

LAW SOCIETY SUBMISSION



RESPONSE TO LAW REFORM COMMISSION'S ISSUES PAPER ON: REGULATORY ENFORCEMENT AND CORPORATE OFFENCES

LAW REFORM COMMISSION

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Standardising Regulatory Powers

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

The Law Society of Ireland believes that it would be more appropriate to have a single regulator or, to have two organisations which are responsible for the regulation of companies and the regulation of banking, respectively.

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

If powers are to be standardised, they should be as set out under paragraph 1.11 of the Issue Paper i.e. the following inspection and investigation powers;

1. Power of entry to premises (with search warrant granted by the District Court and upon application by a member of An Garda Síochána).
2. Power to require the production of and to inspect, copy and remove documents or information (with a search warrant granted by the District Court and upon application by a member of An Garda Síochána).
3. Power of access to computers and storage devices (with a search warrant granted by the District Court and upon application by a member of An Garda Síochána).
4. Power to summons persons to attend and answer questions.
5. Power to interview staff and other persons associated with regulated entities.
6. Power to apply for and execute search warrants and enforcement powers.

In addition to the above, enforcement powers relating to the following issues should also be included:

- a) Fitness and probity regimes
- b) Binding codes of conduct
- c) Civil financial sanctions
- d) Negotiated compliance agreements

Difficulties

In certain circumstances it may not be appropriate for all regulators to have all of these powers. Issues may arise as new regulators are introduced and current regulatory bodies cease to exist.

Paragraph 1.06 of the Issues Paper states: "even when only a single regulator is involved, the multiplicity of statutory provisions could have an inhibiting effect on decisions to prosecute or take enforcement action against offenders".

If it is difficult for regulators to decipher the "multiplicity of statutory provisions" when they are considered to be specialists in their area, it follows that it will inherently be

as challenging for an organisation or individual to determine the position. This will apply particularly where an alleged offence is prosecuted and where an organisation or individual will be obliged to defend itself in such a complex statutory regime.

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

Regulation could be improved by a consolidation of the powers of the regulators and through the establishment of a central prosecution authority for the prosecution of regulatory offences. This might include the DPP, the ODCE, the Central Bank, An Garda Síochána, possibly the Criminal Assets Bureau who would be responsible for the investigation into, and the administration of civil financial sanctions, as well as the criminal prosecution of organisations and individuals.

2. Civil Financial Sanctions

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

In certain circumstances, it may be more proportionate to impose a civil financial sanction rather than a criminal prosecution. There should be serious consideration as to the extent to which civil financial sanctions should be used. In cases of serious breaches, or where a breach reaches a certain limit, criminal rather than civil prosecution should follow.

Fair procedures must be strictly adhered to and should be at the forefront of any proposals in respect of sanctions.

Paragraph 2.11 of the Issues Paper states that "a body such as a regulator that imposes civil financial sanctions is unlikely to breach Article 6 provided it can assure the required fairness and procedural safeguards". It is vital that both a review by the courts and an appeal mechanism remain in place to ensure that fair procedures are consistently upheld.

The constitutionality of sanctions and processes must be examined. For example, it is a matter of concern that the Central Bank may enter into settlement agreements without carrying out a full inquiry.

Where an inquiry is carried out by the Central Bank there is provision for an appeal to IFSAT and then an appeal to the High Court however before an inquiry takes

place an investigation letter is sent to the organisation/individual to which replies or submissions are invited.

Lengthy responses are often received and it is for the Central Bank to determine if there is a contravention, and then proceed to settlement or inquiry. The fact that this is done without any judicial supervision is arbitrary and open to abuse.

The Society questions whether the Central Bank should have the power to stop an inquiry in favour of a settlement agreement without engaging fully in an inquiry. In circumstances where the decision of the Central Bank is not to offer a settlement agreement, it is not generally open to appeal. The Central Bank, in its Outline of Administrative Sanctions states that the Central Bank has “sole discretion whether a particular case is suitable for settlement.

3. Negotiated Compliance Agreements

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

Are there other models of settlement agreement that should be considered? What are the advantages and disadvantages of these approaches?

The Law Society is in favour of statutory settlement agreements resembling those described, subject to adequate scrutiny and oversight.

Furthermore, any provisions in the case of a breach should be efficient and effective, with the possibility of onsite supervision where appropriate. Consistency of enforcement is essential for any sub criminal/court sanctions.

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

These types of agreements if available, should be broadly applicable and could act as an alternative to criminal proceedings in appropriate cases. Crucially, any such decisions must be transparent and subject to oversight.

4. Deferred Prosecution Agreements (DPAs)

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

The Society would be in favour of DPAs along the lines of the UK model rather than the US model. Judicial and executive oversight is crucial. The preservation of entities and employment is of great importance in a country our size. However this priority must not operate to damage public confidence in our authorities. Thus, a consistent approach to enforcement is crucially important.

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

Amendments may be required to certain Acts in order to set out the offences to which the DPAs would apply, for example the schedule of the Criminal Justice Act 2011, any of the Finance Acts and the new Companies Act.

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

Judicial and Parliamentary oversight are necessary for any DPA system. The Law Society would be happy to provide a further assessment of this should the proposal be pursued.

5. Coordination of Regulators

5(a) Do you think there is a case for extending the use of the lead agency approach in Ireland?

There is a case for considering the lead agency approach in Ireland.

5(b) To which, if any, policy areas or economic sectors do you think it should apply?

The Society confines its consideration here to matters of company law, banking and taxation.

5(c) Do you consider that any particular policy area (e.g. competition, corporate governance etc.) should be given priority?

In terms of the answer to 5(b) the Society believes that corporate governance, fiduciary duty and financial probity should be given priority.

5(d) How do you think the role of a lead agency should be defined, and who should have the final decision on the nature and extent of its involvement?

The lead agency - given its statutory function, resources and expertise - should be best equipped to deal with the particular sector or policy area involved.

5(e) How, in your view, should a lead agency be selected?

It should be approached on a case by case basis. It is important that there are personnel in the different regulatory bodies who are used to working together to ensure ease of communication and information sharing.

5(f) Do you think one particular agency should be the default lead agency, or should the choice be open to variation depending on the circumstances?

Given our remarks above it should be open to variation. This is partly down to the incoherent manner in which regulatory bodies have been established in Ireland. There is great scope for streamlining and synergy in this area.

5(g) Do you think the existing arrangements for co-operation agreements have contributed to regulatory efficiency and to compliance?

We have seen no evidence to support this.

5(h) Do you think that co-operation agreements are an effective mechanism for improving regulatory cooperation and outcomes?

All regulatory bodies should as a matter of course, be seeking to cooperate with other relevant regulatory bodies on sectors or issues of common concern. A failure to do this leads to inefficiency and waste of resources and expertise.

5(i) If not, how, in your view, could they be improved?

Until there is some consolidation then it should be mandated that Regulatory bodies cooperate with each other to pursue common objectives.

5(j) Do you consider the lead agency approach to be preferable to co-operation agreements?

We believe that, until consolidation, both options should be considered.

5(k) Do you think co-operation agreements should prioritise a particular cross-sectoral policy (e.g. competition or corporate governance) over other regulatory concerns?

A task force should identify the areas where crossover occurs frequently. This task force should then direct cooperation between agencies for those areas.

5(l) Do you think that it would be desirable or feasible to permit regulators to share with other regulators information that they have received in confidence, if the information relates to matters other than criminal offences?

Yes, providing protocols and oversight provisions exist.

5(m) If so, in your view, what limitations and information governance rules should apply?

It should not be limited to criminal offences and should include breaches of regulations or other provisions.

5(n) What information, do you think, should be allowed to be shared? e.g. identity and basic information supplied on first registration with a regulator, data supplied as part of normal regulatory returns, information supplied during consultations with regulators, information coming to light during supervision or investigation activities etc.

All the examples supplied above are appropriate; however the Society reserves its position subject to the provision of further details on the proposal.

5(o) Do you think that regulators and their authorised officers should be able to work co-operatively in inspections and/or enforcement?

Yes.

5(p) If so, how do you think their statutory mandates should be adapted?

The State should undertake a comprehensive review of the regulatory landscape and the functioning of each body to see where there could be consolidation. Certain regulatory bodies should be examined to see if they could be merged.

5(q) Do you think that information obtained cooperatively should be available for use (whether in enforcement actions or otherwise) by other regulators?

Yes.

5(r) What, if any, information governance rules do you think should apply?

A comparative study should be undertaken to assess international best practice with the objective of formulating the rules that should apply.

6. Jurisdiction for Regulatory Appeals

6(a) Do you think that appeals of the decisions of the regulators that are the focus of this Issue should be made directly to the High Court?

Yes. Benefits include a more transparent and streamlined appeal system ensuring that the same procedures and rules govern all regulatory appeals. Additionally, the High Court has the benefit of total independence from the various regulators. The High Court has a wide body of established jurisprudence and clear rules in relation to the admissibility of evidence and procedural safeguards ensuring that the appeals process is fair and impartial.

The High Court should be permitted to hear appeals on merit but should be confined to approving the decision of the regulator or remitting the case to the regulator for a fresh hearing. This would safeguard the statutory functions of the regulator, as well as recognising the regulator's expertise and discouraging appeals as an automatic next step.

The High Court should have the power to grant costs in the ordinary way which would again discourage appeals as an automatic next step as well "regulatory gaming".

It is noted that the over-arching right to judicially review the procedures and processes of the regulator would be unaffected by an automatic appeal to the High Court. It is further submitted that judicial reviews could, and would, still be a useful tool in ensuring procedural safeguards at first instance.

6(b) If yes, do you think that any additional procedures are required to ensure that the High Court has sufficient expertise to hear such appeals? What, in your view, should these procedures comprise of?

As discussed above, the High Court already has clear rules in place in relation to the admissibility of evidence and procedural safeguards generally. Similarly, the procedures already in place in the High Court are adequate to ensure that it has sufficient expertise to hear regulatory appeals.

It is recommended that a system of case management, already in place in many of the lists, would be applied to regulatory appeals. This would include strict timelines for the filing of submissions in relation to appeal. Certainly, the High Court has been able to deal with a wide variety of complex matters to date and it is submitted that there is no evidence to suggest that regulatory appeals would be any different. Issues specific to an industry or regulatory body could be explored in written submissions by both parties which would be filed in advance of the hearing.

It may also be of benefit to attach to the case management a system of assigning cases to a particular Judge once submissions have been filed by both parties. This would allow the Judge to familiarise himself or herself with the particular appeal in advance of the hearing and where appropriate to seek to narrow the matters to be adjudicated on. It would also allow the parties to raise any preliminary applications

with the trial Judge in advance of the hearing, thereby reducing the risk of delays in the hearing of appeals.

It is worth noting that the Court could exercise its discretionary power to appoint an independent expert assessor where it feels that it is necessary and appropriate.

6(c) Do you think that the Commercial Court or the High Court Competition List could be used to facilitate regulatory appeals? Would a system of appeal to another court of appropriate jurisdiction, such as the Circuit Court, provide an appropriate alternative?

The Society suggests that regulatory appeals should be brought into the ordinary lists of the High Court. Just as in cases brought to the High Court as Court of first instance, provision could be made for applications in the normal way to have these cases transferred to the Commercial Court. Certainly, the appeals of the type with which the Issues Paper is concerned, (i.e. adjudicative decisions of financial and economic regulators that can have high market impact) may be more suited to the streamlined procedures of the Commercial Court and application could be made for transfer to that list.

However, looking at regulatory appeals as a whole, it is submitted that the costs associated with the Commercial Court may be prohibitive if such appeals were transferred to the list as a matter of course and might cause unnecessary backlog in that Court where the High Court acting in its normal capacity would be suitable. Moreover, many of the novel features of the Commercial Court at its inception are now utilised in the other lists of the High Court, for example case management. It is submitted that the system of case management should be utilised from the inception of an appeal to ensure that hearings are not delayed.

6(d) Do you think that, rather than providing for appeals to the High Court, provision should be made for a single, uniform regulatory appeals body to which appeals from the decisions of the regulators that are the focus of this issue could be made?

No.

6(e) If yes, what form do you think this body should take? Should this body replicate the UK CAT model, the Australian AAT model, or another approach?

Please see 6(d) above.

6(f) What requirements or safeguards do you think should be provided for in any such body?

Please see 6(d) above.

6(g) What types of decision making powers do you think such a body should have? Should the process be confined to allowing the appellate body only to either affirm or remit a decision? Or should the body have the power to

replace such decisions? Should both approaches apply in different circumstances?

Please see 6(d) above.

6(h) Do you think that an appeals body should have the ability to conduct a full appeal on the merits?

Please see 6(d) above.

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