

Green Party

Corporate Criminal Liability and Sanctions Policy



19 December 2020

Introduction

The Terms of Reference¹ of the **Company Law and Business** Policy Group (PG) asks us “To establish policy around the regulation and operations of corporations and enterprises operating in Ireland ... to include examining a system change in the balance of rights and responsibilities between all stakeholders...”. The legal baseline is the Company Law Act (2014)² against which our PG references their experience of, and the widespread public concern about, company operations in Ireland today.

Consistent with the Green Party’s core objectives of environmental sustainability and social inclusivity we propose An Inclusive and Sustainability Companies Act that encompasses many of the areas where legislative change is required. These areas can include:

1. Company purpose
2. Transparent ownership (registration of beneficial ownership; circular ownership; access to the CRO; foreign companies and corporate registration)
3. Audit
4. Social and environmental stewardship
5. Corporate Criminal Liability & Sanctions
6. Obligations of company directors towards stakeholders
7. Wider representation and accountability for boards and remuneration committees
8. Company ownership and financial markets.

1. Terms Of Reference "To establish policy around the regulation and operations of corporations and enterprises operating in Ireland, and to explore a related legislative framework in this area. The group may also consider, if it wishes, the same related to state-run enterprises. This will include examining a system change in the balance of rights and responsibilities between all stakeholders, including but not limited to shareholders, company directors, employees, customers and suppliers of goods and services. As part of this, the group will examine the insolvency process and if it needs reform."

2. Companies Act (2014)

1 Executive Summary

The Green Party aims to create a socially just society in which citizens can obtain redress for damage caused by other individuals. The implementation of our policies will ensure that civil and criminal offences committed by corporate bodies can be successfully prosecuted (where appropriate) and similarly that the individuals who manage and control those bodies can also be sanctioned and penalised for these actions.

The solutions/policies offered by the Green Party to the issues outlined above are as follows:

- Adopt the “Attribution Model” of corporate liability that the Law Reform Commission recommended in its 2018 Report on Regulatory Powers and Corporate Offences, to better identify and attach liability to the corporate body and the person(s) within it who authorised or enabled any unlawful act undertaken
- Establish a multidisciplinary Corporate Crime Agency with the power to investigate and assist in the investigation of corporate offences. [Note that this was the intention of The Companies (Corporate Enforcement Authority) Bill]
- Establish a common structure of regulatory powers for the relevant authorities that would define their investigative and administrative powers and clarify their role in conducting summary criminal prosecutions
- Amend the current classes set out in the Fines Act 2010 so that judges can impose financial penalties as a graduated proportion of turnover for corporate entities instead of the absolute amount limits that are in the current legislation

These policy proposals are based mainly on the Law Reform Commission Report 2018 “[Report on Regulatory Powers and Corporate Offences](#)”.

2 The Structure and Administration of Corporate Sanctions

2.1 Amendment to Common Law rules of attribution of liability to corporate entities

These policy proposals will make the individuals impacted more responsible and proactive when discharging their corporate roles because of the personal liability that will attach to them in the event of an illegal act.

2.1.1 Rationale and Context:

- Corporate staff and other implicated parties must be capable of being held accountable for their actions and those of the corporate entities for which they have responsibility. A corporate entity should not be capable of improperly providing a shield from prosecution or consequence from wrongful acts. Similarly, neither should a corporate entity be able to continue without consequence while benefitting from the criminal actions of its directors or other employees. The personhood of companies offers unreasonable protection.
- The law by which corporates and management of corporates are regulated must also be sufficiently developed to deal with how decisions are made currently within corporate

bodies so that those who do carry responsibility for criminal actions can be prosecuted effectively.

- Historically there have been poor outcomes in criminal prosecutions of corporate crime offences and sometimes a lack of effectiveness in sanctions where cases were successful.
- The current common law rule relating to the attribution of criminal liability to corporate bodies (the “identification doctrine”) is no longer fit for purpose.

The current rule can be roughly summarised as follows:

“Liability can only be attached to a corporate body where both the “fault” and “conduct” elements of the offence can be identified in a single natural person who operates high within its managerial structure.” This does not align with how corporations operate today where often the decision making and the actions taken to implement them will involve multiple participants operating at different levels within the organisation.

- The intention of this Policy is to ensure that business activity is conducted in a responsible and lawful manner. It is widely accepted that modern corporates need policies, processes and procedures to ensure that its staff conduct business in such an approved manner. The Attribution Model would hold the entire chain of command to account – from management to customer facing staff - because each individual has a derived role in ensuring the activity is properly executed. This may require corporate entities to be more diligent in their regulation and supervision of their staff and consequently will create costs. However, these systems should already be in place in any well managed enterprise

2.1.2 Policy Point

- For subjective fault-based offences (e.g. theft and fraud offences):
That an expanded attribution model be put in place following the recommendations of the Report (see Recommendations 8.04 through 8.09 pages 761 - 762).
The model will allow for attribution of liability to the corporate where the subjective element can be identified with a decision maker at any level of the organisation that acted in the interests of the corporate, within their bailiwick, regardless of whether they carry out the *actus reus* themselves, they delegate it to a subordinate, or are reckless as to whether it could occur.
- For objective offences: (e.g. pollution offences):
The Report recommends the development of a general scheme of attribution for objective offences with the effect that any strict liability offence currently in place can be prosecuted against a corporate where the offence is carried out by an employee or other stakeholder for its benefit, and the corporate as a whole was negligent (to a simple or gross level as appropriate) in its actions. (see Recommendations 8.10 through 8.16 pages 762 - 763).

2.2 The Establishment of a Corporate Crime Agency

'The fragmented nature of the current multitude of official bodies charged with policing corporate governance weakens their effectiveness. An integrated approach is required.'

2.2.1 Rationale and Context

- A large number of regulatory bodies are authorised to prosecute summary offences along with the Garda Síochána and the Director of Public Prosecutions (DPP). These include Office

Part 1 of a Proposed Inclusive and Sustainable Companies Act

of the Director of Corporate Enforcement (ODCE), Revenue Commissioners, Competition and Consumer Protection Commission (CCPC) and Office of the Data Protection Commission (ODPC). (Note that the DPP has the sole authority to prosecute offences on indictment.)

- The primary focus of these diverse regulatory bodies is on ensuring good governance in their respective areas. Consequently, it is very rare that a single regulatory agency would have the experience, staff or resources to investigate very large, complex or serious offences. This can lead to mistakes being made at a very early stage of the criminal investigatory process which will hamstring the DPP in bringing successful prosecutions
- The Companies (Corporate Enforcement Authority) Bill, which did not pass all its stages prior to the dissolution of the Dáil in 2019, would have created an effective organisation to investigate and assist in the prosecution of corporate offences.

2.2.2 Policy Point

A multidisciplinary Corporate Crime Agency (similar in structure to the Criminal Assets Bureau) should be established and be given the power to investigate and to assist in the investigation of corporate offences. This Agency would work closely with a dedicated Unit in the Office of the Director of Public Prosecutions. (see Recommendations 1.01 through 1.03 pages 743).

2.3 The Reform of Regulatory Agencies

‘The statutory powers and administrative processes used by existing official bodies that regulate corporate governance must be harmonised.’

2.3.1 Rationale and Context

- The number of regulatory agencies in Ireland has grown exponentially during the last 30 years. Estimates vary depending on definition, but at the most conservative definition the number of agencies with regulatory powers (one indicia being that without the consent of “the agency” a person or entity would not be entitled to carry out work in that agencies area) has grown from 40 to 80. Others put the figure as high as 200.
- The establishment and reform of these agencies has been reactive and incremental – responding to developments in political priorities, national scandals, and international developments (e.g. the increase in powers given to the Data Protection Commission on the introduction GDPR, or the disestablishment of the Irish Financial Services Regulatory Authority as a result of its failure to predict or ameliorate the effects of the property market collapse).
- One of the cumulative effects of this piecemeal development is that there is a wide variance in structures, powers, and processes between agencies. Where there are similarities, the powers of the agencies are set out in different Acts and Statutory Instruments. This can lead to situations in which certain agencies simply don’t have powers in their “regulatory arsenal” which would clearly be appropriate and useful but due to political inertia have not been provided.
Another issue which has arisen is that investigations into very high-value or high-profile cases can be thrown off course because the investigating agency inadvertently contravenes its mandate or does not comply with its powers.

2.3.2 Policy Point

This policy proposes to follow the recommendations of the Report to establish a common structure for regulatory powers which would act as a baseline for all relevant agencies. Inter alia it would establish a common structure of regulatory powers for the relevant authorities that would define their powers to issue a wide range of warning directions or notices, to enter and search premises and seize documents and digital records, to compel persons to attend in person before the regulator, to impose administrative financial sanctions or enter into wide-ranging regulatory compliance agreements that remediate the adverse impact of the issue under review and finally to bring summary criminal prosecutions. (see Recommendations 2.02 page 744 and for the scope of regulatory agreements Chapters 4 and 5, pages 750 - 757).

2.4 The Reform of the Fines Act 2010

‘The financial sanction for corporate offences should be proportionate, effective and dissuasive, reflecting both the benefit derived from the offence and the size of the entity involved.’

2.4.1 Rationale and Context

- The current imposition of “absolute amount” fines is not sufficiently flexible to negate the financial benefits which can be generated by corporate entities in facilitating or ignoring criminal activity. Such fixed maximum level of fines will not provide a sufficient deterrent in situations where the cumulative gains from the offence will over time significantly exceed the known potential cost.
- In addition, the fixed maximum level of fines may not provide an adequate deterrent in situations where the size of the corporate involved is sufficiently large.

2.4.2 Policy Point

Implement changes to the current classes set out in the Fines Act 2010 so that judges can impose financial penalties as a graduated proportion of turnover for corporate entities instead of the absolute amount limits that are in the current legislation. (see Recommendations 3.02 through 3.06 pages 745).

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