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Spotlight

Administrative financial sanctions

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Abstract

This Spotlight provides an analysis of administrative financial sanctions in light of their emergence as a feature in a number of pieces of recent legislation. It discusses the advantages and disadvantages of administrative financial sanctions as a regulatory tool, as well as analysing the constitutional concerns they present. It also notes the recent recommendations of the Law Reform Commission in this area.

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Legal Disclaimer

Executive Summary

Administrative financial sanctions, or administrative fines, are a form of financial penalty available to regulators and administrative bodies.[1] As they can be imposed by a regulator directly, without going through the criminal process, they are often seen as an effective and efficient means of deterring misconduct. They are an important instrument for regulators to ensure compliance with the law and regulations governing a particular area over which the regulator has authority. There appears to have been some movement towards a greater use of administrative financial sanctions in this jurisdiction, which has been to some degree prompted by European Union legislation.

Administrative financial sanctions are a common feature of most continental legal systems and the EU is slowly drawing Ireland into this practice through Directives and Regulations. The General Data Protection Regulation (GDPR) provides for the imposition of administrative financial sanctions to enforce its requirements. The *Data Protection Act 2018* empowers the newly established Data Protection Commission to impose these fines.[2] The 2014 EU Markets in Financial Instruments Directive ("MiFID II"), which took effect in January 2018, also provides for the imposition of administrative financial sanctions.[3] The *European Union (Markets in Financial Instruments) Regulations 2017* provides for these administrative financial sanctions and came into operation in January of 2018.[4]

Administrative financial sanctions are also an important aspect of the fight against money laundering, and recent legislation has increased the administrative financial sanctions available to the Central Bank to combat money laundering.[5] In 2019, the EU has published two new directives that provide for administrative financial sanctions to tackle unfair trading practices in the food supply chain,[6] and to tackle anti-competitive practices.[7]

They are also becoming more prevalent in domestic legislation. The *Residential Tenancies (Amendment) Act 2019* gives powers to the Residential Tenancies Board (RTB) to impose administrative financial sanctions on landlords for breaches of certain prescribed contraventions.[8]

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[1] Administrative financial sanctions are distinct from fixed charge penalties and on-the-spot fines, largely because they involve discretion as to the penalty to be imposed. Fixed charge penalties and on-the-spot fines are not considered as part of this Spotlight.

[2] Chapter 6 of the Act.

[3] The L&RS published a Note on MiFiD II. L&RS Note, *MiFID II – key provisions and implications* (February 2018)

[4] Reg. 119, *European Union (Markets in Financial Instruments) Regulations 2017* (S.I. No. 375 of 2017). The *Markets in Financial Instruments Act 2018* gives further effect to the Directive and was passed into law on 29 October 2018.

[5] Section 36, *Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018*.

[6] Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. For further information see European Commission, *Unfair trading practices in the food chain* (Europa.eu).

[7] Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive).

[8] *Residential Tenancies (Amendment) Act 2019*. The prescribed contraventions include increasing rent beyond the applicable limit in a Rent Pressure Zone, which is 4%.

The Broadcasting Authority of Ireland can impose an administrative financial sanction of up to €250,000 on a broadcaster for breach of certain provisions of the *Broadcasting Act 2009*.[9]

As these fines may be imposed by bodies other than the courts, and are not subject to the same procedural and evidential oversight, administrative financial sanctions can be much more easily and efficiently imposed than a criminal sanction. In particular, the standard of proof before an administrative body will be on the balance of probabilities, as opposed to beyond a reasonable doubt in criminal proceedings. As a result, administrative financial sanctions can respond quickly and effectively to regulatory breaches and may be seen by regulated entities as a realistic deterrent.

However, these apparent virtues might be considered vices from a constitutional perspective. It is these constitutional concerns that have seen Ireland lag behind our European neighbours in introducing administrative fines. The Constitution directs that the administration of justice and the prosecution of criminal offences is reserved to the courts.[10] It is arguable that certain regulatory breaches attracting significant administrative financial sanctions are criminal offences in all but name, and a person so charged should be entitled to a trial in a court of law. However, to date, these arguments have not been met with favour by the courts and the constitutional position of administrative financial sanctions appears to be settled for the time being.

This Spotlight analyses the above issues and considers the advantages and disadvantages of administrative fines and what role they may perform in a changing regulatory environment. The Spotlight also examines the types of financial sanctions that are, or should be, available to regulators. The Spotlight considers the constitutional position of administrative fines, and the procedures a body imposing administrative financial sanctions would have to follow to meet the requirements of constitutional justice. Finally, it considers the recommendations of the Law Reform Commission on administrative financial sanctions, as set out in its *Report on Regulatory Powers and Corporate Enforcement*.[11]

[9] Section 54(5) of the 2009 Act. This sanction must be confirmed by the High Court.

[10] Articles 34 and 38 of the Constitution.

[11] LRC 119 – 2018.

Introduction

Administrative financial sanctions, or administrative fines, are a form of sanction that may be imposed by regulators and administrative bodies to deter misconduct and ensure compliance with the relevant regulatory regime. Administrative financial sanctions are an efficient means of responding to misconduct that, while deserving of reprimand, does not merit the imposition of a criminal sanction. It is important that they be distinguished from fines following on foot of a criminal conviction – no criminal conviction is necessary to justify the imposition of administrative financial sanctions. They have been described as forming an essential part of the "regulatory toolkit" of regulators.[12]

Administrative financial sanctions are imposed on foot of a regulatory investigation, rather than a criminal trial and, as such, they are subject to the civil standard of proof; whether the wrong-doing is proved on the balance of probabilities. This forms a substantial part of the utility and attractiveness of administrative fines but is also what renders these sanctions problematic. The lower standard of proof and the absence of formal court process are attractive to regulators, heightening the likelihood of that a sanction may be imposed successfully. However, this process poses constitutional questions, which will be considered in a later section.

European Union legislation is prompting the greater use of administrative financial sanctions in Ireland. In 2019, the EU adopted the ECN+ Directive, which provides that national regulators have certain minimum enforcement powers in the area of competition law, including the power to impose administrative fines. The Competition and Consumer Protection Commission (CCPC) has previously called for its powers to be expanded to allow it to impose administrative financial sanctions.[13] At present the only civil sanctions available to the CCPC are a declaration of illegality and/or an injunction. The CCPC suggests that this leaves a significant gap in the enforcement of competition law.[14]

The Environmental Protection Agency has also called for the introduction of administrative financial sanctions, among other enforcement tools, to allow it to effectively enforce environmental regulations.[15] The *Central Bank (Amendment) Bill 2018*, a Private Members' Bill sponsored by: Pearse Doherty T.D., proposes to extend the powers of the Central Bank to impose administrative financial sanctions on people who provide false or misleading information to the Bank.[16] At

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[12] Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119 – 2018) p. 99.

[13] CCPC, *Response to the Law Reform Commission Issues Paper on Regulatory Enforcement and Corporate Offences* available at https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/09/2017.09.19-LRC-Issues-Paper-CCPC-Response-FINAL.pdf.

[14] Ibid.

[15] Environmental Protection Agency, *A Study on the use of Administrative Sanctions for Environmental Offences in other comparable countries and assessment of their possible use in Ireland* , available at http://www.epa.ie/pubs/reports/enforcement/Admin_Sanctions_final.pdf.

[16] Section 1 of the *Central Bank (Amendment) Bill 2018*, available here. At the time of writing, the Bill is at Committee Stage in Dáil Éireann.

present, the Central Bank of Ireland is the primary body empowered to impose administrative financial sanctions.[17]

Having regard to the likely proliferation of administrative financial sanctions as a feature of the Irish regulatory landscape, it is appropriate for the Library and Research Service to consider their benefits and shortcomings, as well as any constitutional issues, *ex ante* such that Members are well-informed in advance of these developments.

Law Reform Commission Report

In 2018, the Law Reform Commission ("the Commission") published a *Report on Regulatory Powers and Corporate Offences*, which provides analysis and makes recommendations on the subject of administrative financial sanctions.[18] The Report was designed to prompt Government legislation on a range of issues, including on the use of administrative financial sanctions. This Spotlight refers to the Commission's analysis on various points and provides an outline and discussion of the Commission's recommendations.

[17] Civil penalties are available under the *Companies Act 2014* for a variety of purposes, but they are pursued via the courts (e.g. Section 610 and civil liability for fraudulent trading).

[18] Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119 – 2018).

Advantages and Disadvantages of Administrative Financial Sanctions

There are a number of perceived advantages of using administrative financial sanctions to regulate behaviour, encouraging their extended use. Generally speaking, they are often seen by regulators as an efficient and responsive tool to deter the wrongful conduct of people and businesses in a particular marketplace. In using these sanctions for relatively minor, sometimes unintentional, infringements, they reserve criminal offences to more serious cases, while allowing swift and meaningful intervention in the case of less serious, and sometimes unintentional, breaches. That said, there are some disadvantages to the use of administrative financial sanctions and most of these arise from potential constitutional issues. In this section, the main potential advantages and potential disadvantages to the use of administrative fines will be set out.

Advantages

(a) More efficient than criminal process

One significant advantage of administrative financial sanctions is that they are considered to be significantly easier to impose than criminal sanctions.[19] A criminal trial is an expensive and time-consuming process. A criminal trial involves strict evidentiary rules, rigorous procedures, and requires a prosecutor to build a case satisfying a criminal standard of proof; beyond a reasonable doubt. It entails an extended interaction with the relatively slow-moving court process, and it requires the retention of the services of legal professionals. By contrast, an administrative sanction would follow a significantly less onerous adjudicative process, albeit a process that must satisfy the requirement of constitutional fair procedures.[20] Crucially, the imposition of an administrative sanction need only be subject to the civil standard of proof, namely on the balance of probabilities.[21]

That is not to say that criminal sanctions would never be the most appropriate response. For certain types of conduct, a criminal sanction will be the more appropriate and proportionate response. Indeed, reserving criminal penalties for the 'more serious' cases may operate to increase the effectiveness of criminal sanctions overall. A UK report raised a concern that, in a regulatory environment where criminal sanctions were the sole or main penalty available to regulators, the frequency of their use led to the stigma associated with criminal offending being denuded.[22] Companies might come to see criminal penalties as simply "part of the cost of doing

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[19] The Law Reform Commission refers to this advantage in the *Report on Regulatory Powers and Corporate Enforcement* (LRC 119 – 2018) p. 101.

[20] Any public body exercising a decision making function, including the imposition of administrative financial sanctions, must exercise certain basic requirements of fair procedures. The nature and extent of these procedures are discussed in detail later in this paper.

[21] This standard of proof is explicitly provided for in the Central Bank's *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942*, p. 10.

[22] Richard B Macrory, *Regulatory Justice: Making Sanctions Effective Final Report* (2006) available at http://webarchive.nationalarchives.gov.uk/20121205164501/http://www.bis.gov.uk/files/file44593.pdf.

business".[23] It might therefore be argued that the introduction of a two-pronged regulatory sanctions mechanism of administrative sanctions and criminal sanctions increases the effectiveness of existing criminal sanctions by reserving them to more serious cases.

(b) More targeted/responsive

It has also been argued that a regulator is often in a better position than a court to determine whether or not a breach has occurred, and what sanction should be applied.[24] A given regulator will have particular expertise about the marketplace over which it has authority. This expertise, together with ongoing dialogue with central actors, potentially gives the regulator a significant advantage over a court in its ability to assess whether a breach has occurred, and in calculating the damage flowing from that breach.[25] Generally, a regulator is also well-placed to assess the profits flowing from the breach.[26] This is particularly important in deterring calculated breaches of relevant laws and regulations. Such a calculated breach can occur where the company or trader assesses that the profits to be gained from breaching the regulation will outstrip any likely penalty. It is therefore important that the body imposing the sanction is able to accurately determine the profits gained from the breach.

Similarly, criminal sanctions are focussed often on the conduct of an individual and the nature and quality of his or her wrongdoing, whereas administrative sanctions, imposed by regulators, are arguably better able to contemplate the impact of the wrongdoing on the relevant marketplace.

(c) Greater deterrent effect

This possible advantage is related to the advantages outlined above, in that, the relative efficiency with which administrative financial sanctions may be imposed, and the targeted and responsive nature of the sanctions, is likely to result in a more effective deterrent to wrongful conduct.[27] If a regulated body does not perceive a penalty to be a realistic threat, or doubts if the penalty imposed would outstrip the profits it would make in engaging in a particular course of conduct, that body is unlikely to alter its behaviour. By contrast, where administrative financial sanctions are perceived to pose a real and present danger, and where the extent of the fine is targeted to ensure no financial benefit accrues to the regulated body, the likelihood of compliance increases.[28]

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[23] Ibid.

[24] The Law Reform Commission makes this point, referring to the "superior targeting and calibration of sanction" available to regulators. *Report on Regulatory Powers and Corporate Enforcement* (LRC 119 – 2018) p. 102.

[25] The Law Reform Commission comments that an administrative financial sanctions regime "enables the regulator's expertise, including knowledge of the facts, sectors and national markets, to be fully utilised." *Report on Regulatory Powers and Corporate Enforcement* (LRC 119 – 2018) p. 102.

[26] Ibid.

[27] Ibid. The Commission notes that administrative financial sanctions can act as a "realistic deterrent" in comparison with the threat of a criminal sanctions.

[28] Ibid.

Disadvantages

The potential disadvantages associated with administrative financial sanctions flow mostly from constitutional issues; which are discussed in more detail in the following section. While recent case law has upheld the constitutionality of using administrative financial sanctions in Ireland, this is subject to certain conditions. In particular, the financial penalty calculated by the regulator will likely have to be confirmed by a court in order to be constitutional.[29] This to some extent could diminish the advantage of efficiency outlined above. Additionally, the higher the financial penalty, the more likely it is that the penalty will be considered punitive in nature and therefore unconstitutional.[30] This poses issues as, particularly in the case of financial regulation, fines will often need to be set extremely high in order to be effective.

Another concern that has been expressed is the signalling effect of a legal regime that largely excises the enforcement of financial or 'white collar' crime from the scope of the criminal law. Do we diminish or fail to do justice to the wrongdoing involved in financial or regulatory wrongdoing by failing to recognise it as "criminal"?[31] McGrath argues that regulatory offences have historically been distinguished from traditional offences on the basis that they are merely *malum prohibitum* (only wrong because they are prohibited), while most traditional offences are *mala in se* (offences that are inherently wrong), and hence of a lower category of wrongdoing. He further observes that this assumption may no longer hold having regard to increased recognition of the potential harm of corporate wrongdoing in society.[32]

There is arguably a danger that a failure to identify regulatory wrongdoing as "true" crime will perpetuate a prejudice that white-collar crime is technical and of a lesser order than traditional offences. It arguably feeds into public assumptions about what constitutes a "criminal", with the term sometimes reserved for violent crime on the streets, rather than systematic financial wrongdoing committed by white-collar workers in office blocks.[33] This point is well articulated by McGrath:[34]

> Perhaps the most significant factor in the marginalisation of regulatory and corporate wrongdoing from the crime debate is the public perception of who constitutes a criminal, Criminals lurk down darks alleys and perpetrate violence on innocent victims; they are not respectable hard-working executives who generally typify the hopes of the middle classes.

While administrative fines have much to recommend them, there is an arguable concern that they do not provide a sufficient moral condemnation of the conduct involved.[35]

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[29] *Purcell v Central Bank of Ireland* [2016] IEHC 514. These issues are discussed in the following section.

[30] *Registrar of Companies v Anderson* [2005] IESC . These issues are discussed in the following section.

[31] McGrath, *Corporate and White Collar Crime in Ireland: A New Architecture of Regulatory Enforcement* (Manchester University Press, 2015) pp 23, 24.

[32] Ibid.

[33] See Kilcommins et al, *Crime, Punishment and the Search for Order in Ireland* (IPA: Dublin, 2004) p. 102.

[34] McGrath, *Corporate and White Collar Crime in Ireland: A New Architecture of Regulatory Enforcement* (Manchester University Press, 2015) p. 27

[35] This point is made in relation to civil enforcement under the Companies Acts in McGrath, *Corporate and White Collar Crime in Ireland: A New Architecture of Regulatory Enforcement* (Manchester University Press, 2015) p. 28.

Recent examples of an administrative financial sanction imposed by the Central Bank:

€5.88 million fine imposed on Wells Fargo

In July 2019, the Central Bank imposed a fine of €5.88 million on Wells Fargo Bank International Unlimited Company (WFBI), and Irish subsidiary of the major US bank Wells Fargo.

The Central Bank said it found serious and systemic failings in the company's regulatory reporting capability, including the failure to calculate and report accurately its capital position. The Central Bank's Director of Enforcement, announcing the sanctions, stated:

> "It is a minimum requirement of being regulated by the Central Bank that firms submit accurate and timely regulatory returns. The submission of inaccurate information undermines the Central Bank's ability to properly supervise. …[The] enforcement action refers to failings in relation to both capital reporting and liquidity testing. For that reason it is considered to be particularly serious."

It was also found that WFBI had "weak governance arrangements including lack of robust Board and senior management oversight", had failed to properly document processes and procedures and had weaknesses in its IT systems.

Source: Central Bank, *Public statement relating to enforcement action against Wells Fargo* (July 3, 2019)

€3.15 million fine imposed on Bank of Ireland

In May 2017, Bank of Ireland was fined €3.15 million by the Central Bank for breaches of its requirements under the *Criminal Justice (Money Laundering and Terrorist Offences) Act 2010*. Bank of Ireland had failed to carry out proper risk assessments and due diligence in relation to transactions with an unnamed bank outside the EU that was identified as high risk under the legislation.

It also failed to perform due diligence in relation to business with a "politically exposed person", within the meaning of the Act. In imposing the sanction, the director of enforcement at the Central Bank, Derville Rowland, said that "such behaviour is unacceptable and falls far short of the standard expected of one of Ireland's largest retail banks."[1]

Source: *The Irish Times*, 'Bank of Ireland fined €3.15m for breaches of laundering law' (May 30 2017)

Constitutional Concerns

This section outlines in more detail some of the constitutional concerns about the use of administrative financial sanctions noted above. If administrative financial sanctions are to become an increasingly significant element of the Irish regulatory framework, it is important to have clarity and certainty on their constitutionality. This section will discuss concerns under Articles 34 and 38, and under the constitutional principle of double jeopardy.

Article 34

Article 34.1 of the Constitution provides:

> "Justice 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."

The express reservation of the administration of justice to the courts notwithstanding, Article 37 provides for the exercise of "limited functions of a judicial nature" by bodies other than the courts. The effect of these provisions is that an "administration of justice" must take place in a court of law, but certain lesser and "limited" judicial functions can be undertaken by lesser, non-judicial bodies, such as regulators.[36] The question as to what constitutes an "administration of justice" within the meaning of Article 34, or a "limited function" within the meaning of Article 37 has given rise to a significant volume of case law.[37]

The most authoritative statement of the demarcation can be found in the judgment of Kenny J in *McDonald v Bord na gCon*,[38] where he identified the following factors to be considered in determining whether a power is one reserved to the courts under Article 34.1. A court will consider if the process involves:

1. A dispute or controversy as to the existence of legal rights or a violation of the law;
2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment; and
5. The making of an order by the Court, which as a matter of history is an order characteristic of Courts in this country.[39]

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[36] See Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5th edn. Bloomsbury, 2018) paras. [6.1.13] – [6.1.44].

[37] Ibid.

[38] [1965] IR 217.

[39] *McDonald v Bord na gCon* [1965] IR 217 at 231 available here.

These criteria have been repeatedly reaffirmed by the courts over the years and it has been established that a process must meet all of these criteria to be regarded as an administration of justice.[40]

These criteria were recently applied to a regulatory context in the case of *Purcell v Central Bank of Ireland*.[41] This case has been strongly relied upon in subsequent commentary as conclusively establishing the constitutionality of administrative fines, particularly where they are imposed by a well-defined regulatory process, as is the case with the Central Bank Administrative Sanctions Procedure.[42] The case is therefore worth considering in some detail.

The High Court (Hedigan J) found that the Central Bank's Administrative Sanctions Procedure met none of the *Bord na gCon* criteria. In particular, he noted that the sanctions imposed had to be confirmed by a court, bringing the procedure outside the scope of the third *Bord na gCon* criterion; that the process constituted a "final determination" of legal rights.[43] Hedigan J also noted that financial regulation of the kind practised by the Central Bank was not something the courts had traditionally engaged in, thereby bringing the procedure outside the scope of the fifth criterion; that the order made be one characteristic of courts in this country.[44] This fifth criterion is arguably something of a "catch all", permitting a pragmatic assessment of the suitability of the given adjudication to the court process.

The Court's analysis in respect of the other *Bord na gCon* criteria is somewhat less developed. The judgment appears to place particular emphasis on the requirement that the administrative fine be confirmed by a court as a central plank of their constitutionality under Article 34.

Article 38

The Court in *Purcell* devoted less time to considering Article 38.1 which guarantees that "[n]o person shall be tried on any criminal charge save in due course of law." The phrase "due course of law" has been widely interpreted over many years to incorporate an array of procedural and substantive rights for the accused person.[45] The trial of a criminal offence other than in a court established by the Constitution would plainly breach this provision. The question as to what constitutes a "criminal charge" within the meaning of Article 38.1 therefore takes on a great deal of significance.

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[40] *Keady v Garda Commissioner* [1992] 2 IR 197.

[41] [2016] IEHC 514, available here.

[42] Central Bank of Ireland, *Response to the Law Reform Commission Issues Paper "Regulatory Enforcement and Corporate Offences"* available at https://www.centralbank.ie/docs/default-source/publications/correspondence/general-correspondence/central-bank-of-ireland-response-to-the-law-reform-commission-issues-paper-'regulatory-enforcement-and-corporate-offences'.pdf. The Law Reform Commission itself also relied strongly on the decision as establishing the constitutionality of administrative financial sanctions in its final report, *Report on Regulatory Powers and Corporate Offences* (LRC 119 – 2018).

[43] [2016] IEHC 514, para. 8.7.

[44] Ibid.

[45] See Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5th edn. Bloomsbury, 2018) paras. [6.5.03] – [6.5.23].

The leading authority on this question, the judgment of the Supreme Court in *Melling v O'Mathghamhna,*[46] was a case involving a £100 fine for the smuggling of butter, contrary to customs legislation. In determining whether the fine constituted a criminal offence, Kingsmill Moore J laid down the following features of a criminal offence:[47]

(a) Its character as an offence against the community;
(b) The punitive nature of the sanction;
(c) The requirement of *mens rea.*[48]

Kingsmill Moore J also stated that a court should analyse whether the impugned provision was couched in the "vocabulary of the criminal law"; this further element of the test has been relied on strongly by subsequent courts.

In *DPP v Boyle*,[49] the High Court attached significant weight to the fact that the relevant provision used the language of "penalty", "offence", and "summary conviction" in deciding that the provision constituted a criminal offence. The *Melling* test has been applied primarily in cases involving revenue penalties and, significantly, following the passage of the *Proceeds of Crime Act 1996*, where the Supreme Court relied strongly on the absence of a power of arrest or detention in its finding that forfeiture orders are civil in character.[50]

Despite this case law, prior to the decision in *Purcell*, the courts had not given a great deal of consideration to the question of what constitutes a criminal charge in the context of administrative fines.[51] Hogan and Whyte commented in 2003 that, despite various decisions on the question in general "…it still remains unclear whether the case law has established any general principle such as would permit the enactment of legislation enabling regulatory authorities (such as the Competition Authority), to impose fines … [t]he full dimensions of this difficult problem remain, therefore, to be explored."[52]

In *Purcell*, Hedigan J stated his view that "here none of the *indicia* of a criminal offence identified in *Melling v O'Mathghamhna* are present" but he did not elaborate in any detail on how he reached that conclusion, or how future courts might make similar determinations.[53] This is not to argue that

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[46] [1962] IR 1.

[47] Ibid.

[48] *Mens rea* is a legal term meaning "guilty mind". It reflects a basic criminal law principle that a person can usually only be convicted of an offence if it was an intentional or reckless act. It is the mental element of an offence.

[49] [1993] ILRM 128.

[50] *Murphy v GM* [2001] 4 IR 113.

[51] The Supreme Court did address the question of whether a kind of administrative fine (in this case late-filing fees) can constitute a criminal offence in the context of double jeopardy in *Registrar of Companies v Anderson* [2005] 1 IR 21. The Court held that where penalties are fixed and without discretion and their imposition is a "foreseeable, objective and automatic" consequence of the breach, it will be considered administrative rather than criminal. A far broader discretion attaches to the Central Bank in imposing administrative fines, so it is unclear how strong an authority this is for the constitutionality of administrative fines generally.

[52] Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (4th edn. Tottel Publishing, 2003) p. 1138.

[53] [2016] IEHC 514 at para. 8.8.

the Central Bank's Administrative Sanctions Procedure is in reality a criminal process, but rather that further clarity from the courts on the demarcation would be desirable.

Thus, the decision in *Purcell* broadly establishes the constitutionality of administrative fines under Articles 34 and 38 of the Constitution. However, a decision of a higher court with a more developed rationale on certain points would be welcome in conclusively establishing their constitutionality going forward.

Double jeopardy

A related constitutional concern is the principle of double jeopardy or *ne bis in idem*.[54] The principle of double jeopardy is a fundamental principle of criminal justice that protects any person from being punished twice for the same offence. A straightforward application of the principle arises where a person has already been convicted or acquitted of the very same offence being charged. In such a scenario, the person will enter a plea of *autrefois acquit*, if he or she has already been acquitted of the crime, or *autrefois convict*, if he or she has already been convicted of the crime. The Supreme Court has explained the general principle:[55]

> "It has for a long time been a principle of the common law that a person cannot be prosecuted and punished for an offence of which he has already been acquitted or convicted. This is commonly referred to as the rule against double jeopardy. It is a rule which applies to the prosecution of criminal offences. The rule, or what also might be called the notion, of double jeopardy is not normally relied upon in express terms in the sense that if a person is prosecuted for an offence arising out of the same breach of the law or the same essential ingredients for which he has previously been tried and either convicted or acquitted, his defence to the second prosecution will be based on the pleas of *autrefois acquit* or *autrefois convict*. If either plea is successful, the prosecution may proceed no further …"

However, the principle is generally not taken to exclude two different types of legal consequence flowing from the same action.[56] Thus, a prosecution for assault does not preclude the victim from pursuing the offender for damages under the tort of battery. Double jeopardy has significance for administrative fines as the relevant legislation will often specify both a criminal offence *and* an ostensibly civil wrong, in the form of an administrative sanction, in respect of the same conduct.[57] If the ostensible civil wrong is in fact a criminal offence dressed up as a tort or regulatory offence, or "a sheep in wolf's clothing", then the potential for double jeopardy arises. The Supreme Court adverted to this possibility in the context of administrative sanctions in *Registrar of Companies v Anderson*,[58] but did not find it to be the case on the facts.

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[54] This principle, long established by common law, is now derived from the guarantee of a trial in "due course of law" in Article 38.1, and from the guarantee of fair procedures in Art. 40.3.

[55] *Registrar of Companies v Anderson* [2005] 1 IR 21.

[56] Ibid.

[57] This is true of a number of prescribed contraventions which the Central Bank is empowered to enforce.

[58] [2005] 1 IR 21.

Legislators appear to have had this issue in mind in enacting section 33AT of the *Central Bank Act 1942*, as amended.[59] Section 33AT provides that, where the Central Bank imposes an administrative financial sanction that is also a criminal offence, the company or person upon whom it is imposed is not liable to be prosecuted or punished by the courts for that offence. Legislators appear to have taken a view that, even if administrative financial sanctions are civil penalties and do not attract the full weight of the double jeopardy rule, the Oireachtas, as a matter of fairness, should not prescribe two punishments for the same wrongdoing. However, legally speaking, there is nothing to prevent the Oireachtas from prescribing a criminal and administrative penalty for the same conduct, provided the administrative penalty is not so draconian as to in reality constitute a punitive, criminal sanction.

The European Court of Human Rights and Double Jeopardy

It should be noted that the European Court of Human Rights (ECtHR) has been somewhat more willing to identify dual administrative and criminal sanctions as breaching the principle of double jeopardy, as enshrined in Protocol No 7 to the European Convention on Human Rights, which supplements the main convention.Ireland has signed and ratified the protocol. Under the *European Convention on Human Rights Act 2003*, the courts must, as far as possible, interpret statutes in a manner that is compatible with Ireland's obligation under the convention, including Protocol No. 7.

Article 4 of Protocol No. 7, titled "Right not to be tried or punished twice", recognises the rule of *ne bis in idem*. Paragraph 1 provides:

> "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

The ECtHR has considered a number of cases concerning whether proceedings arising from a single set of facts can be permitted in both administrative tribunals and the criminal courts. A leading case on the subject is the 1976 case of *Engel v The Netherlands*,[60] in which the ECtHR set down three criteria for identifying criminal offences:

(a) the state's own classification of the offence;
(b) the nature of the offence; and
(c) the severity of the potential penalty.

The ECtHR has been more likely to find a breach of Protocol 7 in cases where the dual sanctions are pursued subsequent to one another rather than concurrently[61] and where penalty for the administrative sanction is very high.[62]

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[59] This links to the administrative consolidation of the Act created by the Law Reform Commission, known as a Revised Act.

[60] [1976] ECHR 3.

[61] *A and B v Norway* (nos. 24130/11 and 29758/11).

[62] *Ruotsalainen v Finland* (no. 13079/03).

Sanctions Available to Regulators

It is important to acknowledge that financial penalties are not the only tool available to regulators to deter wrongdoing and motivate compliance. Regulators can use education and guidance to guard against inadvertent or non-wilful breaches, as well as issuing informal warning notices. They can also disqualify certain actors from acting in a particular capacity, for example a director.[63] However, a regulator can also have recourse to a financial penalty when required.

As discussed in the previous section, the level of the administrative fine will have a bearing on its constitutionality. This section is not solely an extension of that discussion but will examine the various types of fine, financial penalty and, indeed, other types of sanction that could be made available to regulators to motivate compliance with the law in a given area.

The most varied range of administrative sanctions available to a regulator in Ireland are those of the Central Bank, empowered under the *Central Bank Act 1942*, as amended. The sanctions available to the Bank include:

- caution or reprimand;
- direction to refund or withhold all or part of an amount of money charged or paid, or to be charged or paid, for the provision of a financial service;
- imposition of a monetary penalty (in the case of a corporate and unincorporated body an amount not exceeding €10,000,000 or 10% of the annual turnover of the regulated financial service provider in the last financial year, whichever is the greater, or in the case of a natural person an amount not exceeding €1,000,000);
- a direction disqualifying a person from being concerned in the management of a regulated financial service provider;
- suspension of the authorisation of a regulated entity, in respect of one or more of its activities, for a period not exceeding 12 months, except where the provisions of Council Regulation (EU) No 1024/2013 apply;
- revocation of a regulated entity's authorisation, except where the provisions of Council Regulation (EU) No. 1024/2013 apply;
- direction to cease a contravention, if it is found the contravention is continuing; and
- a direction to pay to the Central Bank all or a specified part of the costs incurred by the Central Bank in holding the Inquiry and in investigating the matter to which the Inquiry relates.[64]

Fines available to the Central Bank

The fines available to the Central Bank are very substantial and constitute a significant deterrent to non-compliance with regulatory standards, particularly where the Central Bank publishes a notice of the wrongdoing and the sanction imposed.[65] The upper limit on the fine available to the Bank

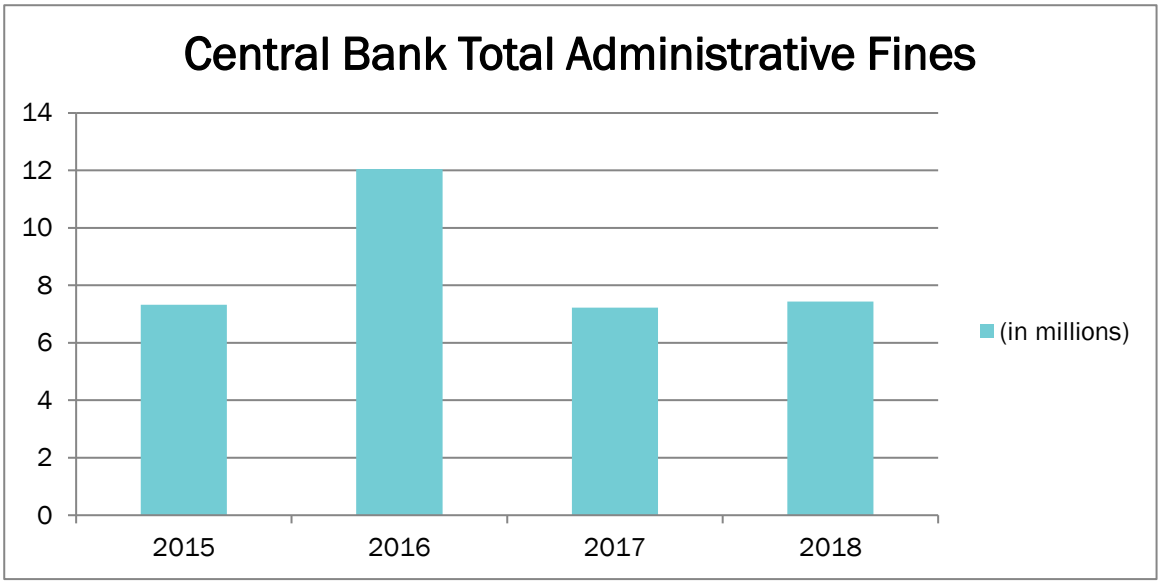
[63] This power is available to the Central Bank in relation to regulated financial service providers. Central Bank of Ireland, *Outline of the Administrative Sanctions Procedure* (2018) p. 34.

[64] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedure* (2018) pp 34–35.

[65] The Bank is empowered to do this under section 33BC of the C*entral Bank Act 1942*, as amended.

varies according to the various pieces of empowering legislation. However, most of the empowering legislation directs an upper limit of €1 million in respect of a natural person, or €10 million or 10% of annual turnover in respect of a legal person. This might be regarded as approaching an upper limit on what would be constitutionally permissible, for the time being. While the courts have not expressed a view on an exact figure beyond which administrative fines would become constitutionally problematic, the Supreme Court has indicated that administrative fines must be proportionate.[66]

The high figures available to the Central Bank reflect the fact that wrongdoing in the financial services sector has the potential to do great damage to the financial situation of the country overall. The calculus of what would be proportionate would likely be different in other regulatory fields. Another important limit on the sanctions available to the Central Bank that is worth considering is that all fines are subject to the condition that they will not be imposed if to do so would render a person bankrupt, or a company to cease business.[67] The following chart outlines the total amount in fines that have been imposed by the Central Bank over last four years:



Source: Central Bank of Ireland, Annual Reports for 2015, 2016 , 2017, and 2018

Disgorgement

A further financial sanction that could be considered, and likely without posing constitutional difficulties, is a power of disgorgement. Disgorgement refers to the removal of any profits or any economic benefit derived from a breach of a relevant regulation. It operates to obviate any benefit gained from the breach and returns the wrongdoer to the position in which they would have been had the breach not occurred. However, while the Central Bank does not have an explicit power to impose disgorgement, the Bank indicates in its Administrative Sanctions Procedure guide that it

[66] *Registrar of Companies v Anderson* [2005] 1 IR 21.

[67] Section 33AS of the C*entral Bank Act 1942,* as amended

already considers the economic benefit gained from a breach as an element to be considered when determining its overall sanction.[68]

The approach of the UK Financial Conduct Authority (FCA), a body with very similar powers to impose administrative sanctions as the Central Bank, is worth considering. The FCA assesses the economic benefit of a breach as the first element in its assessment of a penalty. This is the baseline of its financial sanction. It then imposes further, punitive sanctions as the situation merits.[69] A baseline of total disgorgement for any breach could act as a significant deterrent, particularly in undermining the logic of committing a calculated breach. For the reasons outlined, the Law Reform Commission recommends that regulators be provided with an express power to remove the economic benefit derived from a regulatory breach.[70]

[68] Central Bank of Ireland, *Outline of the Administrative Sanctions Procedure* (2018) pp 35– 36.

[69] Financial Conduct Authority, *Decision Procedure and Penalties Manual* (2013), para. 6.5.

[70] Law Reform Commission, *Report on Regulatory Powers and Corporate Enforcement* (LRC 119 – 2018) p. 155.

Fair Procedures

Public authorities exercising a decision-making function, such as those imposing administrative financial sanctions, must do so according to certain basic standards of fair procedures and natural justice.[71] The collection of procedural guarantees protected by the Constitution is often referred to as the principles of constitutional justice.[72]

Constitutional justice is founded on two pillars: a decision maker not be a judge in their own cause (*nemo iudex in causa sua*); and a person who is to be affected by a decision has the opportunity to be heard and to present his or her own case (*audi alteram partem*).[73] These concepts are necessarily broad and are not amenable to precise definition. The courts have held that what constitutional justice requires will vary depending on the nature of the decision maker and on the gravity of the threatened penalty.[74]

The context of an administrative financial sanction therefore has to be borne in mind. Where an administrative financial sanction is particularly large, the consequences of it for the natural or legal person will be serious, perhaps even more so than for a criminal offence. The procedures that a body imposing such sanctions will be required to follow will therefore have to be well-defined and contain certain similarities to the procedures one could expect from a court. In particular, in such a context, the *audi alteram partem* principle would likely require an oral hearing, a right to give evidence in defence, and a right to cross examine witnesses. It is also likely that a person facing an administrative financial sanction of a size comparable to those available to the Central Bank would have a right to legal representation.[75]

While a right to adduce evidence would likely be a facet of any administrative sanctions procedure, the full gamut of the ordinary rules of evidence would not apply. The Supreme Court has held, in

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[71] The Supreme Court outlined the general principles of constitutional justice relating to non-court proceedings in *East Donegal Co-Operative v Attorney General* [1970] I.R 317 at 341: "[it must be presumed] that proceedings, procedures, discretions and adjudications which are permitted, provided for or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice."

[72] See generally Hogan and Morgan, *Administrative Law in Ireland* (4th ed. Round Hall, 2010) Ch. 12.

[73] These were identified as such by Walsh J in *McDonald v Bord na gCon* [1965] IR 217 at 242.

[74] Chief Justice Frank Clarke described these varying standards in a 2014 lecture:

> "I think it is important to remember that constitutional justice is a slightly moveable feast. It does not necessarily mean the same thing in every type of situation and what is regarded as adequate to deliver a fair process in one type of situation may not be necessary in another. A case, for example, where someone is going to be dismissed from the Civil Service on the grounds of an allegation of corruption may involve a different level of process than a question of whether there should be a designation of an area in a particular way under a statute."

Public Lecture at Engineers Ireland on Adjudication – The Role of the Courts by Mr Justice Frank Clarke 29 January 2014; available here.

[75] Where the issues before an adjudicative or disciplinary body involve a point of law, a potentially serious penalty or damage to a person's good name, the courts have been inclined to find a right to legal representation. In *Flanagan v University College Dublin* [1988] IR 724, the High Court held that a student facing expulsion should have had the right to legal representation at his hearing. More recently, in *Lyons v Longford Westmeath Education and Training Board* [2017] IEHC 272, the High Court held that an employee facing a disciplinary investigation for bullying was entitled to have a lawyer present.

the context of public inquiries, that "evidential requirements must vary depending upon the gravity of the particular allegation."[76] The Law Reform Commission provides a useful overview of the rules of evidence in various non-court adjudicative bodies in its *Report on Consolidation and Reform of Aspects of the Law of Evidence*.[77]

The Central Bank, in its Inquiry Guidelines document,[78] provides for various procedural guarantees, including that a party is entitled to legal representation and to make legal submissions. It also provides that an oral hearing will be held where not to do so would cause unfairness. It also directs that Inquiry Members provide written reasons for decisions, and provides for avenues of appeal to the Irish Financial Services Appeals Tribunal and to the High Court. The document constitutes a useful guide for any other organisation empowered to impose administrative financial sanctions.

[76] *Lawlor v Tribunal of Inquiry into Certain Planning Matters* [2009] IESC 50.

[77] (LRC 117 -2016), Appendix B, available here.

[78] Central Bank of Ireland, *Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942*, available here.

Recommendations of the Law Reform Commission

As noted previously, the Law Reform Commission has recently published a major report, its *Report on Regulatory Powers and Corporate Offences*.[79] This report includes a consideration of administrative financial sanctions. The Commission made recommendations specific to the powers of the Central Bank as well as recommendations applicable to the use of administrative financial sanctions generally. The Commission notes that its recommendations are proposed with a view to devising a standardised approach to regulatory powers. The following is a brief summary of the Commission's primary recommendations for administrative financial sanctions generally:

Box: Primary recommendations of the Law Reform Commission:

(a) The imposition of the administrative financial sanction should follow an oral hearing before an adjudicative panel.

(b) An adjudicative panel should have the same powers as a judge of the High Court examining witnesses in civil proceedings. The panel should follow the requirements of fair procedures, but should not be bound by the laws of evidence. The standard of proof should be on the balance of probabilities.

(c) The recommendation of the panel to impose a sanction should be subject to confirmation by the High Court, and there should be a statutory right of appeal of the decision of the High Court to the Court of Appeal.

(d) Regulators should publish details of any administrative financial sanction imposed.

(e) An upper monetary limit of any financial sanction should be set down by legislation. In the case of a legal person, the Commission recommends a max of €10 million or 10% of annual turnover. In the case of a natural person, the Commission recommends a max of €1 million or 10% of annual income.

The Commission's recommendations propose a framework for an administrative financial sanctions procedure that draws on the Central Bank's Administrative Sanction Procedure and the Purcell decision.

The Commission notes that administrative fines have the potential to seriously affect the lives of private individuals and the financial integrity of undertakings. It therefore takes the view that, at a minimum, fair procedures demand that persons facing such a sanction have the benefit of an oral hearing before an "Adjudicative Panel Committee" (APC) at which they can state their case before a sanction is imposed.[80] The Commission recommends that these oral hearings should be

[79] Law Reform Commission, *Report on Regulatory Powers and Corporate Enforcement* (LRC 119-2018) p. 154.

[80] Ibid p. 140.

adversarial, as opposed to inquisitorial in nature.[81] A number of recommendations are also made in relation to how the APC should be composed; including that the APC should be established within the organisation but should be comprised of external persons.[82]

The Commission makes a number of recommendations as to the procedure that should be employed by the APC.[83] These recommendations broadly reflect the powers and privileges accorded in legislation to various existing non-court adjudicative bodies.[84] It is recommended that the APC follow the principles of fair procedures but should not be bound by the laws of evidence. It is also recommended that the standard of proof be 'on the balance of probabilities', and that the chair of the APC should have the power to compel a witness to answer a question, and to require them to produce documents. It is recommended that the APC have the powers of a judge of the High Court when hearing civil proceedings as to the examination of witnesses, and that witnesses should similarly have the same rights and privileges as witnesses in civil proceedings in the High Court.

Importantly, the Commission recommends that any administrative financial sanction imposed by an APC should be confirmed by the High Court.[85] As discussed above, the decision in *Purcell* placed a high degree of emphasis on the requirement that any sanction imposed be confirmed by the High Court when it determined that the Central Bank procedure was not an administration of justice within the meaning of Article 34. The Commission also places a great deal of emphasis on the *Purcell* decision as establishing the constitutionality of administrative financial sanctions.[86] It therefore appears that the Commission views such a confirmatory process as forming an essential part of any administrative financial sanctions regime. It further recommends that the decision of the High Court should be subject to an appeal to the Court of Appeal.

The Commission puts forward a proposal that the details of any administrative financial sanction should be published.[87] The Commission notes that the publication of administrative financial sanctions provides a deterrent effect both for the regulated entity involved and for other regulated entities in the market.[88] The Commission also sets out certain criteria that should be used to determine the appropriate level of the financial sanction, including recommending a statutory maximum. The Commission considers such a maximum necessary in order to guard against disproportionate sanctions that could have "spill-over" effects on innocent third parties connected to the sanctioned party. The limit recommended is, in the case of a legal person €10 million or 10%

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[81] Ibid.

[82] Ibid p. 141.

[83] Ibid p. 142.

[84] See discussion of procedures before non-court adjudicative bodies in Law Reform Commission, *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117 – 2016), Appendix B.

[85] Law Reform Commission, *Report on Regulatory Powers and Corporate Enforcement* (LRC 119 – 2018) at 145.

[86] Ibid pp. 106-109.

[87] Ibid p. 146.

[88] Law Reform Commission, *Report on Regulatory Powers and Corporate Enforcement* (LRC 119 – 2018) p. 147.

of annual turnover or, in the case of a natural person, €1 million or 10% of annual income, whichever is the greater.[89]

The Commission also recommends a number of matters to which any regulatory body should have regard in determining the appropriate level of the sanction:[90]

1. the gravity and the duration of the breach;
2. the degree of responsibility of the natural or legal person responsible for the breach;
3. the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;
4. the importance of profits gained, or losses avoided, by the natural or legal person responsible for the breach, insofar as they can be determined;
5. the losses for third parties caused by the breach, insofar as they can be determined
6. the level of cooperation of the natural or legal person responsible for the breach with the competent authority;
7. previous breaches by the natural or legal person responsible for the breach; and
8. any action taken to mitigate the damage caused by the breach.

The Commission's Report is a thorough examination of the area, setting out a wide range of significant recommendations for reform, and is worth reading in full.

[89] Ibid p. 161.

[90] Ibid p. 154.

Conclusion

Administrative financial sanctions are likely to become an increasingly prominent feature of the Irish regulatory landscape. They are evidently an important weapon in the arsenal of any regulator in ensuring that targeted and proportionate sanctions are a realistic threat to regulated bodies. This paper has sought to draw out some of the issues involved in introducing administrative financial sanctions into our regulatory environment.

The courts, understanding the essential importance of administrative financial sanctions to efficient and effective regulatory enforcement, have taken a highly pragmatic approach to questions regarding their constitutionality. However, further decisions setting out a more robust case for their constitutionality would be desirable, and are likely given the probable proliferation in the use of administrative financial sanctions.

Provided that due regard is had to these constitutional issues, including the application of constitutional fair procedures, administrative financial sanctions can play a positive and effective role in the Irish regulatory landscape.

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