowledges that significant policy changes and legislative reforms at national and EU level have already been made in response to the banking crisis. The

Report also notes that our existing criminal law, notably in the *Criminal Justice (Theft and Fraud Offences) Act 2001*, has resulted in a number of significant convictions that related to the actions of senior bank executives in the lead up to the banking crash. In this presentation, the Commission does not propose to comment further on the trials that have occurred relating to the banking crisis.

5. Some key recommendations in the Report

Against that background the Report makes over 200 recommendations for further reform on regulatory powers and corporate offences, including:

- A statutory Corporate Crime Agency should be established and the dedicated unit in the Office of the Director of Public Prosecutions should be maintained; and both should be properly resourced.
- Financial and economic regulators should have the power to impose significant financial sanctions and to make regulatory enforcement agreements, which should include consumer redress schemes.
- The recommendations on regulatory powers would apply not only to regulation of financial services but also to the wider economic context, such as in competition law, communications regulation and health products regulation.
- The Report recommends that, in order to address egregiously reckless risk-taking, our existing fraud offences should be amended so that conscious (subjective) recklessness by a person would amount to fraud under, for example, the offence of false accounting in the *Criminal Justice (Theft and Fraud Offences) Act 2001*.
- The Director of Public Prosecutions, working in liaison with financial and economic regulators, should be empowered in suitable cases to enter into Deferred Prosecution Agreements (DPAs), which would require court approval before they could come into force (unlike US-style DPAs, which do not require court approval).

6. Recommendation to establish a Corporate Crime Agency

The Report commends the decision, in the Government's 2017 paper *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework*, to establish on a pilot basis a multi-agency task force to address corporate offences. 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, though not identical to, the multidisciplinary makeup of the Criminal Assets Bureau.

The Commission notes that this proposal is quite separate from the proposal in the *General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018* to establish a Corporate Enforcement Authority which would replace the Office of the Director of Corporate Enforcement (ODCE), and whose regulatory remit will remain the enforcement of the *Companies Act 2014.*

The Commission's proposal is that the Corporate Crime Agency would be empowered to investigate corporate crime that falls outside the regulatory remit of any of the current financial or economic regulators, whether the Central Bank, the CCPC, ComReg, or the proposed Corporate Enforcement Authority. Corporate offences such as false accounting and other fraud-type offences are outside the scope of such

regulators, and the Commission's Report concludes that a one-stop shop Agency, akin to the role played by the Criminal Assets Bureau, is needed to investigate such offences.

We understand from the pre-legislative scrutiny by another Committee of the *General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018* (on 5th February) that the Commission's recommendation is being considered by the review group on anti-fraud and anti-corruption structures (which includes the Department of Justice and Equality, the Garda, the Central Bank, the Department of Business, the ODCE and the Competition and Consumer Protection Commission). We understand that review group is due to make recommendations later this year.

The Report also recommends that the dedicated Unit in the Office of the Director of Public Prosecutions should be maintained and that it would liaise closely with the proposed Corporate Crime Agency.

The Report also recommends that, based on past experience with poorly resourced agencies, both the Agency and Unit should be properly resourced: the details of this are matters for Government and the Oireachtas to determine.

7. What a core set of regulatory powers should include

The Report recommends that, to be fully effective, financial and economic Regulators should have a "core regulatory toolkit". The Report recommends that the 6 "core" powers should be:

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

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

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

(4) the power to impose administrative financial sanctions;

(5) the power to enter into wide-ranging regulatory compliance agreements or settlements; and

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

Of these 6 "core" powers, we might mention in particular:

- 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
- 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.

The Committee will be aware that the Central Bank already has both these powers, and has used them in, for example, the tracker mortgage case, but that other regulators such as the CCPC and ComReg do not: we recommend that they should.

The Commission's Report recommends that the Central Bank's current regulatory framework concerning Administrative Financial Sanctions could benefit from some relatively minor changes. In particular, the Report recommends that, where a formal inquiry is needed, the evidence collected by the Bank's investigative process should be presented to the external inquiry panel, rather than requiring that panel to start that process again. This proposal would align the process with other well-established bodies such as the Medical Council's Fitness to Practice process.

8. Reforms to address egregiously reckless risk-taking

In 2015, the former Governor of the Central Bank, Patrick Honohan, used the phrase "egregiously reckless risk-taking" to describe the extreme behaviour that contributed, in part, to the financial and economic crisis that emerged in 2008.

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.

9. Recommendation to introduce Deferred Prosecution Agreements (DPAs)

Deferred Prosecution Agreements (DPAs) involve suspending a corporate prosecution subject to a company complying with strict conditions. They are similar to the approach taken where an individual pleads guilty to an offence and is subject to supervision by the Probation Service.

The Report recommends that DPAs should be introduced on a statutory basis, under the control of the Director of Public Prosecutions, who would work closely with financial and economic regulators in determining whether a DPA was suitable in a particular case. 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.

10. Due diligence defence for regulatory offences

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.

Any due diligence defence would not apply, for example, to fraud offences: this is because such offences require proof of a subjective state of intention by the accused (or, if the Commission's recommendations were enacted, subjective recklessness). A defence of due diligence would be illogical in such offences.

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.

11. Concluding comments

Our Report has attempted to address a wide range of issues concerning the regulatory powers of financial and economic regulators and the connected area of corporate criminal liability.

In doing so, we have attempted to take account of international best practice approaches. The Report notes in this respect that both the OECD and the EU have strongly advocated that financial and economic regulators should have at their disposal an effective regulatory "toolkit" and that key components of such a toolkit are the powers to impose Administrative Financial Sanctions and to enter into Regulatory Settlements. The Report notes that recent studies of regulators indicate that, put simply, these kinds of powers are effective and are more efficient than other types of collective redress mechanisms, especially where individual consumers are affected by bad corporate behaviour.

The Commission's Report also recommends that the criminal law, reformed in the manner suggested in the Report, can play a suitable deterrent role to prevent the kind of egregious risk-taking to which former Governor Honohan referred.

We recognise that decisions about whether to implement some or all of these recommendations is for others, and we hope that the discussion in the Report will help in that process.

In conclusion, we want to thank the Committee again for its invitation today and we are happy to take any questions.