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Regulatory Powers and Corporate Offences – some key changes suggested by the Law Reform Commission

The Law Reform Commission ("**LRC**") published yesterday (23 October 2018) its report on "Regulatory Powers and Corporate Offences". The report is extensive running to over 800 pages (including draft legislation at the Appendix) and recommends an overhaul of the current regimes in place to tackle regulatory breaches and white collar crime. Eight "financial and economic regulators" are covered by the report.[1] This article focuses on four of the proposals made by the LRC - legislative change will be required in order for any of the LRC's proposals to come into effect.

Establishment of a Corporate Crime Agency

The LRC commented on the difficulties which were encountered in the prosecution of some criminal cases following the banking crisis (e.g. lack of experience in dealing with large scale criminal investigations and lack of resourcing) and have recommended that a multi-disciplinary Corporate Crime Agency should be established *"without any undue delay*."

The LRC recommends that the Agency would have its own statutory mandate to investigate corporate criminal offences independently from any referrals from financial or economic regulators and that it must be sufficiently resourced to carry out

[1] The Central Bank of Ireland, the Competition and Consumer Protection Commission, the Office of the Director of Corporate Enforcement, the Commission for Aviation Regulation, the Commission for Communications Regulation, the Commission for the Regulation of Utilities, the Health Products Regulatory Authority and the Broadcasting Authority of Ireland.

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its functions. The LRC suggests that the apart from the Agency, a dedicated unit which is sufficiently resourced to prosecute corporate offences on indictment should also be established, preferably in the Office of the Director of Public Prosecutions (the "**DPP**").

Introduction of Deferred Prosecution Agreements

The LRC has recommended that Deferred Prosecution Agreements ("**DPAs**") should be introduced in Ireland for the first time. DPAs are agreements between a prosecutor and a corporate body (or other undertaking, such as a partnership) in which the prosecution agrees to dismiss a criminal charge if the corporate body fulfils certain specified obligations.

The LRC has suggested that DPAs would only be available in respect of certain specified offences including offences under the Competition Act 2002, the Companies Act 2014, the Taxes Consolidation Act 1997 and the Criminal Justice (Corruption Offences) Act 2018, among others. It has recommended that DPAs would only apply to corporate bodies and in respect of indictable offences. It has recommended that if DPAs are introduced, a Code of Practice should be published which would outline in detail how the prosecutor would perform its role under the scheme and the standards it will apply in the process of negotiating and preliminarily agreeing a DPA.

The LRC envisages that the DPP would be the only authority with the capacity to invite a corporate to enter into DPA negotiations. These cases may come to the DPP's attention either through an entity self-reporting the misconduct and seeking to open DPA negotiations, or, where criminal behaviour is detected and the corporate offers full and genuine cooperation. The LRC has recommended that oversight and approval of the terms of a DPA would be required by the High Court before a DPA agreed under the scheme could be finalised and become binding.

Introduction of Core Regulatory Powers

The LRC has suggested that core regulatory powers should be introduced for all similarly situated financial and economic regulators so they can all sing from the "same regulatory hymn sheet." The LRC recommends that, at a minimum, six "core" powers would be introduced as follows:

- power to issue a range of warning directions or notices, including to obtain information by written request and "cease and desist" notices;
- power to enter and search premises and take documents and other material;
- power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or produce documents;
- power to impose administrative financial sanctions (subject to court oversight, to ensure compliance with constitutional requirements);
- power to enter into wide-ranging regulatory compliance agreements or settlements, including consumer redress schemes; and
- power to bring summary criminal prosecutions (prosecutions on indictment are referred to

the DPP).

Administrative Financial Sanctions and Regulatory Enforcement Agreements

The LRC has recommended that Administrative Financial Sanctions ("**AFS**") should be made available to all the regulators covered by its report (the LRC notes that some regulators, most notably the Central Bank of Ireland (the "**Central Bank**"), already has the power to impose such sanctions).

It suggests that the maximum statutory limit for AFS would be €10 million or 10% of turnover for corporate bodies and €1 million for natural persons. The removal of any economic benefit derived from the regulatory breach ("disgorgement") should be in addition to any AFS imposed. Interestingly, the LRC suggests that the Central Bank and other comparable financial regulators should be empowered to put a legal costs assistance scheme in place, so for example, if no regulatory breach is found to have occurred the party who has been subject to the AFS procedure may recover its costs.

The LRC recommends that an Adjudicative Panel Committee would be established to hear cases concerning the proposed imposition of an AFS and from this Committee a panel of three would be chosen to hear a particular case. It recommends that the panel would be composed of individuals external to the relevant regulator and the hearing process would be adversarial.

The LRC has also suggested that regulators who are in the scope of its report should be provided with the power to enter into Regulatory Enforcement Agreements ("**REA**") to settle suspected regulatory breaches with a regulated entity or individual. This would be an alternative to the more formal AFS procedure referred to above.

The LRC has suggested that parties who sign up to a REA within a period prescribed by the relevant regulator may be able to get a discount of up to 30% of the discount which might otherwise have been imposed as an AFS if the matter were to be heard by an Adjudicative Panel. The LRC recommends that a pre-condition to a party entering into a REA would be that they would accept responsibility for the breach and that a public statement would be issued following settlement, setting out the details of the breach. The LRC also believes that the regulator should have the express power to agree financial compensation payments to be paid by the regulated entity responsible for the breach, including by means of a redress scheme under the REA.

Commentary

If the LRC's proposals are introduced it will lead to a substantive overhaul of Ireland's current regulatory enforcement regimes and the tools available to tackle white collar crime. If a Corporate Crime Agency is established and DPAs are introduced, this could lead to more "white collar" prosecutions being taken than is currently the case and give the DPP the option of entering into a

DPA with a company rather than deciding not to prosecute because of evidential difficulties.

The suggestion for "core" powers to be standardised between different regulators is no doubt a welcome one for companies which are subject to different regulatory regimes. The LRC's recommendation for legislative provision to be made for entities and individuals that are subject to an Inquiry under the Central Bank's Administrative Sanctions Procedure to recover their costs in certain circumstances – and in respect of any other similar procedure which may be given to other regulators following the LRC's recommendations – is also a welcome one. This should go some way in mitigating the financial considerations which can impact on a party's decision as to whether to contest a case.

Finally, companies are less likely to be pleased by the LRC's suggestion that REAs (if introduced) should be published and include a provision stating that the regulated entity accepts responsibility for the breach. In other jurisdictions it is possible to enter into agreements with a regulator on a "no admit, no deny" basis.

Contact Information

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