

Ireland's White-Collar Crime Oversight Agencies

Fit for Purpose?

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¹ This is a very early draft paper and forms part of my current research plan. Any comments, suggestions or amendments, very much welcomed. I can be contacted here - <http://elaine.ie/contact/>

The purpose of this working paper is to examine the enforcement capacity of key oversight agencies in Ireland with regard to white-collar crime, particularly the Office of the Director of Corporate Enforcement. This paper is divided into four sections. It contextualises the prosecutorial ability of oversight agencies. It asks if the perceived lack of prosecutions has contributed to the low levels of trust in Ireland. The failure of oversight agencies to react in a timely fashion raises fundamental questions. Are Ireland's oversight agencies fit for purpose? The impact of budget cuts across a range of agencies is examined. A series of recommendations are proposed. These recommendations are as a consequence of consultation with senior enforcement officers and legal experts within the agencies.

The laggard programme of reform undertaken by enforcement agencies is in stark contrast to the ground-breaking reforms embarked by the Central Bank of Ireland since 2010. This paper does not seek to examine the Central Bank or the Financial Regulator, other than to highlight the reforms undertaken.

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1. Ireland – Prosecutions?

Scandal in Ireland has been historically characterised by impunity.² Despite a great number of white-collar crime inquiries, there have been little or no negative consequences for the individuals identified as having engaged in ethical breaches.

The outgoing financial regulator Matthew Elderfield criticised the failure by authorities to tackle white-collar crime.³ In response to questions from members of the Public Accounts Committee in June, he said the system for tackling financial crimes needed a review and that the current legislation was not fit for purpose.⁴ "The white-collar set-up in and around capabilities, resources, powers, constitutional interaction – I don't think in the round that it's working sufficiently well, he said." Elderfield called for the Law Reform Commission or a retired judge to conduct a review.

Notwithstanding recent actions taken against Sean Fitzpatrick and potential future ones against Michael Fingleton, more systematic problems of corporate oversight and enforcement nevertheless remain in Ireland.⁵ Although the Criminal Justice Act 2011⁶ identifies new categories of white-collar crimes, and enhances powers to gather evidence, it did not appear to quicken the painfully slow pace of criminal investigations arising from the 2008 banking crisis. Ireland's regulatory record and prosecution of white-collar crime is weak.

- The chair of the Revenue Commissioners, Josephine Feehily, noted that although 289 cases of illegality were identified in relation to the largest tax evasion scheme in Irish history, not one person has been prosecuted over the Ansbacher tax scandal.⁷
- The Competition Authority has secured 33 convictions against companies and individuals, but the yield has been low: €600,000 in fines and no one sent to jail.⁸
- The ODCE has yet to secure a prosecution for insider trading or market abuse since its establishment in 2001.⁹

² Village Magazine Editorial (2012) Calling for an end to impunity for white-collar criminals. *Village Magazine*, 7th July, <http://www.villagemagazine.ie/index.php/2012/07/july-12-editorial-calling-for-an-end-to-impunity-for-white-collar-criminals/>

³ McGee, H., (2013) Rethink needed on ways to tackle white-collar crime, says Elderfield. *Irish Times*, 13th June, <http://www.irishtimes.com/news/rethink-needed-on-ways-to-tackle-white-collar-crime-says-elderfield-1.1428087>

⁴ Kelpie, C. (2013) Elderfield says laws must be stronger on white-collar crime. *Irish Independent*, 14th June, <http://www.independent.ie/business/irish/elderfield-says-laws-must-be-stronger-on-white-collar-crime-29343639.html>

⁵ Sean Fitzpatrick is the former chair of Anglo Irish Bank. He is currently facing 12 charges of failing to disclose to auditors Ernst & Young the true value of loans worth at least €139m given to him or people connected to him, by Irish Nationwide Building Society from 2002 to 2007 while he was an officer of the bank. Michael Fingleton is the former chief executive of Irish Nationwide Building Society. A civil action is being taken against by the special liquidator of the Irish Bank Resolution Corporation, which took over control of INBS and Anglo Irish Bank.

⁶ Irish Statute Book (2011) *Criminal Justice Act*. <http://www.irishstatutebook.ie/2011/en/act/pub/0022/index.html>

⁷ Irish Independent (2013) Not one person prosecuted for Ansbacher scam. 24th March, *Irish Independent*, <http://www.independent.ie/irish-news/not-one-person-prosecuted-for-ansbacher-scam-29150283.html>; Committee on Public Accounts (2013) *Chapter 10 - Increasing Tax Compliance (Continued)*. 21st February, <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/ACC2013022100018?opendocument>

⁸ Irish Independent (2011) You won't do time for 'white-collar' crime - no laws seem to cover it. *Irish Independent*, 9th June, <http://www.independent.ie/business/irish/you-wont-do-time-for-white-collar-crime-no-laws-seem-to-cover-it-2669932.html>

⁹ Irish Independent (2011) You won't do time for 'white-collar' crime - no laws seem to cover it. *Irish Independent*, 9th June, <http://www.independent.ie/business/irish/you-wont-do-time-for-white-collar-crime-no-laws-seem-to-cover-it-2669932.html>

- A substantial drop in the number of people convicted of white-collar crime was recorded from 2003-2010, in spite of an increase in the number of offences. The number of convictions for white-collar crime fell to 178 in 2010 compared with 579 in 2003.¹⁰ In the same period, the number of white-collar crime cases had increased from 2,295 in 2003 to 2,680 in 2010.¹¹ The cases included fraud, deception and false pretence offences, falsification of accounts, offences under the Companies Act, offences under the Investment Intermediaries Act, offences under the Stock Exchange Act, money laundering, embezzlement, fraud against the European Union and corruption involving public officeholders.¹²

A comprehensive breakdown of statistics is difficult to ascertain. The Transparency International 2012 National Integrity Study has emphasised that a “full analysis of trends is impeded by an absence of clear and consolidated statistics on investigations or prosecutions for corruption-related offences by law enforcement agencies and the various regulatory bodies. For example, the ODCE’s statistics on convictions under the Companies Acts are at odds with those supplied by the Central Statistics Office, which takes its data mostly from the Garda Síochána record management system.”¹³

The failure of Ireland’s oversight agencies to react in a timely fashion raises fundamental questions. Are Ireland’s oversight agencies fit for purpose?

2. The Issue of Trust

The upshot of Ireland’s economic collapse and the subsequent intervention of the troika is the amplified focus on ethics, integrity and transparency in Irish life public.¹⁴ The collapse of the Irish economy has seen a greater emphasis on cases involving fraud, deception, falsifying accounts, offences under the Companies Acts, money laundering and embezzlement.¹⁵

Systemic failures in financial regulation, corporate governance and accountability contributed to the depth of Ireland’s financial collapse which is cited in an IMF working paper as the “costliest banking crisis in advanced economies since at least the Great Depression.”¹⁶ The entire Irish banking sector was nationalised or part nationalised. In his

¹⁰ Melia, P. & T., Brady, (2012) Cases 'too complex' as white-collar convictions plummet. *Irish Independent*, 19th November, <http://www.independent.ie/national-news/cases-too-complex-as-white-collar-convictions-plummet-3297189.html>

¹¹ RTE NEWS (2012) Substantial drop in number of white-collar crime convictions. *RTE NEWS*, 18th November, <http://www.rte.ie/news/2012/1118/346108-white-collar-crime-figures/>

¹² Dowds, R. TD. (2012) Conviction for white-collar crime has halved – Dowds. *Labour Press Release*, 16th November, <http://www.oireachtas.ie/parliament/mediazone/localmediareports/weekending16november/convictionforwhitecollarcrimehashalved-dowd>

¹³ Transparency International Ireland, (2012) *National Integrity Systems Study*. <http://transparency.ie/resources/NIS>

¹⁴ Department of Justice and Equality, *Third Discussion Document - 'Organised and White-collar Crime' - Summary of Consultation Outcomes*. http://www.justice.ie/en/JELR/Pages/3rd_disc_doc_summary

¹⁵ Transparency International Ireland, (2012) *National Integrity Systems Study*. <http://transparency.ie/resources/NIS>

¹⁶ Laeven, L., F. Valencia, (June 2012) Systemic Banking Crisis Database: An update, *IMF Working Paper* <http://www.imf.org/external/pubs/ft/wp/2012/wp12163.pdf>

official banking report to the Minister for Finance, the Governor of the Central Bank, Patrick Honohan, described it as “the most expensive [banking crisis] in history.”¹⁷

The intervention of the IMF/ECB/EU troika in 2010 not only demoralised public confidence in the very ability of political action, but asked fundamental questions regarding the rule of law. A casualty of such intensified attention on accountability is that of trust and one articulated across all sections of Irish society. The President of Ireland, Michael D. Higgins, had designated the theme of his presidency for 2013 as “the crisis in ethics”. The President’s deliberate emphasis on the “enormous breaches of trust” suffered by the Irish people at the hands of the banks and other institution reflects popular perceptions.¹⁸ “Gavin from Cork” rang Liveline, the second most listened to Irish radio station, following the release of the “Anglo Tapes”¹⁹ and asked: “Who can you trust now? This lack of transparency, this lack of honesty... the stock exchange in London used to have a motto – your word was your bond – now you don’t know who the hell you can believe in at all, whether its financial organisations, banks or politicians.”²⁰

Trust in government in Ireland is significantly below the EU average, dropping by almost half between 2008 and 2012, from 46 to 24 per cent. In 2010, Ireland recorded the lowest level of trust in government of any of the EU27 at just 10 per cent.²¹

In any well-ordered republic there must be equality before the law. For no one will be prepared to trust another who enjoys a different legal status to himself.²² A functioning democratic society is dependent on a mutual faith in the triumph of public over private interests. Instead, there is an engrained belief that some sections of the Irish elite are above reproach, without question and beyond criticism. The history of scandal in Ireland suggests that the recurring absence of consequence or prosecution has enabled a licence to act with impunity.²³

3. Capacity

The impact of Ireland’s oversight agencies since the 2008 economic collapse with regard to white-collar crime has been limited. The investigation of white-collar crime is notoriously complex and time-consuming and does not lend itself to quick resolution. The decision to prosecute is ultimately with the Director of Public Prosecutions.

¹⁷ Honohan, P., (2010) *The Irish Banking Crisis Regulatory and Financial Stability Policy 2003–2008: A Report to the Minister for Finance by the Governor of the Central Bank*, Dublin: The Stationery Office, p. 131.

¹⁸ Horan, N., (2013) Higgins: 'enormous breaches of trust by institutions need repair. *Sunday Independent*, 21 April, <http://www.independent.ie/irish-news/higgins-enormous-breaches-of-trust-by-institutions-need-repair-29210725.html>

¹⁹ The Anglo Tapes refer to recorded phone calls from 2008 between executives of Anglo Irish Bank, released by the *Irish Independent* newspaper. Anglo was a reckless property development bank whose liabilities were guaranteed by the Irish government. The cost of the Irish government guarantee of Anglo has to date cost the state over €30 billion, or 20 percent of GDP. <http://www.independent.ie/business/irish/anglo/>

²⁰ RTE LIVELINE (2013) *Joe Duffy*. 26 June, <http://www.rte.ie/radio1/liveline/>

²¹ European Commission, *Standard Eurobarometer 78, 'Public Opinion'* http://ec.europa.eu/public_opinion/archives/eb/eb78/eb78_en.htm

²² Pagden, A., (2000) *The Destruction of Trust and its Economic Consequences in the Case of Eighteenth-century Naples*, in Gambetta, Diego (ed.) *Trust: Making and Breaking Cooperative Relations*, electronic edition, Department of Sociology, University of Oxford, chapter 8, pp. 127-14, <http://www.sociology.ox.ac.uk/papers/pagden127-141.pdf>.

²³ Byrne, E., (2012) *Political Corruption in Ireland 1922-2010: A Crooked Harp?* Manchester University Press.

Table 1: Oversight agencies²⁴

White-Collar Crime Offence	Responsible Agency	Domestic Legislation	International Legislation
Corporate and/or business fraud White-collar Crime	Garda Síochana Garda Bureau of Fraud Investigation (GBFI) Central Bank of Ireland (Central Bank) Revenue Commissioners Criminal Assets Bureau (CAB) Office of the Director of Corporate Enforcement (ODCE)	Criminal Justice (Theft and Fraud Offences) Act 2001 (CJA 2001). Companies Acts 1963 to 2012	See below
Bribery and Corruption	Garda Síochana GBFI National Bureau of Criminal Investigation (NBCI) CAB Revenue Commissioners Standards in Public Office Commission (SIPO)	Prevention of Corruption Acts 1889 to 2010 Criminal Justice Act 2011 Criminal Justice (Corruption) Bill 2012	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (ratified 2003) Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the EU 1997 (ratified 2003) Council of Europe's Criminal Law Convention on Corruption 1999 (ratified 2003) UN Convention against Corruption 2003 (ratified 2011) UN Convention against Transnational Organised Crime 2000 (ratified 2010)
Insider dealing and market abuse	Central Bank	Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (IFCMPA 2005) CJA 2001	Directive 2003/6/EC on insider dealing, market manipulation and market abuse. (MAD Regulations)
Money laundering and terrorist financing	Gardaí Revenue Commissioners Regulated financial service providers are monitored for compliance by the Central Bank. Unregulated entities that are defined as "designated persons" are monitored by their own supervisory authorities. For example, lawyers are monitored by the Law Society of Ireland (Law Society).	Criminal Justice (Money Laundering and Terrorist Financing) (Section 31) Order 2012 Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (CJA 2010) Trust or Company Service Provider (Authorisation) (Fees) Regulations 2010 Criminal Justice (Terrorist Offences) Act 2005 (CJA 2005)	Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Third Anti-money Laundering Directive).

²⁴ Practical Law Company, *Corporate crime, fraud and investigations in Ireland: overview*. <http://us.practicallaw.com/6-525-1288>

Members of the public are engaging and interacting with oversight agencies more than ever before. However, resources in many cases have been reduced despite the workload of oversight agencies increasing.

Nonetheless, the Head of Financial Regulation at the Central Bank of Ireland, better known as the Financial Regulator, has implemented significant changes to its operation. This includes the development of PRISM (probability risk and impact system), a risk-based supervision system model, which is one of the most invasive prudential systems in the world. PRISM assists the six hundred supervisors tasked to regulate more than ten thousand regulated entities through strategic choices about resource allocation. Prior to Ireland's financial crisis, the supervisory capability of the Financial Regulator, a stand-alone body until 2010, was under-resourced.²⁵ The outgoing Financial Regulator, Matthew Elderfield, had originally estimated that the regulatory function of the Central Bank required staffing levels of 725 but believes that the current complement of 600 is "sensible for the end of the current three year Central Bank Strategy in 2015."

The Public Service Agreement 2010-2014 between public sector unions and the government introduced a moratorium on public sector recruitment. Commonly referred to as the Croke Park Agreement, the Agreement seeks to introduce efficiencies into the public sector without compromising pay reductions or redundancies. However, the work requirements of key oversight agencies have risen significantly at a time when resources have been cut or have not increased to meet the demands of an augmented workload.

The capacity of the Garda Bureau of Fraud Investigation to investigate white-collar crime is limited somewhat given the absence of solicitors or barristers on its staff and just two full-time forensic accountants on its books. The lifeblood of every white-collar crime investigation is heavily dependent on the specialist skills of forensic auditors. There are just three forensic accountants within a team of 70 officers at the Criminal Assets Bureau.

Privately, senior officers from different agencies have confided that diminished resources are "strangling" their ability to do their job effectively. The Croke Park Agreement means that in reality a "six year gap between recruitment drives" now exists. The government argue that funding reductions is reflective of wider efficiency changes within the public sector rather than a reflection of government priority on white-collar crime.²⁶

3.1 Office of the Director of Corporate Enforcement (ODCE)

The public have expressed frustration with the pace of the corruption and white-collar crime investigations which have centred on high profile individuals noticeably associated with Ireland's economic collapse. This disquiet is particularly focused towards the on-going investigation initiated into Anglo Irish Bank since February 2009, the lender that was central to the Irish banking crisis. The ODCE is tasked with this investigation.

²⁵ Elderfield, M., (2013) *Opening Statement by Deputy Governor Matthew Elderfield to the Public Accounts Committee*. 13th June, <http://www.centralbank.ie/pressarea/speeches/Pages/OpeningStatementDeputyGovernorMatthewElderfieldtothePublicAccountsCommittee.aspx>

²⁶ Department of Justice and Equality, (2013) *CSO show crime down 8%*, 28th June. <http://www.merrionstreet.ie/index.php/2013/06/cso-figures-show-crime-down-by-8/?cat=3>

The Minister for Justice has said that he shares the impatience of many people at the pace of investigations into possible criminal behaviour at Anglo. He has also said that he appreciates that the “investigators and prosecutors face particular challenges as a result of the complexities of the matters being investigated... This is the most complex investigation of its kind ever undertaken in the State.”²⁷ The Commercial Court’s most senior judge, Mr Justice Peter Kelly is of the view that the investigation was taking “longer than desirable”.²⁸ The then Director of Public Prosecutions, James Hamilton, has described the investigation into Anglo as “unusual” given its scale and complexity.²⁹ In May 2013, the director at the Office of the Director of Corporate Enforcement, Ian Drennan, said that his office had “substantively completed” its investigations into the former Anglo Irish Bank and that 60 charges were brought against a number of individuals following the probe.³⁰

Nonetheless, despite the demands of the Anglo investigation and the high levels of corporate insolvency rates in this period due to the economic crisis, the Office of the Director of Corporate Enforcement (ODCE) saw a decrease in its funding in 2011 of 7.5 per cent.³¹ The ODCE however was allocated five additional administrative staff and five additional Gardaí to assist in the Anglo investigation.

4. Budget

These figures arise following a parliamentary question by Brendan Griffin TD to the Minister for Jobs, Enterprise and Innovation, Richard Bruton.³²

Table 2: Budgets of the Ombudsman, SIPO, ODCE and CAB 2008-2013

	Ombudsman €000s**	SIPO €000s**	ODCE €000s	CAB €000s
2008	4722	1033	4957	7509
2009	4726	861	5535	6877
2010	4537	862	6086	6531
2011	4432	861	5967	6673
2012	4172	869	5660	6410
2013	5326*	980***	5355	-

*Budget Estimate Figures – Increase is as a result of amalgamation with the Commission on Public Service Standards

**Appropriation Accounts Data

²⁷ Regan O’, M., (2012) Shatter claims frustration at pace of investigation into Anglo. *Irish Times*, 21st June, <http://www.irishtimes.com/newspaper/ireland/2012/0621/1224318356651.html>

²⁸ O’Donovan, D., (2012) Judge scolds DPP’s office for ‘longer than desirable’ delay in taking action. *Irish Independent*, 25th July, <http://www.independent.ie/national-news/judge-scolds-dpps-office-for-longer-than-desirable-delay-in-taking-action-3179765.html>

²⁹ RTE News (2011) DPP defends inquiry into Anglo affairs. *RTE News*, 28th May, <http://www.rte.ie/news/2011/0528/anglo.html>

³⁰ RTE News, (2013) Corporate Enforcement office director says Anglo investigation substantively complete, 29th May, <http://www.rte.ie/news/2013/0529/453370-anglo-corporate-enforcement/>

³¹ The Office of the Director of Corporate Enforcement (2012) *The ODCE Annual Report 2011*. Dublin.

http://www.odce.ie/en/media_general_publications.aspx

³² Minister for Jobs, Enterprise and Innovation, Richard Bruton, (2013) *Brendan Griffin TD: Dáil Question 252*. 5th March.

*** Increase as a result of new and additional functions

- The Criminal Assets Bureau budget was cut by almost 15 per cent from 2008 to 2012.
- The Director of Public Prosecutions budget was cut by 18 per cent between 2009 and 2011.
- Garda Bureau of Fraud Investigation budget was cut by 21 per cent from 2008 to 2011.³³
- The ODCE budget was cut by 11.6 per cent from 2010 to 2013, though the 2013 figure is higher than that of 2008, reflecting the increased costs of the Anglo Investigation and increases in corporate insolvency.

All members of An Garda Síochána may be tasked with the investigation of crime, including fraud-related incidents. In that context, no specific Garda budget is allocated to combating white-collar crime. The Garda budget was cut by €39m in 2013.³⁴

In response to a Dáil question on the possible impact of funding constraints on CAB, the Minister for Justice and Equality, Alan Shatter, replied to Brendan Griffin TD that the budget allocation for the Bureau is “sufficient for the Bureau to carry out its duties.”³⁵

The Minister for Public Expenditure and Reform, Brendan Howlin, is “satisfied that adequate resources” are being provided to the Ombudsman and the Standards in Public Office Commission (SIPO). He has stated that he is “not aware of any difficulties arising from these organisations as a result of funding constraints.”³⁶

The attention of the Minister for Jobs, Enterprise and Innovation, Richard Bruton, was not “drawn to any difficulties arising since March 2011 in relation to the performance of his functions by the Director of Corporate Enforcement.” He noted “the moratorium on recruitment and the need to observe Employment Control Framework targets severely limit the capacity of my Department to respond as requested.”³⁷

The 2012 ODCE annual report outlined how it had “limited latitude” to address its discretionary work streams including “the examination of complaints received from members of the public, auditors’ and professional bodies’ statutory reports and to proactively seek to address other areas of potential risk.” It noted that “regard must also be had to the financial constraints within which the State is currently operating, and to the associated expectation that statutory entities such as the Office do more with less. Accordingly, we, and our stakeholders, must recognise and acknowledge that we cannot do everything.”³⁸

³³ Transparency International Ireland, (2012) *National Integrity Systems Study*. <http://transparency.ie/resources/NIS>

³⁴ McDonald, D. & Melia, P., (2013) Crime up but prosecutions plummet after years of cuts. *Irish Independent*, 19th March, <http://www.independent.ie/irish-news/crime-up-but-prosecutions-plummet-after-years-of-cuts-29138383.html>

³⁵ Minister for Justice and Equality, Alan Shatter, (2013) *Brendan Griffin TD: Dáil Question 368*. 5th March.

³⁶ Minister for Public Expenditure and Reform, Brendan Howlin, (2013) *Brendan Griffin TD: Dáil Question 236*. 5th March.

³⁷ Minister for Jobs, Enterprise and Innovation, Richard Bruton, (2013) *Brendan Griffin TD: Dáil Question 252*. 5th March.

³⁸ Office of the Director of Corporate Enforcement (2013) *Annual Report 2013*.

http://www.odce.ie/en/media_press_releases_article.aspx?article=e5ae1bfc-5901-428e-8f7f-9a0cc9925f2a

5. Recommendations

5.1 Information Sharing

The oversight agencies tasked with the prevention, detection, investigation and prosecution of corruption and white-collar crime has come under considerable scrutiny since Ireland's economic crisis. Ireland has a multi-layered approach when it comes to the regulation of abuse within politics, finance, professions and public life.

Ireland's legislative architecture, in many respects, represents international best practice with key transnational conventions incorporated into Irish domestic legislation (see Table 1 below). Nonetheless, the complex, if not confusing, layers of institutions with overlapping functions and responsibilities may militate against their effectiveness. The Henry Kissinger phrase "Who do I call if I want to call Europe?" applies. From the whistleblower or public perspective, "Who do I call if I have a complaint about white-collar crime?"

Other agencies which monitor, investigate and probe standards include Tribunal of Inquiry, Commission of Inquiry, High Court Inspector, Financial Regulator, Data Protection Commissioner (DPC), Environmental Protection Agency (EPA), Local Authorities, Office of the Ombudsman, Dáil and Seanad Committees on Members Interests, Comptroller and Auditor General, Public Accounts Committee and the Competition Authority.

The 2010 ODCE submission to the Department of Justice on white-collar crime, observed that a disparate set of agencies have responsibility under one legislative code only – be it company law, competition law, pensions law, revenue law, financial services law, etc. White-collar criminals do not conduct illicit activity within the confines of one piece of legislation. What is much more likely is that the events of suspected illegality will give rise to a variety of acts or omissions breaching several different legislative codes. Multiple agencies may need to be involved but information sharing is not always possible because of confidentiality requirements.

Moreover, the agencies operate within statutory regimes whereby they must treat confidentially all information which they receive, and not disclose it except in accordance of the law. The ODCE has encountered difficulties as to the basis on which it can share information with at least one regulatory body, and in another case a regulatory body expressed doubts as to whether it had any power to furnish certain information to the ODCE which the ODCE considered would be of assistance in the furtherance of a criminal investigation which the ODCE is undertaking.³⁹

5.2 One primary regulatory body

The OCDE has recommended that there should be a common legal basis permitting one primary regulatory body to take the lead role in investigating a set of events relevant to

³⁹ ODCE has outlined specific examples in its submission - Office of the Director of Corporate Enforcement, (November 2010) *Submission on White-Collar Crime*, http://www.odce.ie/en/media_general_publications_article.aspx?article=acc2923b-9e90-4f9d-8d85-f67ab0d93103

different legislative codes in agreement and in cooperation with other relevant regulatory bodies. In addition, the OCDE recommended that the law should permit joint investigation teams to be established between any two or more law enforcement bodies.⁴⁰

Table 3: Overlapping responsibilities?⁴¹

Agency Responsible	Status	Principal Responsibilities
Central Bank of Ireland	A single unitary body responsible for central banking and financial regulation.	In its role as the regulatory authority for the financial sector, the Central Bank has a wide range of rule- making, investigatory and enforcement powers in a number of areas including anti-money laundering and market abuse.
Criminal Assets Bureau (CAB)	A specialist unit within the Irish police force.	CAB's statutory remit is to carry out investigations into the suspected proceeds of criminal conduct.
National Bureau of Criminal Investigation (NBCI)	A specialist unit within the Irish police force.	The NBCI investigates serious and organised crime.
Office of the Director of Corporate Enforcement (ODCE)	A government appointed statutory body.	The ODCE is responsible for ensuring compliance with company law and can prosecute offenders.

5.3 Hearsay Rule

In response to the Anglo Tapes controversy, a prominent Irish barrister described Ireland's white-collar crime legislation as "eye-wateringly complex and in large part irrational."⁴² Remy Farrell SC pointed to the hearsay rule which features prominently in white-collar cases because much of the evidence is based on documents. He notes that it is not uncommon to find that a particular document will be admissible evidence in relation to one particular charge but not in relation to another in the same case.

In his presentation to the 2010 Annual National Prosecutors' Conference, Farrell noted that "Prosecutors will frequently encounter enormous difficulty in proving the most simple of transactions which are otherwise 'evidenced' by extensive documentation." He puts forward the view that documentary evidence should be rendered admissible in criminal proceedings where the court is satisfied as to relevance and necessity and moreover that, subject to appropriate safeguards, where documentary evidence should be rendered admissible in criminal proceedings where the court is satisfied as to relevance and necessity. Such a move, he believes, "would very significantly change the landscape so far as regulatory prosecutions are concerned."

The 2010 consultation by the Law Reform Commission on Hearsay in Civil and Criminal Cases did not recommend reform in relation to the manner in which the rule against hearsay operates in criminal cases.⁴³

The 2010 ODCE submission to the Department of Justice on white-collar crime supported Farrell's position. It believes that the investigation and prosecution of white-collar crime would be improved by the use of hearsay evidence in criminal investigations. It also

⁴⁰ Ibid.,

⁴¹ Practical Law Company, Corporate crime, fraud and investigations in Ireland: overview. <http://us.practicallaw.com/6-525-1288>

⁴² Farrell, R., SC (2013) The criminal justice system has failed us. *Irish Independent*, 26th June, <http://www.independent.ie/business/irish/anglo/remy-farrell-the-criminal-justice-system-has-failed-us-29372434.html>

⁴³ The Law Reform Commission (March 2010), *Consultation Paper on Hearsay in Civil and Criminal Cases*, <http://www.lawreform.ie/2010/consultation-paper-on-hearsay-in-civil-and-criminal-cases.297.html>

supported the use or greater use of immunity programmes, plea bargaining, deferred prosecution agreements and certificate evidence.⁴⁴

The focus of this report is on financial crime. Similar concerns regarding the complex legislative framework for political ethics and calls for its consolidation, have been made by the Council of Europe body, the Group of State against Corruption (GRECO), the Standards in Public Office Commission and the Joint Committee on Finance, Public Expenditure and Reform in 2012.⁴⁵

5.4 The UK experience – Serious Fraud Office

The UK Serious Fraud Office (SFO) is an independent government department with responsibility for the detection, investigation and prosecution of serious or complex fraud. It has the combined function, unlike the oversight agencies in Ireland, of investigation and prosecution.

Its inability to secure prosecutions was highlighted by the 2008 Review of the Serious Fraud Office (De Grazia Review). Since 2008, the SFO has been engaged in a process of review which has resulted in deep-seated structural change.⁴⁶ In 2011–12, verdicts were reached in 20 SFO cases, securing 38 convictions. The average prison sentence for immediate custody was 56 months. There were three civil settlements (worth a total of £16.2 million).⁴⁷

SFO Audit

The 2008 De Grazia Review, commissioned by the Attorney General, sought to appraise the SFO in relation to two US agencies: the US Attorney’s Office for the Southern District of New York and the Manhattan District of Attorney’s Office, two well-established bodies prosecuting serious and complex economic crime. The 34 recommendations focused on all aspects of operations, capability, leadership, governance and external relationships. In particular, it recruited specialist senior investigators and established the role of “Chief Investigator”.

In response to the De Grazia review, a Capability Review Team assessed the SFO’s ability to function as a standalone non-ministerial government department. The review focused on capability, strategy, leadership and delivery. A central part of the Capability Review was enhancing engagement and collaboration with other cross-Whitehall departments.

⁴⁴ Office of the Director of Corporate Enforcement, (November 2010) *Submission on White-Collar Crime*, http://www.odce.ie/en/media_general_publications_article.aspx?article=acc2923b-9e90-4f9d-8d85-f67ab0d93103

⁴⁵ Joint Committee on Finance, Public Expenditure and Reform, (2012) *Report on hearings in relation to the Scheme of the Protected Disclosures in the Public Interest Bill 2012*, 14th July, <http://www.oireachtas.ie/parliament/media/committees/finance/Report-on-Protected-Disclosures-Final.pdf>; GRECO, third evaluation round Compliance report on Ireland – ‘Incriminations’, ‘transparency of Party Funding’ (Council of Europe, December 2011): 5 [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecorC3\(2011\)10_Ireland_en.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecorC3(2011)10_Ireland_en.pdf)

⁴⁶ The Work of the Serious Fraud Office, (October 2012), *Commons Select Committee on Justice*, <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/740/m1.htm>

⁴⁷ *Ibid.*

The 2012 inspection by Her Majesty's Crown Prosecution Service Inspectorate (HMCPISI) reviewed the SFO's casework with a view to determining the effectiveness of the SFO. The report is pending.

New Director – New Direction

The SFO changed direction when David Green QC was appointed as director in April 2012. His predecessor, Richard Alderman, had adopted a strategy of encouraging companies to come forward to report suspected corruption in return for leniency. This softly, softly approach was rejected by Green who stated that "First and foremost, we've restated the SFO's role and purpose... We're not a regulator and we don't do deals."⁴⁸

As a consequence, the use of civil settlement powers which attract expeditious results and the generation of large settlements are not as widespread. Green has winded up any presumption that self-reporting would afford those who made a self-report a level of protection from SFO investigation.

In addition, the SFO was extensively restructured and overhauled with several high profile appointments. In complex cases, the SFO supplements permanent staff with short term specialists. The SFO has a headcount of around 360 people, including 300 permanent staff. Over 90% are frontline staff (lawyers, investigators, accountants and those working in Digital Forensics) who work flexibly across cases.

Funding

The SFO has not been immune to the drive for deep cuts to funding in the UK. Nonetheless, it has increased its income from assets seized through successful investigations and through controversial special funding arrangements with the Treasury Asset Recovery Incentivisation Scheme (ARIS).⁴⁹ The SFO has also secured additional ring-fenced funding for specific investigations, such as the alleged manipulation of the LIBOR benchmark.

5.5 Deferred Prosecution Agreements (DPAs)

The ODCE, in its 2010 submission to the Department of Justice on white-collar crime, proposed that the introduction of DPAs should be considered.⁵⁰ This recommendation was supported by the 2012 Transparency International Ireland, National Integrity Systems Study.⁵¹

⁴⁸ Spence, A., (2013) Serious Fraud Office chief David Green tells business: 'No more deals'. *The Times*, 27th April <http://www.thetimes.co.uk/tto/business/industries/banking/article3750324.ece>

⁴⁹ HM Revenue and Customs, *Strategic framework for tackling criminal finances*, <http://www.hmrc.gov.uk/about/cf-framework-exec-summary.htm>

⁵⁰ Office of the Director of Corporate Enforcement (November 2010) *Submission on White-Collar Crime*. http://www.odce.ie/en/media_general_publications_article.aspx?article=acc2923b-9e90-4f9d-8d85-f67ab0d93103

⁵¹ Transparency International Ireland, (2012) *National Integrity Systems Study*. <http://transparency.ie/resources/NIS>

DPA's are conditional civil settlement which, in some cases, may be more appropriate in return for self-reporting of white-collar criminal offences. DPAs encourage companies to report wrong doing in order to avoid prosecution. The rationale for this is that it is not always possible, practical or pragmatic to prosecute in the public interest. Reasons where this might apply include the avoidance of a lengthy investigation and trial; the avoidance of a conviction and consequent debarment from competition for certain contracts; supporting public confidence; providing restitution; offering flexibility; and allowing reform and compliance exercises to keep functioning.

DPA's have been extensively used in the US in cases where the prosecutor would lay, but would not immediately proceed with, criminal charges pending successful compliance with agreed terms and conditions stated in the DPA. The terms and conditions might include a financial penalty; costs; restitution for victims; disgorgement of the profits of wrongdoing; and implementation of reforming measures.

Justin O'Brien and Olivia Dixon completed a detailed examination of DPAs and the potential risks associated with introducing them in 2013.⁵²

5.6 Whistleblowers: Good Faith

The 2012 Report of the Mahon Tribunal said the fragmented legislative approach to whistleblower protection has led to a complex and opaque system for protecting whistleblowers which is likely to deter at least some from reporting corruption offences.⁵³ The Protected Disclosures in the Public Interest (Whistleblower Protection) Bill 2012, to be published shortly, will introduce a single overarching framework protecting whistleblowers. Significantly, it will provide immunity from both civil and criminal liability and introduces a new claim of "tortious liability" under which a whistleblower can institute civil proceedings against a third party who retaliates against her.

The UK Public Interest Disclosure Act (PIDA) of 1998 is a template for Ireland's new whistleblower legislation. It is therefore worth noting the recent criticisms of the PIDA by the UK Parliamentary Commission on Banking Standards (PCBS) which published its report in June 2013.⁵⁴ The shortcomings of the PIDA were exposed following the Libor, Winterbourne View and Mid Staffordshire Foundation NHS Trust scandals.⁵⁵ Before the PCBS report, amendments to the PIDA were being implemented through the Enterprise and Regulatory Reform Bill (ERRB) in order to strengthen protections against any detriment or dismissal subsequent to disclosure. These reforms deal with many of the PCBS's areas of concern. Significantly, employers will now be held vicariously liable where whistleblowers are bullied or victimised. This reflects the PCBS recommendation that "the Board member responsible

⁵² O'Brien, J., & O. Dixon, (2013) *The Common Link in Failures and Scandals at the World's Leading Banks*, 36 SEATTLE U. L. REV. 941 (2013).

⁵³ The Mahon Tribunal was an Irish public inquiry established by parliament in 1997 to investigate allegations of corruption within the planning process.

⁵⁴ Joint Select Committee on Banking Standards, (2013) *Parliamentary Commission on Banking Standards*.

<http://www.parliament.uk/bankingstandards>

⁵⁵ For further information about each of these scandals, see Baker Tilly, (2013) *The State of Accountability in 2013*, <http://www.public-i.info/wp-content/uploads/2012/10/The-State-of-Accountability-in-20131.pdf>

for the institution's whistleblowing procedures be held personally accountable for protecting whistleblowers against detrimental treatment" (para 791).

Employees no longer need to demonstrate that their disclosure was made in "good faith". The "good faith" test had discouraged whistleblowers from coming forward because although something may be in the "public interest", the motive for whistleblowing may have been primarily self-interested. In the Irish case, although the Whistleblower Protection Bill has yet to be published, the Heads of the Bill are instructive. The head five of the Bill however stipulates that the "worker must have a reasonable belief that allegation is true and make the disclosure in good faith." Head seven provides that "Workers in State bodies are protected if they report their concerns in good faith to the sponsoring Department."⁵⁶

5.7 Whistleblowers: Financial Compensation

Taking a leaf from the US Office of the Whistleblower, implemented under the 2010 Dodd Frank Act, the PCBS has called on the UK regulatory authorities "to undertake research into the impact of financial incentives in the US in encouraging whistleblowing, exposing wrongdoing and promoting integrity and transparency in financial markets" (para 803).⁵⁷

The US has a long established practice of safeguarding whistleblowers and its legal culture protects employees from unfair employment termination by inserting whistleblower protection provisions to almost every major piece of legislation where federal dollars are spent. The False Claims Act of 1863 dates back to the civil war and was a reaction by the federal government to fraud. Senator Jacob M. Howard outlined his motivation for sponsoring the Bill in the Senate.

"The Bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class... In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fashion idea of hold out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."

Whistleblowing in the American sense was conceived as a necessary evil in the financial self-interest of both the state and the "co-conspirator". The *Qui tam* principle still exists within federal law. Rewards of between 15 and 25 per cent of an overall settlement continue to be made to those who assist the government in the recovery of civil penalties and forfeitures. Kyle Lagow, an appraisal manager for Countrywide Financial from 2004 to 2008, claimed the subprime mortgage lender inflated the value of homes to support bigger loans and filed his whistle-blower suit alleging appraisal fraud in 2009. He was awarded \$14.5 million in 2012 for his part in the mortgage industry's \$25 billion settlement with federal and state regulators. Bank of America, the parent bank of Countrywide Financial and the second-

⁵⁶ Department of Public Expenditure and Reform, *Draft Heads of the Protected Disclosure in the Public Interest Bill 2012*.

<http://per.gov.ie/wp-content/uploads/Draft-Heads-Protected-Disclosure-in-the-Public-Interest-Bill-2012.pdf>

⁵⁷ References and further information regarding this section can be found at: Byrne, E., Whistleblowing as a Necessary Evil? (2013) The Case of Lagow, Manning and Snowden. *Centre for Law, Markets and Regulation*, <http://www.clmr.unsw.edu.au/article/ethics/whistleblowing/whistleblowing-necessary-evil-case-lagow-manning-and-snowden>

largest in the U.S. by assets, subsequently made a \$1 billion settlement in Federal Housing Administration. “The scheme both directly and indirectly cost the United States government billions of dollars and played an important role in the wave of foreclosures that fuelled the financial meltdown of 2008,” Steve Berman, Lagow’s attorney, said in a statement.

It was in this vein that the Office of the Whistleblower was established by the Securities and Exchange Commission under the Dodd Frank Act of 2010, expanding powers first introduced in Sarbane-Oxley in 2002. Whistleblowers aware of possible securities law violations are regarded by the SEC as one of “the most powerful weapons in the law enforcement arsenal.” The Commission is authorised by Congress to provide monetary awards ranging between 10 and 30 per cent of the money collected in cases where high-quality original whistleblower information leads to a Commission enforcement action of over \$1 million in sanctions.

The first pay-out from this new anti-securities fraud scheme was awarded in August 2012. In June 2013, three whistleblowers were awarded 15 per cent of the money that the SEC will ultimately collect from its enforcement action against hedge fund Locust Offshore Management LLC and its CEO Andrey C. Hicks, who defrauded investors of \$2.7 million. The Office of the Whistleblower is regarded by the American government as a key reform in response to the Global Economic Crisis and vital to protecting the integrity of the market, notwithstanding ongoing contestation over the rationale why individual whistleblowers go public.

The Anglo Tapes, released by the *Irish Independent* and *Sunday Independent* newspapers in 2013 following receipt by an unnamed source, refer to the period leading up to the blanket bank guarantee introduced by the Irish government in 2008. They are responsible for galvanising the political and public mood to introduce a Banking Inquiry, five years after the controversial bank guarantee. Would these tapes have come into the public domain earlier if a financial incentive were available to a whistleblower?

6. Fourteen Recommendations

1. Independent audit of the capacity and operational ability of oversight agencies - CAB, ODCE, Garda Bureau of Fraud Investigation, Central Bank, Revenue, National Bureau of Criminal Investigation, Competition Authority and other agencies charged with the prevention, detection, investigation and prosecution of white-collar crime;
2. Subvention of the Croke Park embargo to recruit specialists, such as forensic accountants, digital analysts and other experts;
3. Establish a police-led multi-agency taskforce with a singular focus on white-collar crime;
4. Introduce Deferred Prosecution Agreements;
5. Amend the Protected Disclosure in the Public Interest (Whistleblowers) Bill 2012 to exclude the “good faith” test;
6. Introduce monetary awards for whistleblowers;
7. Improve intelligence-gathering and co-operation between the agencies fighting white-collar crime, and to identify areas where further resources should be directed;
8. Publish detailed statistics breaking down the type of corruption and white-collar crime detected, investigated and prosecuted;
9. Simplify complaints procedures;
10. Consolidate legislation. It is noted that the Criminal Law Codification Advisory Committee is being abolished – this body could have had responsibility for consolidation;
11. Amend the hearsay rule where documentary evidence should be rendered admissible in criminal proceedings where the court is satisfied as to relevance and necessity;
12. Consider the role of juries on white-collar cases - is fraud too complex for juries and should judge-only regime be applicable in certain cases?
13. Introduce ‘civil fines’ to allow the Competition Authority to more effectively police infringements of competition law;
14. Enforce the provisions of the 2011 Criminal Justice Bill which would compel witnesses to provide information across a broad range of white-collar/fraud categories.